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CHASE COUNTY, NEBRASKA, V. IDA M. KELLY.

FILED JUNE 18, 1903. No. 12,915.

1. **County Superintendent:** SALARY. Section 2, subdivision 7, chapter 79, Compiled Statutes, provides the minimum and not the maximum salary to be paid county superintendents in the various classes therein enumerated.
2. ———: DISCRETION. In counties of less than 2,000 school population, the number of days which a county superintendent may be employed in the discharge of his office is left to the sound discretion of the superintendent himself.
3. **Board of Commissioners:** MINISTERIAL ACT. When a board of county commissioners audit and adjust the claim of an officer whose salary is prescribed by statute, it acts ministerially and not judicially. *Gallaher v. Lincoln*, 63 Neb. 339, followed and approved.

ERROR to the district court for Chase county: GEORGE W. NORRIS, DISTRICT JUDGE. *Affirmed.*

P. W. Scott, for plaintiff in error.

Webster S. Morlan and *Charles W. Meeker, contra.*

OLDHAM, C.

The plaintiff in the court below was, during the year 1901, the legally elected, duly qualified and acting superintendent of public schools of Chase county, Nebraska. The school population of the county that year was 946, and the board of county commissioners had, prior to the year 1901, fixed the compensation of the county superintendent at $3.50 a day, for each day actually employed in the discharge of the duties of the office. Claims for salary at this rate were filed, audited and allowed from January to November, in the aggregate amount of $529.60. A subsequent claim for salary for the months of November and December of $80.50 was filed and rejected, because, as claimed by the board, the maximum salary that could be paid the superintendent, for one year, was fixed by the statute at $500. It was admitted that the services had

been actually performed and were necessary, and were charged for at the amount fixed by the board as the *per diem* of the superintendent. On an appeal taken from the order of the county board, disallowing the claim, trial was had to the district court and judgment was rendered for the claimant, and the county brings error to this court.

The only question involved in this controversy is the construction of section 2, subdivision 7, chapter 79, Compiled Statutes 1901 (Annotated Statutes, 11110), which is as follows:

"The county commissioners, or a majority of them present at the first regular session of each year, shall determine the compensation to be paid to the county superintendent, but such compensation shall not be less than twelve hundred dollars per annum in counties having a school population of five thousand or more; and not less than one thousand dollars per annum in counties having a school population of four thousand and less than five thousand; and not less than eight hundred per annum in counties having a school population of three thousand and less than four thousand; and not less than five hundred dollars per annum in counties having a school population of two thousand and less than three thousand; and in counties having a school population less than two thousand, a *per diem* of not less than three and one-half dollars, or more than five dollars, for each day actually employed in the duties of his office. The number of days necessary for the duties of his office shall be determined by the county superintendent, but the number of days so employed shall not be less than the number of school districts in said county, and one day for each precinct thereof, for the examination of teachers. The superintendent shall file in the office of the county clerk a sworn statement of his account."

As it is conceded that Chase county has a school population of less than 2,000, the compensation of the superintendent is fixed by this act at not less than $3.50 or more than $5.00 for each day actually employed in the

duties of his office, and the number of days he may be employed in each year, in excess of the minimum number fixed by statute, is left to the sound discretion of the superintendent.

An examination of the above section of the statute shows that, for the purpose of fixing salaries for county superintendents, the lawmakers divided the counties of the state into five classes, according to their school population. That they named a minimum salary that should be paid in each of these classes, but named no maximum salary, except as to the amount of *per diem* in counties of the least population. That, within these limits, the question of salary was left in the discretion of the boards of commissioners or supervisors of the various counties. Now the contention of plaintiff in error is, that we should read a provision into this statute, which would make the minimum salary in one class, the maximum salary of the next lower class, and that as the minimum salary of superintendents, in counties having over 2,000 population and less than 3,000, is $500, we should hold this to be the limit of the amount of compensation of superintendents in counties of less than 2,000. This is a demand for judicial legislation to which we are not inclined to accede. If, as contended by plaintiff in error, the lawmakers contemplated a uniformity of salaries for county superintendents in the counties of the various classes, they should and would no doubt have fixed a uniform compensation. But instead of this they simply named the low limit to be paid in each of the classes, except the last, and conferred on the county boards the power to fix salaries at or above this limit. If, as claimed under this provision, county superintendents in counties of less than 2,000 may actually receive more compensation than others in counties of greater population, this would present a good reason for legislative action, but not for judicial nullification of this statute, now in force. From the admitted facts in the case at bar, it appears that the salary claim was one fixed by statute; consequently, in allowing the claim, the board of county

commissioners acted in a ministerial and not a judicial capacity. *Gallaher v. Lincoln,* 63 Neb. 339. This evidently was the view of the learned trial judge.

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

HASTINGS and AMES, CC., concur.

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

AFFIRMED.

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

FILED JUNE 18, 1903. No. 12,601.

Taxes: REALTY: DISTRESS WARRANT. Local taxing officers of the several counties can not enforce collection of taxes on the unused roadbed of a railroad company by distress warrant.

APPEAL from the district court for Custer county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Reversed.*

J. W. Deweese and *F. E. Bishop,* for appellant.

Lester E. Kirkpatrick, contra.

OLDHAM, C.

The plaintiff railroad company and its predecessor in interest, during the years 1887 and 1888, obtained a right of way consisting of a strip of ground 100 feet wide along its surveyed line for a railroad across parts of Sargent and West Union townships, in Custer county, Nebraska. Considerable work was done upon the right of way in constructing the grade upon which to build the road, and particularly building some bridge structures and otherwise preparing the ground on proper levels through grades and cuts for the construction of a railroad track and the operation of a railroad line. The right of way and partly constructed grade were an extension and part of an operated

line of the company extending from Central City west and northwest, through and across Merrick, Howard, Greeley, Valley, Garfield, Wheeler, Sherman, Custer and other counties in the state. About eighteen miles of this right of way and uncompleted road-bed extended into and through Sargent and West Union townships in the years 1889, 1890, 1891, 1892, 1893 and 1894.

In the years 1893 and 1894, the precinct assessors of said townships listed this road-bed and right of way for taxation, and the county board by resolution directed the clerk of the county to list the road-bed and right of way for taxation for the years 1889, 1890, 1891 and 1892. Taxes were subsequently levied on this assessment and a distress warrant for the taxes so levied was delivered by the treasurer of the county to the sheriff.

Plaintiff thereupon instituted this action to restrain the levy of the tax warrant and to remove the cloud from its property occasioned by the attempted assessment of its right of way by the local authorities. On issue joined on this petition in the court below, a trial was had to the court; judgment was rendered for defendants, and plaintiff brings the cause here by appeal.

It will be observed from the foregoing statement that the local taxing authorities are seeking to enforce the collection of taxes on this unused road-bed as if it were personal property and not real estate. This, we think, they can not do. The property being real in its nature should be listed for assessment and taxation in the manner prescribed for the assessment of real estate and the collection of taxes should be enforced by advertisement and sale as provided for in section 109, chapter 77, Compiled Statutes. It would follow from this view that the action of the local taxing officers in listing this unused road-bed as personal property and seeking to enforce the collection of the taxes thereon by distress warrant is without authority and that so much of the prayer of plaintiff's petition as sought to permanently enjoin the levy of the distress warrant should have been granted.

It is therefore recommended that the judgment of the district court be reversed, and the cause remanded for proceedings in conformity with this opinion.

BARNES and POUND, 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 in conformity with the opinion.

REVERSED.

BENJAMIN T. SNYDER V. THOMAS PORTER.

FILED JUNE 18, 1903. No. 12,884.

1. **Forcible Detainer: PLEA: WAIVER.** In an action of forcible detainer, a tenant, by failing to avail himself of the plea of not guilty and by pleading as a defense to the action a verbal agreement to extend his term, waives any objection he might have urged to the sufficiency of the notice to terminate his lease.
2. **Termination of Lease.** One who claims that the action taken by his landlord is insufficient to terminate his lease, must pay or tender payment of the rent due or he will be considered as a tenant holding over his term under section 1021 of the code.

ERROR to the district court for Sherman county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Affirmed.*

Richard J. Nightingale, for plaintiff in error.

Thomas S. Nightingale, Elliot J. Clements and *J. S. Pedler, contra.*

BARNES, C.

The defendant, herein, commenced this action in the county court of Sherman county against the plaintiff in error, to recover the possession of lots 16, 17 and 18, in block 34 of the original town, now village, of Loup City, and to that end filed his complaint in forcible entry and detainer, which was in the usual form; and alleged, among other things, that in October, 1900, he rented the premises to the plaintiff at a monthly rental of $4, and that the

term extended from month to month, for an indefinite period; that the rent was payable on the 17th day of each month; that on the 17th day of February, 1901, he duly terminated the lease; that the plaintiff, herein, was holding over his term; that he had served a notice on him on the 18th day of March, following, to vacate the premises on or before the 25th of that month. It appears that, thereafter, he commenced this action. The answer did not contain the usual plea of "not guilty," but, instead of such plea, the plaintiff, herein, alleged that, by the conditions of a notice served on him on the 18th day of February, 1901, the lease did not expire until the following 17th day of April, and that the action was prematurely brought. A further defense was pleaded in the nature of an oral contract made between the parties, on or about the 14th day of February, 1901, to extend the lease until the 17th day of May following. On these issues the cause was tried, and resulted in a finding and judgment for the defendant, herein, for the restitution of the premises. An appeal was taken to the district court where the cause was tried upon the pleadings filed in the county court. A jury was waived, and at the close of the evidence the court found, among other things, that, at the time the action was commenced, the plaintiff, therein, was entitled to the possession of the premises, and rendered a judgment of restitution. A motion for a new trial was filed and overruled, and the defendant prosecuted error to this court.

The record contains no bill of exceptions, hence the findings of fact cannot be assailed. It is contended, however, by the plaintiff in error, that the facts found by the court are not sufficient to sustain the conclusion of law, for the reason, that the notice, or notices, were not sufficient to terminate the lease and that the action was prematurely brought. The principal contention is, that this case must be decided according to the rules of the common law, which plaintiff alleges are in force in this state, and, by which, it is claimed that plaintiff was en-

titled to a notice to quit, served on, what he terms, the rent day; that service of notice on any other day was illegal; that he was entitled to a full month's notice, and that the time fixed thereby for the termination of the lease, must have been on the rent day, to wit, the 17th day of the month. These are the questions which are urged by the plaintiff as a ground for a reversal of the judgment of the district court. It may be conceded that the common law, so far as it relates to leases, is in force in this state, and yet we think the conclusion of law and judgment of the trial court were right. The plaintiff failed to include in his answer a plea of not guilty, and by alleging a verbal agreement by which, it was claimed, he was to have possession of the premises until the 17th day of May, 1901, he waived any defect in the notice by which it was sought to terminate the lease. On the issues thus presented by the plaintiff, the court found against him, and, in the absence of a bill of exceptions, such finding will be sustained if warranted by the pleadings. It further appears from the record, that the plaintiff did not pay or tender payment of any rent, from or after the time when, it is alleged in the complaint, and found by the court, the lease was terminated. Having failed and neglected to pay the rent or tender it, when due, the plaintiff was, on and after February 17, 1901, a tenant holding over, under the provisions of section 1021 of the code; he was, thereafter, entitled to only the three days' notice provided for in section 1022 of the code. The court having found that such notice was served, it follows that the defendant was, thereafter, authorized to maintain this action.

We therefore hold that the plaintiff must fail in his contention, and we recommend that the judgment of the trial court be affirmed.

ALBERT and GLANVILLE, CC., concur.

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

AFFIRMED.

THOMAS DRAPER, ADMINISTRATOR OF THE ESTATE OF HARRY DRAPER, DECEASED, V. CHARLES A. TUCKER ET AL., ADMINISTRATORS OF THE ESTATE OF GEORGE P. TUCKER, DECEASED.

FILED JUNE 18, 1903. No. 12,852.

1. **Trial:** ERROR. A judgment will not be reversed on account of a technical error in the admission of evidence, when the party complaining is not prejudiced thereby.

2. ———: ———. Where an objection to a question is overruled—the answer not being given—and the question is afterwards put in another form and is answered without objection, error cannot be predicated thereon.

3. **Parent May Recover for Loss of Services of a Child.** A parent may recover for the loss of expected services of children, not only during minority but afterwards, on evidence justifying a reasonable expectation of pecuniary benefit therefrom.

4. **Damages:** AMOUNT. *Held*, That a verdict for only $10, for the pecuniary loss sustained by reason of the death of a minor child three years and four months old, is inadequate in amount.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Reversed.*

George A. Adams and *Jesse B. Strode,* for plaintiff in error.

Allen W. Field and *Guy A. Andrews, contra.*

BARNES, C.

The plaintiff, as administrator, commenced this action in the district court for Lancaster county to recover damages alleged to have been sustained by the next of kin of the intestate, Harry Draper, a minor, whose death was alleged to have been caused by the negligence of the defendants. The case is now before us for the second time. On the first trial the jury returned a verdict for the plaintiff for $1,000, and he had judgment. The defendants prosecuted error, and the trial in this court resulted in a reversal of that judgment. *Tucker v. Draper,* 62 Neb. 66.

The particular ground for reversal was the failure of the trial court to submit the question of contributory negligence to the jury. On the second trial the plaintiff had a verdict for $10. His motion for a new trial was overruled; judgment was rendered in his favor, and he now brings the case here by petition in error. The facts disclosed by the record, briefly stated, are as follows:

The plaintiff's son, a child three years and four months old, on the 2d day of April, 1895, in company with his brother, a year or two older, went onto some lots situated in the city of Lincoln owned by the estate, of which one of the defendants was the administratrix and in which both of them had an interest, fell into a well situated thereon and was drowned. It appears that sometime before the accident occured one Meyer had been renting a building situated on the southwest corner of the lots, in which he conducted a saloon; that while engaged in that business he had invited and allowed persons to hitch and feed their teams on the vacant part of the premises; that the building had formerly stood on another part of the lots, and had been supplied with water from the well in question; that shortly after the building was moved, the pump was taken out of the well and a curb was built around it from ten to fifteen inches in height, which was covered with two-inch planks, so that the premises, including the well, at that time, were placed in a safe condition; that shortly before the accident some boys were seen attempting to remove the covering of the well, and were driven away by one not the owner of the premises; but in some way one of the planks used as a covering was taken off; the well was then left open and that was the condition which existed at the time of the accident. On that day several persons saw the children on the street and on some lots adjoining the premises, where a ball game was in progress; they also visited a livery stable in that vicinity where their father's horse was kept; and finally, unattended by any one, wandered onto the premises in question. One of the witnesses testified that about 5 o'clock in the afternoon she saw the two

children, still unattended, at the well; that the deceased appeared to reach over inside the curb for something, lost his balance and fell in. She immediately gave the alarm, and as soon as possible the body of the child was recovered, but when taken out of the well he was dead. The plaintiff was appointed administrator of the estate of the deceased, and brought this suit, in his representative capacity, to recover the pecuniary loss alleged to have been sustained by himself and others, as next of kin of the deceased, and the trials resulted as above stated.

1. Plaintiff contends that the court erred in overruling his objections to the cross-examination of witness, Charles Meyer, Jr. It appears that on such examination of this witness he was asked by counsel for the defendants the following question: "Do you know where the well was?" This was objected to as not proper cross-examination. The objection was overruled, and the witness testified as to the location of the well. It is true that, strictly speaking, the question asked and answered was not proper cross-examination. Yet it is apparent from the record that the plaintiff was in no manner prejudiced by the testimony. Meyer's evidence did not in any manner differ from the evidence produced by the plaintiff himself at to the location and condition of the well. The judgment of the trial court will not be reversed for error without prejudice, or on account of harmless error. *St. Paul Fire & Marine Ins. Co. v. Gotthelf,* 35 Neb. 351; *Forbes v. Thomas,* 22 Neb. 541; *Dillon v. Russell & Holmes,* 5 Neb. 484; *Tracey v. State,* 46 Neb. 361; *Stratton v. Dole,* 45 Neb. 472; *Vernon v. Union Life Ins. Co.,* 58 Neb. 498; *Andrews v. Kerr,* 54 Neb. 618.

2. It is alleged that the court erred in overruling the plaintiff's objections to certain interrogatories put to the witness, Nelson Westover, on his direct examination. The record in relation to that matter is as follows:

Westover testified that his residence was in the city of Lincoln; that he had lived there about thirty-one years; that he had brought up a family consisting of nine chil-

dren, five boys and four girls; the oldest boy being almost twenty-three, and the youngest about nine years of age. He was then asked the following question:

Q. State to the jury what, in your opinion, would be the value of the services of a boy, to rear him in this community and properly clothe, educate with the ordinary advantages of school, over and above his expenses, from the time of his birth to the time of his majority.

Objected to as incompetent, immaterial and not proper under the issues in this case. Overruled. Exception.

A. Well, that depends on how a fellow would use his children.

Q. Well, properly working them when they should be worked, evenings and Saturdays, and going to school all the year, what would you say would be their money value to you over and above their expenses?

Objected to as incompetent, immaterial, irrelevant and not tending to prove any of the issues in this case. Overruled. Exception. No answer.

Q. You may state what would be the value of the services of a child, treated as your own was treated, from the time of his birth to his majority.

Objected to as incompetent, immaterial, irrelevant and not proper under the issues in this case. Overruled. Exception.

A. Well, my children have run behind, so far.

Plaintiff moves to strike out the answer as not responsive.

By the Court: Sustained.

Q. Just answer the question.

A. Well, I thought I had answered the question.

Q. Just give your opinion—what would be the value of the services of the boy over and above the cost of keeping him?

A. My experience is, that I do not think a boy twenty-one years old is even with his expense.

Q. You think the parent would be behind?

A. Yes, sir.

It will be observed that the question was finally asked and answered without objection. It further appears that the plaintiff moved to strike out the testimony of the witness on the question of value. The motion was overruled, and thereupon the plaintiff cross-examined the witness at length on the value of the services of an infant from the age of the deceased to majority, and brought out the following:

Q. Mr. Westover, do you know what business Mr. Draper was engaged in?

A. Yes, sir.

Q. Do you think a boy twelve or thirteen years old until he was twenty-one could be of any service to him?

A. Yes, sir; if he put him in the business his services would be of value to him.

Q. How much value, say from twelve years to twenty-one years, in his business, would a boy of that age be?

A. A boy of that age would be as valuable as any young man he would hire.

Q. Wouldn't he earn more than it cost to keep him?

A. Yes, sir.

The same objection is made to the testimony of A. D. Burr, whose experience and qualifications were the same as Westover's. He has brought up a family of boys in the city of Lincoln from their birth until after they reached their majority. His testimony was, practically, the same as Westover's, and the main question was answered by him without objection or exception. Therefore the record is not in a condition to render the contention of the plaintiff available. It further appears that Gran Ensign testified to about the same state of facts, having had the same experience as the witnesses Burr and Westover, without any objection on the part of plaintiff whatever.

The authorities on the question of the proper way to prove the value of the services of a minor are very meager. None are cited by counsel for either party, and after a careful research we have been unable to find any authority bearing directly on this point. The plaintiff himself pro-

duced and relied on the same class of testimony in order to establish his measure of damages. It is probable that the jury were not influenced by this testimony. They were as competent as the witnesses, to judge of the value of the services, and whether or not they would be equal to or greater than the cost of rearing and educating the child until he arrived at majority. In the case of *Chicago & A. R. Co. v. Shannon,* 43 Ill. 338, the court said:

"The question of how damages are to be measured must be largely left (within the limits of the statute) to the discretion of the jury, to whom the law commits the question, and who can give such damages as shall be a fair and just compensation. What the life of a person is worth in a pecuniary sense to another, is a question which does not lie within the limits of exact proof, and hence the subject has been confided to the jury, the court to see that their finding be not the result of passion or prejudice."

We therefore hold that the failure of the court to exclude the evidence complained of was not reversible error.

3. Plaintiff contends that the court erred in giving paragraph 15 of his own instructions to the jury, because by that instruction the recovery was limited to the loss of the value of the services of the deceased during his minority.

In the case of *Missouri P. R. Co. v. Baier,* 37 Neb. 235, this court said:

"A parent may recover for loss of expected services of children, not only during minority, but afterwards on evidence justifying a reasonable expectation of pecuniary benefit therefrom."

In the case of *Johnson v. Missouri P. R. Co.,* 18 Neb. 690, we find the following statement:

"If it should appear upon the trial that the father suffered no damage in the death of the son, it is probable there could be a recovery only for nominal damages. But, it is said the word 'pecuniary' as used in our statute is not construed in the strict sense. The damages are largely prospective, and their determination committed to the dis-

cretion of juries upon very meager and uncertain data. A parent may recover for the loss of expected services of children not only during minority, but afterwards, on evidence justifying a reasonable expectation of pecuniary benefit therefrom."

The same rule was announced in *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613, and in *Post v. Olmsted*, 47 Neb. 893.

It appears from the evidence that the plaintiff at the time of the accident was forty years of age; that he was engaged in the restaurant business in the city of Lincoln; that his expectancy of life extended many years beyond the minority of the deceased. We therefore hold that the giving of the instruction complained of, which limits the recovery to the pecuniary loss of the services of the deceased during the time of his minority, was reversible error.

4. Lastly, it is contended that the judgment should be reversed because the verdict is inadequate in amount. There are many cases of this kind in which verdicts have been sustained ranging in amounts from $500 to as much as $3,000. It has been said that a jury in this class of cases is authorized to estimate the pecuniary damages from the facts proved in connection with their own knowledge and experience. *City of Chicago v. Scholten*, 75 Ill. 468; *Chicago, R. I. & P. R. Co. v. Morris*, 26 Ill. 400; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 346. But a verdict for only $10, for the pecuniary loss caused by the death of a bright, intelligent child, three years and four months old, shocks the sensibilities of all fair-minded persons, and if any recovery is to be had in this case, which question we do not determine, it should be for a reasonable and substantial sum.

For the giving of the erroneous instruction complained of, and on account of the amount of the verdict, which seems to us to be inadequate, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

ALBERT and GLANVILLE, CC., concur.

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

REVERSED.

GEORGE MILLER ET AL., APPELLANTS, V. ESTATE OF PHILIP H. MILLER ET AL., APPELLEES.

FILED JUNE 18, 1903. No. 12,905.

1. **Perjury Vitiates a Decree: JUDGMENT: VACATING: FRAUD.** The intentional production, by a litigant, of false testimony to establish a cause of action or defense will, in a proper case, justify the annulment of a decree or judgment which is the product of such testimony. Following *Secord v. Powers*, 61 Neb. 615.

2. **Petition to Vacate Judgment.** In an action to vacate a judgment on the ground of fraud, the plaintiff must allege sufficient to show that the failure to secure a just decision at the former trial is not attributable to his own fault or negligence.

3. ———. Where the fraud relied upon, for the vacation of a decree admitting a will to probate, is of such a character that it would have been available to defeat the probate of the will, an allegation that the plaintiff had no actual notice of the proceedings, is not sufficient to excuse his failure to contest the will, where it appears that notice of the proceedings was given according to law, and he had notice of facts sufficient to put him upon inquiry.

APPEAL from the district court for Adams county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

L. J. Capps, for appellants.

J. W. James, contra.

ALBERT, C.

On the 2d day of June, 1900, an instrument purporting to be the last will and testament of Philip H. Miller, deceased, was duly admitted to probate by the county court of Adams county. The appellee, Mary E. Jacobs, is one of the children of the testator, and the principal beneficiary named in the will; the other appellee is her husband and executor under the will.

On the 26th day of December, 1900, the appellants filed a petition in said county court, asking the vacation of the decree admitting the will to probate. The petition filed in the county court is the same, in effect, as one afterward filed in the district court on appeal, which is hereinafter set out at length. The issues were made up and a trial had to the county court, which resulted in a judgment, rendered the 23d day of April, 1901, dismissing the action. The appellants carried the case on appeal to the district court, where they filed the following petition.

"And now at this time came George Miller and Lovina Powell and represent unto the court the following facts, and present this their petition herein as follows, to wit:

"1st. Your petitioners show unto the court that George Miller, Lovina Miller, now Powell, and Mary Ellen Miller, now Mary Ellen Jacobs, are the only heirs at law of Philip H. Miller, deceased. That all of said persons are more than twenty-one years of age, and each of them own an undivided equal interest in the estate of said Philip H. Miller, deceased. That Christian Jacobs is the husband of said Mary E. Jacobs, and interested in this proceeding, by reason of the fact that he is the proponent of the alleged will hereinafter mentioned. That all of said persons except Lovina Powell reside in Adams county, Nebraska; and that said Lovina Powell is a nonresident of the state of Nebraska. That said Philip H. Miller was the father of your petitioners and the said Mary E. Jacobs and that said Philip H. Miller left no wife surviving him.

"2d. Your petitioners further allege that at the time of the death of said Philip H. Miller, he was possessed of the east one-half (E. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) section twelve (12), township six (6), range ten (10), in Adams county, Nebraska, together with a large amount of personal property, an exact description of which your petitioners are unable to give, and that said property which said decedent owned at the time of his death was and is of the reasonable worth and value of three thousand and no-100 ($3,000) dollars, and your petitioners are each

entitled to have and receive a one-third part of said property, less the reasonable costs and expenses of administration; that about the month of May, A. D. 1900, said Christian Jacobs presented for probate herein a certain paper, purporting to be the last will of one Philip H. Miller, deceased, and for letters testamentary; that there were and are no debts owing by said decedent to any person or persons, save and except the reasonable and ordinary charges incident to the administration of his said estate.

"3d. Your petitioners further allege that on or about the said month of May, A. D. 1900, a certain paper purporting to be the last will and testament of Philip H. Miller, deceased, was presented for probate by said Christian Jacobs, and such proceedings were had and done in and about that matter so that said alleged will of said decedent, dated January 8, A. D. 1894, was on the 17th day of May, A. D. 1900, filed in said court, and approved as such will of said decedent, on or about the 2d day of June, A. D. 1900.

"4th. Your petitioners further allege that neither of them have ever accepted anything provided by the terms of said will propounded herein, although they are advised that under the alleged terms of said will, they and each of them would be entitled to receive the sum of twenty and no-100 ($20) dollars, and no more.

"5th. Your petitioners further represent unto the court that said orders entered on or about the 2d day of June, A. D. 1900, relative to the proving of said will and the proceedings had therein, were not final and conclusive orders and judgments therein, but are ancillary orders and incident to the orderly administration of this estate, and that no final decree has ever been had or entered therein and that no final decree ought to be entered therein, making a disposition of the above described property and distributing the same, until the final determination of the matters and facts alleged in this petition, because your petitioners allege that if final decree were entered herein, and said alleged will finally established, all of the real estate described hereinbefore, would by the final decree of

said court be distributed and turned over to said Mary E. Jacobs, thereby extinguishing the rights of your petitioners in said estate and in said property. Your petitioners further allege that the personal property belonging to said decedent was and is of insignificant value, the exact value thereof your petitioners are unable to state.

"6th. Your petitioners further allege that said paper filed therein, purporting to be the last will and testament of Philip H. Miller, ought not to be finally probated and allowed therein by this court because that said instrument was not, and is not, the last will and testament of said decedent, and that said decedent was for more than twenty years last past wholly without testamentary capacity, mentally. And that for about the period of ten years immediately preceding the death of the decedent, he was utterly unable to transact any sort of business, even of the most ordinary kind, but therein was obliged to, and did, rely upon others to transact the same for him.

"7th. Your petitioners further allege that from the year 1878 to 1891, and from this until the time of the death of the decedent he grew steadily worse, and at no time during any of the said period of time was he able to execute a will, or transact any other ordinary business.

"8th. Your petitioners further allege the fact to be that about the month of June, A. D. 1878, said Philip H. Miller, sustained a severe and disabling sun stroke and heat stroke and was found on his land by Mrs. George Miller suffering from the existence of a high fever, and was taken and cared for by your petitioner and his wife thereafter until the month of March, A. D. 1891. Your petitioners further allege that shortly after this, and about the latter part of June, A. D. 1878, said decedent again suffered another and more intense heat stroke, and was thereafter cared for by your petitioner, George Miller, and his wife, until the said month of March, A. D. 1891. Your petitioners further allege, that said affliction affected the brain and nervous system of said decedent to the extent that he was unable to transact ordinary business, or execute the

proposed will in this case; that after said heat stroke he grew continually worse and lost his mind and memory. These facts were well known to the proponent of said will and to his wife, the beneficiary named therein. Your petitioners further allege that said Philip H. Miller departed this life on the 10th day of April, A. D. 1900, and the paper puporting to be his last will and testament was presented for probate on or about the 16th day of May, A. D. 1900. Your petitioners further allege that the proponent of said will and Mary E. Jacobs, the beneficiary therein, being fully aware of the mental condition of said decedent, aforesaid, by acts of kindness and by threats that he would lose his home with the proponent and said Mary E. Jacobs, induced said decedent to execute the paper purporting to be the last will and testament of said decedent, because they said to him it was his duty to do so in order to protect the said Mary E. Jacobs, on account of the care and provision made by her and the said proponent of said will, during the latter part of his, decedent's, lifetime. That the said proponent and the said Mary E. Jacobs procured the scrivener to draft the proposed will; that the proponent of said will notified the draftsman of said will, when to come to his house in the evening of the day said document was drafted, when said proponent could be at home; that the wife of said proponent, on account of the inability of said decedent so to do, gave to the person who drafted said paper, the names of the children of said decedent; that said decedent was unable to describe his land, and that the description thereof was furnished by the proponent of said will, and that without the undue influence of said proponent and his wife, both long prior to the signing of said paper, and at the time thereof, said decedent could not have executed the same; that the expense of drafting said will was paid for by said proponent; that the proceeds of the real estate herein described were sufficient to sustain said decedent, and this fact was well known to the proponent of said will, and his said wife, and that they handled and managed the same. Your petitioners further

allege that at the time of the execution of said alleged will, decedent was unable to go about unaided or to give directions to any one to take him to the land in question or elsewhere, and that after the heat strokes hereinbefore mentioned, said decedent was, until the time of his death, wholly without ability to make a will, and that the paper purporting to be his last will and testament was the result of the exercise of undue influence as herein stated; and that the procurement of the execution of the same by said proponent and his wife was a fraud upon the rights of your petitioners to the extent of one-third each in the value of the property which decedent had at his death; that the proponent and Mary E. Jacobs were in constant contact with decedent during the last ten years of his life and had it in their power to make his life pleasant or otherwise as they desired, and procured said purported will by means of the exercise of their undue influence as hereinbefore stated; that without the exercise of said undue influence said decedent never could have executed a will; that the proponent practiced a fraud upon this court in undertaking to probate said document as and for the last will and testament of said Philip H. Miller, deceased, he being in full knowledge of all the facts relative to decedent's want of mental ability to make a will, and also in obtaining a judgment and order allowing and approving such paper as and for the last will and testament of said decedent on or about the 2d day of June, A. D. 1900, and in each, all and every other proceeding had and done in this court at the instance of said proponent and said beneficiary Mary E. Jacobs, under said alleged will, relative thereto.

"9th. Your petitioners further allege that they had no knowledge of the proceedings in this matter, or any of the same, until late in the month of November, when they had their attention called thereto by the dealings of the proponent of said alleged will, with the personal property of said decedent, and in and about the disposing of the crops left by decedent upon the real estate hereinbefore de-

scribed; that immediately upon actual notice thereof, from said proponent and his wife, and following their inquiry into the proceedings had and done by said proponent, they commenced their action herein.

"Wherefore, your petitioners pray that said alleged will upon the final hearing in this case be not proven and probated, and that no final decree be entered in this proceeding. And your petitioners pray that no final decree shall, in any event, be entered in this court until the final hearing and settlement of this preceeding, and that a full and complete hearing may be granted to your petitioners and that said alleged will may, upon such hearing, be declared null and void, and not the will of said Philip H. Miller, deceased. And in particular your petitioners pray for a vacation and annulment of any and all orders made with reference to said proposed will in this court. And your petitioners further pray for such other, further and different order, judgment and decree in the premises as may be warranted by the evidence presented herein."

The appellees filed a motion to strike the petition and dismiss the appeal, on the ground, among others, that the facts stated in the petition were insufficient to constitute a cause of action. The district court sustained the motion and dismissed the appeal, and the appellants now appeal to this court.

The parties, in their argument to this court, proceed on the theory that the motion of the appellees filed in the district court, so far as it assails the sufficiency of the petition, is equivalent to a demurrer. In view of the nature of the case and the entire record, such theory is, probably, correct. However that may be, it is not out of place for this court to adopt the theory upon which the parties themselves have presented the case, and we shall, therefore, treat that portion of the motion referred to as a general demurrer. The question then presented is, whether the facts stated in the petition are sufficient to entitle the appellants to a vacation of the decree of the county court admitting the will to probate.

It is the settled rule, in this state at least, that under section 602 of the code a judgment clearly shown to have been obtained by fraud or false testimony, which it would be against conscience to enforce, will, on the application of the unsuccessful party and a showing of due diligence, be vacated and set aside. *Secord v. Powers,* 61 Neb. 615. In the same case, it was held: "The intentional production by a litigant, of false testimony to establish a cause of action or defense will, in a proper case, justify the annulment of a decree or judgment which is the product of such testimony."

The decree admitting the will to probate is based, of necessity, on testimony to the effect that at the time of making the will the testator was of sound mind; because, without such testimony, indulging the presumption of regularity in the proceedings as we must, such decree would be legally impossible. It is alleged in the petition that the testator, at the time of making the will, was of unsound mind and without testamentary capacity, and that the appellees, with full knowledge of his mental condition, not only induced him to make the will, but offered it for probate as his last will and testament, and procured the decree admitting it to probate as such. These allegations are all admitted by the demurrer, and the only logical deduction from the admitted facts is that the decree is the product of false testimony, adduced by the appellees with a full knowledge of its falsity. That of itself would amount to fraud in procuring the decree. *Secord v. Powers, supra.*

But it is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary, but he must go farther and show that the failure to obtain a just decision is not attributable to his own fault or negligence. *Secord v. Powers, supra.* The allegations upon which the appellants rely, to negative negligence on their part, and to excuse their failure to resist the probate of the will, are as follows:

"Your petitioners further allege that they had no knowl-

edge of the proceedings in this matter, or any of the same, until late in the month of November, when they had their attention called thereto by the dealings of the proponent of the said alleged will, with the personal property of said decedent, and in and about the disposing of the crops left by decedent upon the real estate hereinbefore described; that immediately upon actual notice thereof, from said proponent and his wife, and following their inquiry into the proceedings had and done by said proponent, they commenced their action herein."

We do not think those allegations are sufficient to show due diligence on the part of the appellants, or to excuse their failure to contest the will when it was offered for probate. Proceedings in probate are *in rem,* and notice of such proceedings, of necessity, is generally constructive. It is not claimed that notice of the proceedings for the probate of the will was not given according to law; the most claimed by the appellants is that they had no actual notice of the proceedings. But that only goes to the question of their diligence. It is a familiar rule, that knowledge of facts sufficient to put a reasonably prudent person on inquiry is equivalent to notice of such facts as the inquiry would have disclosed, had it been pursued with due diligence. The testator was a resident of Adams county and died there on the 10th day of April, 1900, leaving an estate. Such facts were sufficient to put the appellants upon inquiry as to whether their father had died testate or intestate, and as to whether proceedings had been instituted to administer on his estate. Had such inquiry been instituted and pursued with due diligence, it would have led inevitably to a knowledge of the proceedings. But it does not appear that the appellants took a single step to inform themselves in regard to the estate, or whether any steps were being taken to administer it according to law, until long after the will was probated. That was not the conduct of an ordinarily careful and prudent person, which is the standard by which their conduct must be tested, but it is what appears to have been an indifferent and reckless disregard of their own rights.

It is true, as is urged, that the fraud in procuring the decree stands admitted by the demurrer; it is also true that the law abhors fraud, and, ordinarily, will not permit a party to retain the fruits of [illegible] fraudulent acts. But the peace and repose of society forbids that litigation should be prolonged indefinitely. The law, therefore, requires a litigant to present his defense seasonably. If, through his own negligence or want of diligence, he fails to do so, equity will not relieve him from the consequences of his own neglect or want of care. Were it otherwise, no man could know with certainty that any controversy was finally settled and at rest. As the petition shows no sufficient excuse for the failure of the appellants to contest the will when it was offered for probate, it is insufficient to justify a vacation of the decree. The demurrer, therefore, was properly sustained.

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

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

PHŒBE R. E. E. LINTON ET AL. V. FRED HEYE ET AL.*

FILED JUNE 18, 1903. No. 12,937.

1. **Special Appearance.** Ordinarily, if a defendant intends to rely on a want of jurisdiction of the court over his person, he must appear, if at all, for the sole purpose of objecting to the jurisdiction; if he appears for any other purpose, his appearance is general.

2. **Plea to Jurisdiction.** When the lack of jurisdiction does not appear on the face of the record, but must be established by evidence *aliunde*, he may plead to the jurisdiction, or unite a plea to the jurisdiction with other defenses to the action, without waiving his right to insist on a lack of jurisdiction. *Hurlburt v. Palmer*, 39 Neb. 158, 173.

* April 11, 1904, judgment of this court was affirmed by the supreme court of the United States, *Linton v. Heye*, 194 U. S. 628.

3. ———: CROSS-PETITION. The preceding rule is limited to cases where the plea to the jurisdiction stands alone, or is united with such defenses as go to defeat a recovery by the plaintiff, and does not extend to cases where such plea is joined with a cross-petition or counter-claim, which necessitates a trial on the merits of the issues tendered by the plaintiff's petition.

4. **Statute of Limitations**: REAL PROPERTY: DUE PROCESS OF LAW. The statute of limitations respecting actions for the recovery of real property, as construed by this court, is not open to the objection that it operates to deprive the owner of his property without due process of law.

5. ———: MARRIED WOMEN. Such statute runs against married women during coverture, whether residents or nonresidents of this state.

ERROR to the district court for Otoe county: PAUL JESSEN, DISTRICT JUDGE. *Affirmed.*

John O. Yeiser, for plaintiffs in error.

John C. Watson and *John V. Morgan, contra.*

ALBERT, C.

This is an action to quiet the title to several tracts of land, each plaintiff asserting title to a separate tract. The title of each is traceable to separate conveyances from one Finlay, as attorney in fact for the defendants. Those of the plaintiffs who claim immediately under such conveyances had been in the open, notorious, exclusive and adverse possession of their respective tracts, claiming title under such conveyances for more than ten years before the commencement of this action; the possession of those claiming by virtue of *mesne* conveyances, coupled with that of their *mesne* grantors was for a like period and character and under a like claim of title. The title of each, therefore, as disclosed by the petition, is based on a conveyance from the said Finlay, as attorney in fact for the defendants, and upon adverse possession. Service on the defendants was had by publication. They appeared specially and objected to the jurisdiction of the court over their persons, on the grounds that the affidavit for service by publication and the notice, published in pursuance

thereof, were defective in certain particulars, and that such notice was not published for the period required by law. The objections were overruled, and the defendants answered.

In their answer the defendants review the objections to the jurisdiction of the court, and admit the possession of the plaintiffs and their *mesne* grantors to have been as alleged in the petition. Further answering the defendants allege, in substance:

(1.) That at the time of the said conveyances by the said Finlay, as attorney in fact, the title to the said lands was in the defendant Phœbe R. E. E. Linton for life, remainder over to the issue, naming them, of her marriage, with her codefendant, who had no interest whatsoever in the land.

(2.) That the power of attorney, by virtue of which the said Finlay assumed to act in making said conveyances, was wholly void and of no effect, for the reason that it was not executed, acknowledged and stamped as required by the laws of England when it was made.

(3.) That adverse possession for more than ten years "does not constitute an equitable title, or afford authority or reason for a court of equity to extinguish a legal title or the title of the defendants"; that the statute of limitations of this state, as regards actions for the recovery of real estate, as construed by this court, is unconstitutional in that, as thus construed, it permits a person to be deprived of his property without due process of law. The prayer for relief is, that the plaintiffs' petition be dismissed, that the said conveyances from Finlay, as attorney in fact for the defendants, be adjudged null and void, and, that all claims of the plaintiffs, in and to the said lands be forever extinguished, and for such other relief as may be equitable. The defendants, afterward, presented what is denominated in the record as a cross-bill, asking that the issue of this marriage be brought in as parties to the suit, and that they be required to set up their interest in the lands in controversy. Leave to file a cross-bill

was denied by the court. The reply of the plaintiffs is a general denial. A trial to the court resulted in a finding and decree for the plaintiffs. The defendants prosecute error.

It is first urged that the court had no jurisdiction over the defendants. The general rule, settled by a long line of authorities, is, that if a defendant intends to rely on a want of jurisdiction over his person, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court. If he appear for another purpose, such appearance is general, and a waiver of all defects in the original process, and an acknowledgment of the complete jurisdiction of the court in the action. *Bankers Life Ins. Co. v. Robbins,* 59 Neb. 170; *Omaha Loan & Trust Co. v. Knight,* 50 Neb. 342; *Leake v. Gallogly,* 34 Neb. 857; *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank,* 45 Neb. 29; *Dryfus v. Moline, Milburn & Stoddard Co.,* 43 Neb. 233; *Hurlburt v. Palmer,* 39 Neb. 158, 173. An exception to this rule is, that, where the lack of jurisdiction does not appear on the face of the record, the defendant may unite a plea to the jurisdiction with his other defenses to the action, without waiving his rights to insist on the lack of jurisdiction of the court. *Hurlburt v. Palmer, supra.* But, we think, such exception must be limited to cases where the plea to the jurisdiction is joined only with such defenses as go to defeat a recovery by the plaintiff, and should not be extended to cases where, as in this case, such plea is joined with a cross-petition, or counter-claim, which necessitates a trial on the merits of the issues tendered by the petition. Such pleading, though denominated an answer, contains all the essential elements of a petition or complaint, and might be made the basis of an independent action and decree against the plaintiffs. It puts it beyond the lawful power of the court to dispose of the case, by a finding on the issues tendered by the plea to the jurisdiction, and compels an adjudication on the merits. The defendants, having thus compelled an adjudication on the merits, can not now be heard to question the authority of the court whose jurisdiction they thus invoked.

Another complaint of the defendants is based on the refusal of the court to require their children to be brought in as parties to the action. We are unable to see how the ruling of the court in this behalf was prejudicial to the defendants. The relief sought by the plaintiff was an adjudication, quieting their title as against the claims of the defendants. That there might be other parties having, or claiming to have, some interest in the premises, would not strengthen the defense, nor assist the court, in the slightest degree, in a just determination of the respective rights of the parties before it. So far as the parties not before the court are concerned, they are not affected by the decree.

A considerable portion of the defendants' brief is devoted to the question of title by adverse possession. The facts upon which the plaintiffs base their claim to title by adverse possession are not denied, but the defendants strongly insist, that while our statute of limitations, in respect to actions for the recovery of real estate, operates to extinguish the remedy, it does not extinguish the right. The learned counsel for the defendants does not overlook the decisions of this court to the effect that one who has maintained an actual, continued, notorious and adverse possession of real estate, claiming title to the same against all persons for ten years or more, acquires a perfect title thereto. See *Lantry v. Wolff*, 49 Neb. 374, and cases there cited. But it is contended that the statute, as thus construed, operates to deprive the owner of his property without due process of law, and is therefore unconstitutional. We think it too late in the day to go into that question. It is the policy of the law that the dominion of things should not long remain uncertain, so as to disturb the peace of society by giving rise to numerous controversies and perpetual litigation. Hence, statutes of limitations exist in every state in the Union. In speaking of such statutes, Miller, J., in *Campbell v. Holt*, 115 U. S. 620, said:

"The weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open

possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. * * * It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him." Citing, *Leffingwell v. Warren,* 2 Black (U. S.), 599; *Dickerson v. Colgrove,* 100 U. S. 578; *Bicknell v. Comstock,* 113 U. S. 149; *Croxall v. Shererd,* 5 Wall. (U. S.) 268. This court is fully committed to that doctrine. *Lantry v. Wolff, supra.*

But the defendants contend that the statute of limitations does not apply to the wife in this case, because, by section 17 of the code, the statute of limitations does not operate against married women during coverture, and that the amendment thereof, by implication, by the provisions of chapter 53, Compiled Statutes (Annotated Statutes, 5317), relative to married women, applies only to married women in this state, and, that as Mrs. Linton is a nonresident, the statute does not run against her.

In *Murphy v. Evans Steam Laundry Co.,* 52 Neb. 593, this court held, since the enactment of the provisions of chapter 53, the statute of limitations runs against married women during coverture, notwithstanding the provisions of section 17. There is nothing in chapter 53 to indicate that it was intended to limit it, so far as it operates to enable a married woman to maintain an action in her own name, to residents in this state. The provision is general, that a married woman may, while married, sue and be sued, in the same manner as if she were unmarried. Con-

sequently, the rule announced in *Murphy v. Evans Steam Laundry Co., supra,* applies, not only to women who reside in this state, but also to nonresidents, and to the wife, defendant in this case. Besides, having joined with her husband in the motion for a new trial, and in the petition in error, under the repeated rulings of this court, no defense not available to her codefendant, as well as herself, is available to her.

Considerable space is given to a discussion of the question of the validity of the power of attorney, under which Finlay executed the conveyances hereinbefore mentioned. It is not claimed that they were not given by the defendants, but merely that they were invalid under the laws of England where made. In view of the sufficiency of the plaintiffs' title by adverse possession, we do not deem it necessary to go into that question. If we are correct in our construction of the law, the title of the plaintiffs by adverse possession stands admitted, and is perfect, so that it would be useless to go into the other questions raised by the defendants.

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

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

CLIFTON F. PLEDGER, NEXT FRIEND TO GROVER C. PLEDGER, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED JUNE 18, 1903. No. 12,876.

1. **Evidence: DECLARATION AS PART OF THE RES GESTÆ.** A declaration to be competent evidence, as part of the *res gestæ,* must be made at such time, and under such circumstances, as to raise the presumption that it was the unpremeditated and spontaneous explanation of the matter about which made. Following *Union P. R. Co. v. Elliott,* 54 Neb. 299.

2. **Admission of Evidence:** DISCRETION OF COURT. The admission or exclusion of such evidence rests largely in the discretion of the trial court; such discretion is not an absolute discretion to be exercised arbitrarily but a legal discretion, the abuse of which constitutes reversible error.

3. ———: ———. Upon the face of the record in this case, *held*, that it was not an abuse of discretion to exclude the declarations offered in evidence as part of the *res gestæ*.

4. **Common Carrier:** TRESPASSER. A party who boards a railway train with the intention of "beating" his way or "stealing a ride," and, to that end, secretes himself on such train, does not stand in the relation of passenger to the common carrier, and the latter owes him no active duty as such passenger.

5. **Liability of Carrier.** While the common carrier owes such person no active duty as a passenger, yet, if it uses unnecessary force to remove him, or expel him at a dangerous place, or while the train is moving at a dangerous rate of speed, and he thereby sustains injury, the carrier is liable in damages.

6. **Instructions.** In order to determine whether a particular paragraph of the charge to the jury is erroneous, it should be read in the light of the whole charge and the entire record.

7. **Railway Company:** TRESPASSER. A person who attempts to board a railway train in such a way as to avoid the payment of his fare, and intending to "beat his way," is a trespasser, and the railway company owes him no duty to keep its right of way free from obstructions.

8. **Error:** AFFIDAVITS NOT IN RECORD. An assignment of error, based on the alleged misconduct of the jury, will not be considered, where such misconduct is ascertainable, only from affidavits not included in the bill of exceptions.

ERROR to the district court for Kearney county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

George A. Adams, Lewis C. Paulson and *E. C. Dailey*, for plaintiff in error.

Webster S. Morlan, John L. McPheely, J. W. Deweese and *Frank E. Bishop, contra.*

ALBERT, C.

This action was brought by the next friend of Grover C. Pledger, whom we shall hereafter call the plaintiff, to recover damages for personal injuries alleged to have been sustained by the plaintiff by the wrongful acts of the defendant.

The petition alleges that on the 24th day of August, 1900, the plaintiff boarded one of the defendant's trains at Hastings, intending to go to the state of Colorado; "that after said train started from the station in the city of Minden, and while the same was in motion and in said city and county, the said Grover C. Pledger was standing on the back end of one of said coaches, when, without any warning whatever, the defendant's employee in uniform, being a brakeman or other employee of defendant in and about said train, violently pushed the said Grover C. Pledger off said moving train, into a pile of cinders with sloping sides, negligently and carelessly, by the defendant and its employees, placed and suffered to remain piled up along and parallel with the defendant's track and in close proximity to said track, causing him to fall on the sloping side of said cinder pile and under said moving train, which train ran upon and over the right leg of said Grover C. Pledger, crushing and mangling the same, necessitating an amputation of said right leg about five inches below the knee, thereby permanently injuring and crippling said Grover C. Pledger for life, all without any fault or negligence upon the part of said Grover C. Pledger." The damages are laid at $15,000.

The answer, in effect, admits that the plaintiff sustained the injury alleged in the petition, but alleges that it was occasioned by the misconduct, carelessness and negligence of the plaintiff and without any fault or negligence on the part of the defendant. It appears from the evidence that the plaintiff boarded the defendant's train at Hastings and concealed himself on the front platform of the first passenger car, to avoid paying his fare. He thus rode until the train reached Minden, which was about 9:30 P. M., when the accident occured. As the train upon which he had been riding was leaving Minden, he was found lying beside the railroad track, with one of his legs so mangled that it was necessary to amputate it below the knee. Whether the accident was the result of his being pushed from the train by one of the defendant's employees, was

the principal question of fact in the case. One theory of the defense was that the plaintiff had left the train at Minden and was trying to board it again while it was in motion, intending to conceal himself as before. The jury returned a verdict for the defendant, and the plaintiff brings error.

The plaintiff was present at the trial and took the stand as a witness on his own behalf. He testified that the accident was the result of his being thrown from the train by one of the defendant's employees. He then offered to prove by three different witnesses that they arrived at the place where he was lying, not exceeding a minute after the accident occurred, that they heard exclamations of pain and that someone asked the plaintiff: "Were you on that train?" And he responded: "Yes, and the brakeman pushed me off, and I believe my foot is cut off." This evidence was excluded on the ground that the declarations of the plaintiff, at that time, were no part of the *res gestæ* and the ruling of the court in that behalf is now assigned as error.

It would unduly extend this opinion to attempt a review of the authorities on the question of the admissibility in evidence of declarations as a part of the *res gestæ*. The leading authorities on this question are reviewed in 1 Rice, Evidence, 362, *et seq.* A large number may also be found in the note to *People v. Vernon,* 35 Cal. 49, 95 Am. Dec. 49. From the numerous and conflicting authorities this court has deduced two rules, which appear to us sufficient for present purposes. In *Union P. R. Co. v. Elliott,* 54 Neb. 299, the rule is thus stated by commissioner RAGAN, and approved by this court:

"A declaration or admission, to be competent evidence as *res gestæ,* must be made at such a time and under such circumstances as to raise the presumption that it is the unpremeditated and spontaneous explanation of the matter about which made."

In *Hewitt v. Eisenbart,* 36 Neb. 794, this court, speaking through IRVINE, C., say:

"The trial court must be permitted to exercise its discretion, very largely, in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions, and the jury must be left to determine whether or not such inference shall be drawn."

In *Omaha & R. V. R. Co. v. Chollette*, 41 Neb. 578, the foregoing language is reiterated. The doctrine announced in the last two cases has the support of Greenleaf, who, at sec. 108, vol. 1, of his celebrated work on Evidence, says:

"The surrounding circumstances, constituting parts of *res gestæ*, may always be shown to the jury, along with the principal fact, and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion."

The discretion of the presiding judge in such cases, however, must not be understood as an absolute discretion to be exercised arbitrarily, but as a legal discretion, the abuse of which would constitute reversible error.

Satisfied with the foregoing rules, the question presented in this case is, whether the exclusion of declarations in question was an abuse of discretion. We do not think it was. The plaintiff was before the court and testified to the facts showing how he claimed to have received the injury. His testimony shows that he was not an entirely artless witness; that, although but sixteen years of age, he had traveled over a considerable portion of the country, concealing himself on railway trains, to avoid paying his fare, and that he was thus traveling, or attempting to travel, at the time the accident occurred. Under such circumstances, it would be rash to assume that his declarations, made after the injury, were the natural and spontaneous expressions of the truth, rather than an attempt to shift the responsibility for his injury to the shoulders of another, to excite sympathy or for other ulterior purposes. It is urged, however, that suffering as he was from a frightful injury at the time he made the declaration, it is

unlikely he would concoct a self-serving declaration. Whether he would be likely or unlikely to concoct such a declaration, would depend largely on his moral habits, the acuteness and readiness of his mental faculties, his fortitude and the intensity of his bodily pain, which would not necessarily be in direct ratio to the seriousness of the injury. Of such matters, the trial court, with the party before it as a witness, was the best judge, and, in the light of all the circumstances shown by the record, we do not think it can be said, as a matter of law, that the exclusion of the testimony, as to his declarations made shortly after the accident, was an abuse of discretion. He was permitted to tell his story under oath, and there was no pressing necessity for the admission of his unsworn statement.

We have not overlooked the case of *Missouri P. R. Co. v. Baier,* 37 Neb. 235, wherein the declarations of an injured party remote, perhaps, in point of time, as those under consideration, were admitted in evidence as part of the *res gestæ.* We can only say of that case, as we have said of this, that, whether such declarations should have been admitted, rested largely in the discretion of the trial court, and, having been admitted, this court held, that the circumstances under which they were made warranted their admission. Besides, in that case, the injured party died shortly after the injury, and could not be produced as a witness on the trial. That fact, in itself, would not render evidence of such declarations admissible, but it is undoubtedly proper to be taken into account by the trial court, in the exercise of its discretion as to the admisssion of such evidence. *Travellers Ins. Co. v. Mosley,* 8 Wall. (U. S.) 397.

The following instructions—the first at the request of the defendant, the other by the court on its own motion—were given the jury:

"You are instructed by the court, if you find from the evidence that Grover C. Pledger on the 24th day of August, 1900, was on the front platform of one of the passenger

cars of a train operated by the defendant company, with the intention of riding upon said train without paying any fare, then and in that case he was not a passenger upon defendant's train and the defendant railroad company, as a common carrier, owed him no duty."

"It is the duty of a person when traveling upon a railroad from one station to another to enter the passenger coaches provided for the carrying of passengers and to remain therein while such train is in motion, and to procure, prior to the entering therein, a ticket from the agent of said company or, if such ticket be not purchased, then to pay the conductor on said train the proper and legal fare. A person doing this and not guilty of misconduct on said train, would be a passenger and the railroad company would be bound under the law to properly care for and attend to the necessary and reasonable conveniences and wants of such passenger and would be *prima facie* liable for any injury that such passenger received while so traveling. But a person riding on the outside of such passenger train, whether on the platform or some other place without, or on parts of the baggage car, for the purpose of obtaining a ride on such train without the payment of any fare therefor, would not be a passenger upon such train, but would be a trespasser thereon and such railroad would owe no duty to such person, and the employees of such company would have the right to put such person off the train and the railroad company would not be liable therefor unless such removal was done in a reckless, careless or negligent manner and the injury, if any, was the result of such negligence."

The plaintiff contends that the foregoing instructions are erroneous, because they ignore the rule that a railroad company is bound to use due care, even in removing a trespasser from its trains, and is liable in damages for any injury resulting to a trespasser from an omission of such duty. Such is undoubtedly the rule. *Kansas City, Ft. S. & G. R. Co. v. Kelly,* 36 Kan. 655, 14 Pac. 172; *Johnson v. Chicago, St. P., M. & O. R. Co.,* 116 Ia. 639, 88 N. W. 811;

Beems v. Chicago, R. I. & P. R. Co., 58 Ia. 150, 12 N. W. 222. But we do not think the charge of the court, taken as a whole, contravenes it. These instructions must be thus taken and read in the light of the rest of the record in the case. The claim was made in the petition that the plaintiff was a passenger on the train; the defendant's theory was that he was a trespasser. These instructions were evidently drawn for the purpose of distinguishing between the relation of a common carrier to its passengers and to trespassers. That the court did not intend the jury to understand that the defendant was under no obligation to refrain from injuring the plaintiff in removing him from the train, even if he were a trespasser, is clear from the other portions of the charge. The fourth paragraph is as follows:

"If you find from the evidence that the plaintiff was traveling upon the train in question, and that for the purpose of avoiding the payment of fare he was riding upon the platform of one of said cars, or other place outside the passenger coach, then the employees of the defendant would have the right to use all force and power necessary to overcome any resistance that might be offered, but they would not have the right to remove him, or push him off, or require him to jump off, at a place where it was unsafe to get off, or at a time when the train was running at such rate of speed that it would be unsafe for a person to get off, and if you find that the plaintiff has established, by a preponderance of the evidence, that the brakeman on said train, or other employee thereon, did push the plaintiff off said train, at a place where it was unsafe to jump off, or at a time when the train was running at a speed when it made such act dangerous, and that the plaintiff was injured thereby, then your verdict must be for the plaintff."

In three other instructions, the foregoing language, touching the duty of the defendant to the plaintiff, even if the latter were merely a trespasser, is, in substance, reiterated. From the charge, taken as a whole, we are satisfied that the jury could not have failed to under-

stand, that, even though the plaintiff were a trespasser on the train, the defendant had no right to remove him at such time, place, or in such a manner, as would be liable to result in his injury.

The defendant requested and the court gave the following instruction:

"You are instructed by the court, it is your imperative duty to try this case and decide the same, as if it were a suit between two individuals. The fact that the person injured was a boy and the defendant a corporation, should make no difference with you in the trial of this action. In considering and deciding this cause, you should look solely to the evidence for the facts and the instructions of the court for the law in the case, and find your verdict accordingly, without any reference to who is plaintiff and who is defendant. The fact that the plaintiff has brought suit in this action constitutes no ground whatsoever on which to base the presumption that he is entitled to a verdict against the defendant. That he is a poor boy constitutes no reason why the plaintiff should be entitled to a verdict. All these things are outside of what you are to consider."

The plaintiff objects to this instruction, because it gives too much prominence to the situation of the parties, and claims that it tended to admonish the jury that they were likely to be criticised if their verdict should be for the plaintiff. We do not think the complaint is well founded. It is the theory of the law, that the verdict of a jury shall be based exclusively on the evidence and the instructions of the court. Such being the law, sympathy has no more legitimate place in a verdict, than in the demonstration of a proposition in Euclid or an experiment in chemistry. This is well known, but at times there is danger that it may be overlooked; and when the trial court feels that such danger exists, there can be no doubt of the propriety of reminding the jury, that in an honest and legitimate search for the truth, sympathy has no place. Another objection to this instruction is based on the closing sentence: "All

these things are outside of what you are to consider." It is claimed that the court having referred to the evidence and its instructions in a former sentence, the closing sentence was a direction to the jury to disregard the evidence and instructions. This objection appears to us to be hypercritical. The jury could not have failed to understand that the closing sentence referred, not to the evidence and the instructions which, in a former sentence, they had been directed to look to exclusively, but to such matters as had been pointed out as improper for them to consider.

The plaintiff also complains of the fourth instruction, given at the request of the defendant. It is as follows:

"One who is injured by the negligence of another can not recover damages therefor if the injured party, by his own negligence or wilful wrong, approximately contributed to the injury so that it would not have happened but for his own fault. If, therefore, you find that said Grover C. Pledger, by his own carelessness, substantially contributed to the injury, or that he might, by the exercise of ordinary care, such as a prudent person generally would have used under similar circumstances, have avoided the injury, he cannot recover damages."

It is urged that this instruction permitted the jury to infer that boarding the car, as the plaintiff was shown to have boarded it, was such fault or wrong as would prevent a recovery in this case, notwithstanding the defendant was guilty of the wrongful acts charged. The instruction must not be taken as standing alone, but in connection with the rest of the charge and the record. The theory upon which the plaintiff asked a recovery was, that he had been pushed from the moving train by one of the defendant's employees, and fell or rolled, so that the wheels of the car passed over his leg. As we have already seen, the jury were fully instructed upon this theory, and, that the defendant had no right to remove him from the train in such a way, or under such circumstances as to endanger his life or person. One theory of the defendant was, that the

plaintiff, in attempting to board the train at an improper place and while in motion, fell with his leg under the wheels. At the place he fell, whether by being pushed off the car or in attempting to board it, there was a pile of cinders. The instruction under consideration appears to have been drawn on the theory that the company might be found guilty of negligence for leaving the pile of cinders on the right of way, if the jury found the plaintiff was not a trespasser. In the light of these theories, and the other instruction given, we do not think the paragraph under consideration is open to the objection urged against it. Another criticism of this instruction is, that it uses the word "approximately" instead of "proximately." The two words are not synonymous, but closely allied in meaning. The use of the former, in the connection in which it appears in this instruction, could not have misled the jury, especially in view of the rest of the charge.

The second instruction given by the court on its own motion is criticised because the jury were thereby directed to consider all the evidence offered in the case. Of course, the jury should have been instructed to consider only such evidence as had been received. But the plaintiff has pointed out no evidence offered which, if considered by the jury, would have been prejudicial to him. On the contrary, the only evidence to which our attention has been called, which was excluded, was the declarations of the plaintiff hereinbefore referred to and which the plaintiff insists should have been received in evidence and considered by the jury. He certainly is not in a position to complain, if the jury, acting upon this instruction in question, considered that evidence. Besides, the likelihood that the jury could have been misled by the instruction, to us, appears exceedingly remote.

Complaint is made of the fifth paragraph of the charge to the jury, because the jury were thereby instructed that if the plaintiff, in running to catch the train, or in attempting to get on the platform or other part of the train for the purpose of avoiding the payment of car fare, fell

over obstructions, and by reason of such obstructions he fell or rolled under the train and was injured thereby, the defendant was not liable for negligence on account of leaving such obstructions on its right of way. We think this instruction was proper. It was based on the defendant's theory of the case, which was supported by evidence, that the plaintiff was a trespasser. The instruction in effect is, that the defendant was not bound to keep its right of way in a safe condition for the benefit of trespassers. It would be carrying the doctrine of negligence altogether too far to hold that a railroad company is compelled to keep its right of way free from obstructions, for the benefit of persons attempting to board its trains intending to evade the payment of their fares.

Another criticism of this instruction is, that there is no evidence that the plaintiff was running and trying to board the train. This is a mistake. One witness, a passenger on the train, testifies to having seen someone running at the side of the train just before the accident. The circumstances detailed, taken with other facts in the case, were sufficient to warrant the inference that the person thus running was the plaintiff, and were a sufficient basis for the instruction.

Misconduct of the jury is one of the errors assigned for reversal of this case. It is claimed that such misconduct is shown by affidavits filed in the district court. They have not been pointed out in the bill of exceptions, nor in our examination of it have we been able to find them there. It is well settled, that affidavits, to be available in this court, must be incorporated into the bill of exceptions. As they were not thus preserved, we are unable to determine whether there was misconduct on the part of the jury.

We find no reversible error in the record, and it is therefore recommended that the judgment of the district court be affirmed.

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

JOHN R. DREXEL ET AL. V. ABRAHAM L. REED ET AL.

FILED JUNE 18, 1903. No. 11,755.

1. **County Court:** APPEAL: REPEAL OF STATUTE. Section 242, chapter 23, Compiled Statutes, 1901, is repealed, in effect, by sections 1 and 2, chapter 47, laws of 1881, entitled "An act providing for an appeal from the decisions of the county court in certain matters."
2. **Appeal:** TRANSCRIPT. Under section 5 of the last mentioned act, it is the duty of the county judge to transmit to the district court a transcript of his proceedings, within ten days after an appeal from an order in probate is perfected.
3. **Fees:** WAIVER. Under said section the county judge has a right to prepayment of fees, but this right may be waived, and will be, if he has established a regular mode of collecting his fees, which is complied with in the given case.
4. **Second Appeal.** Taking a second appeal in a case does not, of itself, constitute an abandonment of the first one.
5. **Appeal:** JURISDICTION. Where a party has, within due time, done all that is legally required to perfect an appeal, and no waiver of transmission of record by county judge is shown, the district court does not lose jurisdiction of the appeal, by reason of its being filed six days late.

ERROR to the district court for Douglas county: LEE S. ESTELLE and WILLARD W. SLABAUGH, DISTRICT JUDGES. *Former judgment of reversal adhered to.*

Woolworth & McHugh, for plaintiffs in error.

Hall & McCulloch, W. D. Beckett, J. W. Woodrough and *J. H. McCumber, contra.*

GLANVILLE, C.

This cause has once before been submitted to this court and decided in favor of the plaintiffs in error. *Drexel v. Reed,* 65 Neb. 231. A rehearing was granted, and the case

again has been briefed, argued and submitted, and we have made another careful examination of the record and are of the opinion that the former decision is correct, and should be adhered to, for the reasons stated therein.

The defendants in error urge that the evidence, *pro et contra,* on the question of the failure to have the transcript of the proceedings in the county court appealed from, filed in the district court within the time limited by statute, and the excuse or cause of such failure, was examined by the district court, and that upon such evidence a finding was made against the plaintiffs in error, and that we are not at liberty to disturb such finding, if supported by any competent evidence. In reference to this, it should be noticed that the finding of the district court is made in the following language:

"The court being fully advised in the premises, doth find that the said appeal was taken later than the time fixed by the statute for the taking of appeals from final orders of the probate court."

This is simply a finding that the appeal was *taken* later than the time fixed by statute. The taking of an appeal in this connection has a definite meaning, given to it by the wording of the statute itself, and does not include the filing of the transcript.

Section 43 of the act governing such appeals (chapter 20, Compiled Statutes; Annotated Statutes, 4824) provides: "All appeals shall be *taken* within thirty days after the decision complained of is made." Section 46 provides: "When such appeal is *taken,* the county court shall, on payment of his fees therefor, transmit to the clerk of the district court, within ten days *after perfecting such appeal,* a certified transcript of the record and proceedings relative to the matter appealed from."

The defendants in error strenuously contend, in their brief and argument, that the appeal taken by the plaintiffs in error by filing their bond on the 3d day of October, was ineffectual, because of the insufficiency of the bond; also that it was rendered nugatory, by afterwards secur-

ing another order, allowing them to appeal, and giving a new bond; and also that this subsequent action worked an abandonment of the first appeal. One of the grounds stated in their motion for a rehearing herein is:

"The court was in error in holding that the institution of substituted appeal proceedings in the county court did not operate as a withdrawal and abandonment of the original appeal proceedings for which the later ones were substituted."

They still argue that the second bond was filed too late and, therefore, that the appeal is too late.

This was undoubtedly their contention in the district court, and the finding of the district court that the appeal was not taken in time, is a finding upon this contention. In that we think the trial court was clearly wrong. There was no conflict of evidence upon this question and it is simply a question of law applied to the facts disclosed by the record.

The bond was given and approved by the county court, and is sufficient to sustain the appeal, or if insufficient, can be amended, and the appeal therefore was *taken* within the required time.

This leaves us free to examine the evidence on the other branch of the case, all of which is before the court in the same form in which it was presented to the district court, and we may make our finding upon this evidence, according to its weight as presented to us.

The trial court having expressed no finding upon this issue, under the evidence presented to it, we are justified in presuming that its finding upon the evidence was in accordance with its clear preponderance, which we think is in favor of the contention of the plaintiff in error.

It is made clear by the evidence in the bill of exceptions, that the delay in perfecting the transcript, and the transmission thereof to the district court, was not caused by the failure of the plaintiffs in error to pay the cost therefor. All other duties required of the plaintiffs in error to secure a successful appeal had been performed. The delay

then was not caused by the failure of appellants to do anything required of them to cause the district court to be possessed of the action.

Appeals are favored by the courts, rather than otherwise. The jurisdiction of the county court in ordinary civil actions is limited to $1,000; while in such matters as this, issues involving fortunes may be tried before them. While vexatious appeals should be discouraged, and perhaps punished, yet the opportunity for litigants to have their issues tried in the higher courts should not be hindered by rules other than those necessary to secure the orderly administration of justice. In cases of appeal in probate matters, the legislature has not seen fit to establish, by positive enactment, any rule forfeiting the right of an appellant to be heard on his appeal, if the transcript is not filed within a fixed time, as has been done in regard to appeals from justices' court and the county court in its ordinary jurisdiction; moreover, while the law of appeal in probate matters, contained in chapter 23, provided, by sections 240 and 241, for such forfeiture, yet the act of 1881, held to have repealed the old law, contains no such provision, and, as though the legislature had in mind the rule favoring appeals in such matters as this, the county court is charged with the duty of transmitting the record necessary to give the district court jurisdiction, and section 47, chapter 20, Compiled Statutes of 1991, provides:

"Upon the filing of such transcript in the district court, that court shall be possessed of the action."

Perhaps no better example of a case justifying the rule favoring appeals could be found than the one before us. The pleading upon which the county court heard and allowed a claim of $94,652.39 is as follows:

"County Court, Douglas County, State of Nebraska.

"IN THE MATTER OF THE ESTATE OF ANTHONY J. DREXEL, DECEASED.

"The Estate of Anthony J. Drexel, deceased, Dr.

"To Abraham L. Reed	$83,333 00
and interest on the above amount from Jan. 1, 1896, at 5 per cent. per annum	5,381 89
	$88,714 89

"STATE OF NEBRASKA, COUNTY OF DOUGLAS, ss.

"Abraham L. Reed, being duly sworn, deposes and says that the above claim against the estate of Anthony J. Drexel, deceased, is just and true, and that the amount of said claim, as stated above, after allowing all just credits thereon, is now due and wholly unpaid.

"Affiant says that said claim is due him as his share of the unpaid purchase price of certain land, described as follows, to wit: (Here follows the description of certain real estate.)

"And upon certain notes, mortgages and deeds, and agreements made in connection with the sale of said land and the assumption of said unpaid purchase price by said Anthony J. Drexel."

This, as a pleading, is only sufficient to suggest to the mind of a lawyer what issues are probably involved that should be tried upon pleadings, much more full and specific, such as are required in the district court.

Plaintiffs in error urge that the act of 1881, providing for appeal in cases like this, does not repeal the provisions of section 242 of chapter 23, wherein parties of their class are allowed extra time for taking an appeal. We think the former opinion holding against this contention is correct, and we adhere to that holding for the reasons therein given.

We think the district court became possessed of the action, and that it erred in dismissing the appeal. We

therefore recommend that the former decision of this court be adhered to, and the cause remanded to the district court for further proceedings.

BARNES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order of the district court sustaining the objections to its jurisdiction is reversed, and the cause remanded for further proceedings.

REVERSED.

ARTHUR C. RAWSON V. CADET TAYLOR ET AL.

FILED JUNE 18, 1903. No. 13,118.

1. **Right of Creditor of Bank to Maintain Action on Bond.** Where, pending an application for the appointment of a receiver for a bank, under the provisions of chapter 8, Compiled Statutes, a bond is given to procure the return of the assets of such bank under the provisions of section 35 of said chapter, and such proceedings are dismissed and the assets returned, any creditor who is a beneficiary of such bond may maintain an action at law thereon, after the condition is broken to his damage.
2. **Erroneous Instruction.** Record and evidence examined, and *held* that, in this case, the plaintiff can maintain such an action, and that the charge, "It appearing that there are other unpaid creditors of the Globe Savings Bank not parties hereto and not represented herein, and the law being that this plaintiff can not maintain this suit if that be true, you are therefore instructed to find for the defendants," given by the court to the jury, is erroneous, and the plaintiff is entitled to a new trial.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, DISTRICT JUDGE. *Reversed.*

Arthur C. Wakeley, for plaintiff in error.

A. S. Churchill, contra.

GLANVILLE, C.

This is an action upon a bond given under the provisions of section 35, chapter 8 of the Compiled Statutes (Annotated Statutes, 3735), running nominally to the state of Nebraska, given to secure the return of the assets of the

Globe Savings Bank, to its officers, the bond being as follows:

"Know all men by these presents: That we, the Globe Savings Bank of Omaha, Nebraska, as principal, and H. O. Devries, Cadet Taylor, D. T. Mount and Globe Loan & Trust Company, as sureties, are jointly and severally held and firmly bound unto the state of Nebraska for the use and benefit of all the depositors and creditors of the Globe Savings Bank of Omaha in the sum of fifty thousand dollars ($50,000) in good and lawful money of the United States, for the payment of which we do by these presents bind ourselves, our heirs, executors, administrators and assigns. The conditions of the above obligation are such: That, whereas, the said Globe Savings Bank of Omaha having become insolvent, and the officers and shareholders of said bank being desirous to make full payment and settlement of all the liabilities of said bank, and for that purpose desire that H. O. Devries as president, and Cadet Taylor as vice-president of said Globe Savings Bank, shall take and retain possession of all the assets of said bank:

"Now, if the said Globe Savings Bank, or its officers as aforesaid shall make, or cause to be made, full settlement of all the liabilities of said bank with the several and numerous creditors and depositors thereof, within three (3) years from the date of this obligation, with interest, then in that case, this obligation to be null and void, otherwise to be and remain in full force and effect.

"In witness whereof, we have hereunto set our hands, this ninth day of June, 1896.

"(SEAL.) GLOBE SAVINGS BANK, *Principal*,
"By H. O. DEVRIES, *President*.
"H. O. DEVRIES,
"CADET TAYLOR,
"D. T. MOUNT,
"(SEAL.) GLOBE LOAN AND TRUST CO.,
"By H. O. DEVRIES, *Pres.*,
"W. B. TAYLOR, *Secretary*,
"Sureties."

After three years from the date of this bond, the plaintiff, who was one of the unpaid creditors of the bank, and also the assignee of the claims of a large number of other such creditors, both as to claims and damages, brought this suit upon the bond, alleging breach of condition and damages. All the obligors, except H. O. Devries, then deceased, were made defendants in the court below, and are defendants in error here.

Several defenses were pleaded to plaintiff's action, which briefly stated, are as follows: First: That plaintiff is not the real party in interest except as to his original, individual, claim. Second (stated in full as in the answer): "The defendants further say that the plaintiff can not sue and maintain an action, in his own name and for his sole use, upon said bond set out and made a part of his amended petition, there being numerous other creditors of said Globe Savings Bank unpaid. That an action could only be maintained thereon in the name of the state of Nebraska, for the use and benefit of all the creditors of the said Globe Savings Bank." Third: "Defendants deny that said bond ever became effective or operative in any way at any time," etc. The claim being that the assets of the bank were not turned over to the proper parties as required by law, and the terms of the bond. Fourth: A plea of the statute of limitations. (This, however, seems to have been abandoned.)

Trial was had to a jury, and the court instructed a verdict for the defendants by the following charge:

"It appearing that there are other unpaid creditors of the Globe Savings Bank, not parties hereto, and not represented herein, and the law being that this plaintiff can not maintain this suit if that be true, you are therefore instructed to find for the defendants."

This charge was duly excepted to. A verdict was returned in accordance with the above direction; a proper motion for a new trial was filed, overruled, and exception taken. Judgment that plaintiff take naught upon his cause of action was entered, and the case is brought to this

court on a petition in error, properly raising the question of the correctness of the instruction above quoted, the verdict rendered and judgment based thereon.

The main question to be determined, is the correctness of the charge or direction to the jury, based upon the reasons therein assigned. Other reasons are urged why an instruction for the defendant was proper, one being that the bond in suit shows upon its face, that the consideration thereof required the return of the assets of the bank to H. O. Devries, as president, and Cadet Taylor, as vice-president of the bank, and that the evidence shows that the assets were turned over to Cadet Taylor, instead of to H. O. Devries and Cadet Taylor, and that, therefore, no liability ever attached upon the bond.

The question is also raised as to the right of the plaintiff to maintain his action upon the assigned claims, but if upon the entire case the plaintiff could sustain his action for his own claim, the direction to the jury is wrong, and the case must be reversed, whether his assignments are good or not. Moreover, we think the defendants' answer admits the assignments, and as they place the legal title to the claims, and the legal right to receive the money thereon, in the plaintiff, we are of the opinion that he can maintain his action for all claims, if for any. We say the answer admits the assignments because the language used therein is:

"The defendants deny that any of said claims mentioned in said amended petition have been assigned to the plaintiff and (allege) that said pretended assignments, if any were made, are without consideration, and are null and void."

This is an admission of the assignments. See *Dinsmore & Co. v. Stimbert,* 12 Neb. 433.

Coming now to the contention that no proper delivery of the assets of the bank was made, so as to cause the bond to become operative and binding, we think the evidence tends to show, which is all that would be necessary to render the instruction erroneous, unless right for the reason therein given by the court, that the assets of the bank

were in fact turned over or delivered to Cadet Taylor in the presence of H. O. Devries, who made no objection to the delivery.

We think it will be recognized as the law without citation or argument, that where either a legal or a contract duty requires the delivery of property to two parties for their joint benefit or joint control, a delivery to one in the presence of the other, who makes no objection, is a good delivery to both; in fact, a manual delivery to two persons simultaneously is practically impossible, and if the contention of defendants in error is that the assets should have been delivered to Devries and Taylor, the evidence tends to show such delivery.

That in so receiving the property they acted as officers of the bank, is clear from the letter to the state banking board, contained in the bill of exceptions, signed by them and the defendant Mount, a director, as for the bank, clearly acknowledging for the bank, possession of the assets and control of negotiations for settlements. There is much to indicate that defendants think the officers signing this bond as sureties are the officers "furnishing the bond" under the statute, but in this case it is the owner, the bank corporation, that furnished the bond, the bank is principal, the others are the sureties upon its bond.

It may be remarked here, that it is difficult to determine, from the pleadings and argument of the defendants in error, who they claim should have received the assets, the redelivery of which was secured by the giving of this bond. There is much vagueness in their pleadings on this branch of the case, with denials of facts not pleaded.

We think, further, that the evidence strongly tends to show that if any mistake was made in regard to the redelivery of these assets, certain of the defendants, if not all, are estopped, or have waived their right, to contend that the bond is not binding upon them because of such mistake.

In thus disposing of this branch of the case, we do not wish to be understood as holding or admitting, that the

obligors upon this bond can read the recitals of the preamble to the condition, into the condition, as a proviso, and thus avoid a liability, the consideration for which, was the dismissal of the proceedings for the appointment of a receiver, and the release of the assets of the bank from the sequestration under the law.

Without giving more space to this branch of the case, we will say that in the condition of the pleadings and the evidence, we are satisfied that the instruction complained of, and the resulting verdict and judgment, can be sustained upon no theory other than that adopted by the trial court, and here strenuously urged by defendants in error, namely, that an action upon this bond can not be sustained by a single creditor of the bank for his benefit alone, but that the only action that can be sustained thereon, is one in the name of some proper party for the benefit of all the creditors of the bank whose claims have not been settled in accordance with the conditions of the bond, and that any fund created by the collection of money from the obligors in this bond, would constitute a trust fund which should be ratably distributed among all the creditors.

The case has been advanced to an immediate hearing because of the general, and perhaps the public interest in the decision of the question. What is desired is a right rule, and a certain rule of procedure in such cases, but in announcing what we hold to be the rule, we will, in view of the importance of the question, give its consideration some time and space, with a view to satisfy the profession that the rule is right.

The question is one that is not easily settled by precedent, or by authorities cited from other states where the legislative and judicial policies may be different from those of our own.

The provisions under which the bond in suit was given are contained in section 35, chapter 8 of our statutes, which prescribes the duties of receivers of banks appointed under other provisions of the act, and then provides:

"That whenever the officers, stockholders or owners of

any insolvent bank shall give a good and sufficient bond running to the state of Nebraska, * * * conditioned upon the full settlement of all the liabilities of said bank by such officers, stockholders or owners, within a stated time, and said bond shall have been approved by the state banking board, then the state banking board shall turn over all the assets of such bank to the officers, stockholders, or owners of such bank furnishing the said bond."

It is contended by the defendants in error that the action of the banking board in taking charge of the assets of the bank, the giving of the bond sued upon in this section, and the resulting proceedings, worked a dissolution of the bank corporation, and that, therefore, under the provisions of section 62, chapter 16 of our statutes, the assets of the bank became, *ipso facto,* a trust fund for the benefit of all the creditors.

Without attempting to answer the extended argument in support of this contention, we will hold that the corporation was not thereby dissolved, and the section referred to has no application to the question under discussion. See 2 Morawetz, Private Corporations (2d ed.), sec. 869; *State v. German Savings Bank,* 50 Neb. 734.

It has been strenuously urged by plaintiff in error that this case turns upon the question: "Is money due upon this bond, an asset of the bank?" This can not be the test question, for the statutory double liability of stockholders of banking corporations can never be considered a true asset of the bank; the corporation has no right to collect it; if it be collected by the bank and used to keep it a going concern, this does not protect the stockholders when called upon to pay as required by law for the benefit of creditors. It is a fund or security, provided by law for the benefit of creditors, and is attached to the stockholders' contract, as an incident, and yet it has been held by this court that the money due on such liability can only be collected in a suit for the benefit of all creditors.

It has been provided by statute, that upon certain named contingencies, the assets of a bank shall be se-

questered in a manner provided, and in effect that the proceeds thereof shall be ratably distributed. In the case before us, the bond in question is a security, outside of the assets of the bank, which has been required by law, and given by the defendants as a condition of allowing the bank to withdraw from the custody of the officers of the state, or of its courts, the assets which, under the law, had become a fund sequestered for the benefit of all creditors, and differs in character from the stockholders' secondary liability, so far as being an asset is concerned, only in that the bond is not looked to by those dealing with the bank, and does not give it standing and credit, while the stockholders' liability is so far an asset as to help give credit to the bank as a going concern, but neither is an asset upon which the bank itself can realize.

And yet, while it is admitttd that by law the fund collected from the stockholders of a banking corporation by enforcement of this statutory liability is to be ratably distributed, it is urged by plaintiff in error that the money can be collected upon the bond in suit by an individual creditor, because the bond is not an asset of the bank.

We think there are two questions that have a greater bearing on the case before us, than the one referred to above. First: Is the bond sued upon such that the right under it is a joint right, or a several right? Second: Is the liability of defendants upon this bond direct and primary, or collateral and secondary? And then if we shall find the right is several, and the liability direct and primary, we have to inquire, is there any statutory or constitutional provision that overrides the usual rules of law governing this case upon such a finding?

In 1 Parsons, Contracts (9th ed.), page 13 *et seq.*, it is said:

"The question whether the *right* under a contract is joint or otherwise, enters more intimately into the nature of the contract, and therefore is of more importance; and it is at the same time of greater difficulty. * * * In general, all contracts, whether express or implied and

resulting from the operation or construction of law, are joint, where the interest in them of the parties for whose benefit they are created, is joint, and separate where that interest is separate. But the interest which is thus important as a criterion is an interest in the contract, and not in any sum of money, or other benefit, to be received from it. It is a strictly legal and technical interest created *by* the contract, and does not depend upon the condition or state of the parties aside from the contract. * * * The circumstances of each case, and the situation and the relation of the parties, and the nature of the consideration, are all to be looked into, to ascertain who is really interested, and who has sustained the damage arising from a breach of the contract, and whether such damage was joint or several. * * * Parties are not said to be joint in law, merely because they are connected together in some obligation or some interest which is common to them both. They must be so connected as to be in some measure identified. They have not several and respective shares, which being united make a whole; but these together constitute one whole, which, whether it be an interest or an obligation, belongs to all."

In the case before us, the bond is not single but is upon condition, and creating a liability only to respond in damages for a breach of a condition requiring the performance on the part of the bank, of a duty to its several and numerous creditors, each creditor being only interested in the performance of that duty toward himself, and the bond creates a liability several as to the obligees. The obligors can not invoke the rule of law preventing the splitting of causes of action, for the rule does not apply in such a case; their obligation is to each creditor individually, and each creditor has an individual claim for the amount of his damage occasioned by a breach of the condition, and an independent cause of action therefor, unless his rights are modified by some special law of this state.

The bond under consideration, it will be noticed, is for the use and benefit of all the depositors and creditors of

the bank, and is conditioned upon the making of full settlement with its several and numerous creditors and depositors.

The case of *Lyman v. City of Lincoln,* 38 Neb. 794, was an action brought against the obligors of a bond, given to the city of Lincoln, to secure the performance of a contract, a part of which required the contractors to file with the board of public works receipts of claims from all parties furnishing them with material and labor in the construction of an engine house, and it was held:

"That the promise they made to the city of Lincoln was for the benefit of all persons who furnished labor and material used in said contract and such persons could sue on said bond."

In *Sample & Son v. Hale,* 34 Neb. 220, one of the conditions of the bond was for the fulfillment of the agreement that:

"The first party further agrees to pay off and settle in full, with the parties entitled thereto, all accounts and claims that may become due by reason of laborers' and mechanics' wages, or for materials furnished or services rendered, so that each and all persons may receive his or their just dues in that behalf."

The bond in that case ran to the state of Nebraska and was a penal bond. The lower court, upon an agreed state of facts, found for the defendant, and dismissed the action which had been brought by the plaintiff on the bond, to recover for materials furnished to the contractor. The case was reversed and remanded. In the course of the opinion, the writer quotes with approval from *Baker & Co. v. Bryan,* 64 Ia. 561, where a similar bond was in question, this language:

"The parties for whose benefit these covenants were made may prosecute actions upon the instruments containing them."

The rights of the obligees upon the bond in the case before us are no less several than were those of the parties who were allowed to maintain their actions in the cases

cited, and we have no doubt this bond is several as to those for whose benefit and use it is made, and they may maintain several actions thereon unless restrained by other considerations.

Is the liability upon this bond direct and primary, or collateral and secondary?

Some little confusion on this question may have grown out of the fact that the condition of this bond is for the payment of money, so that obligors by paying damages for a breach thereof may seem to be fulfilling the condition, but that does not affect the character of the contract, and the liability is as direct and primary as though the condition had been to make good title to property. If the defendants are liable at all, it is upon the bond, and the liability, if any, is for damages for a breach of its condition. It is no more their legal duty to fulfill the condition of the bond than, in the case supposed, it would be to make good title. If the condition is fulfilled, their bond is *void,* not *paid.* If condition is broken, the bond is in force and the damages caused by the breach are due as part of the penalty and upon the bond, and not on the obligation creating the duty named in the condition.

The opening statement in Murfree, Official Bonds, sec. 1, is:

"A bond may be briefly defined to be a sealed obligation to pay money. It may be either single and absolute, or upon condition and contingency. However complicated may be the condition or contingency and however alien from pecuniary considerations may seem the inducements to its execution, or the circumstances surrounding the parties, a bond will always be found to resolve itself into an obligation to pay money sooner or later, either absolutely or upon some condition, or on the happening of some future event."

And in section 129 of the same work, it is said:

"The condition of a bond is the statement with necessary and appropriate recitals of the circumstances and contingencies under and upon which the bond shall become void.

The statement is necessarily in the alternative. In one case or contingency, the obligation is to become null and void, and the obligor's liability will be at an end; in the other his responsibility will become absolute and the condition is in such case said to be broken, and it is from a breach of the condition that nearly or quite all the litigation on this subject arises."

The same writer, in sec. 136, says:

"It is not necessary in the condition of a bond that all the details of its subject matter should be particularly and specifically rehearsed," and quotes Chief Justice Marshall as saying: " 'That is certain which may be rendered certain'; and an undertaking to perform the duties prescribed in a distinct contract or in a law, or any other known paper describing those duties, is equivalent to an enumeration of those duties in the body of the contract itself."

The bond in question then should be interpreted as though the several creditors of the bank were named in the condition, with the amount owing to each, specifically stated, for it is "full settlement of all the liabilities of said bank, with the several and numerous creditors and depositors thereof, within three years," that is named and its condition, and while this of itself, is uncertain as to who are the beneficiaries, and the amount of their claims, yet the duty that is to be performed by the bank and damages for the failure of which are secured by the bond, is a separate and distinct duty of the bank to each individual creditor, to pay to that creditor alone and individually, the amount of his separate claim, and, therefore, this condition may be made certain by reference to "other known papers prescribing those duties," which, as Chief Justice Marshall has said, "is equivalent to an enumeration of those duties in the body of the contract itself."

We think no further argument or reference to authority is necessary to show that the liability on the bond in question is direct and primary.

In *Farmers Loan & Trust Company v. Funk*, 49 Neb.

353, the effect of sections 4 and 7, article 11 of our constitution, in regard to the liability of stockholders, and the manner of its enforcement, was under consideration, and in the course of the able opinion by commissioner RYAN, it is said, on page 359:

"At common law, stockholders in a corporation proper were not personally liable for its debts. Quite early in the history of this country there were frequently inserted in the charters of corporations provisions fixing the individual liability of stockholders in certain contingencies. When there were presented cases in which it was sought to render effective these special provisions, the courts differed among themselves as to the nature of this liability, the character of the fund arising from it, the persons entitled to sue, and the manner in which the action should be brought. These four matters of difference, on examination, will be found to depend on one question, and that is whether this liability is to be deemed to have been created for the purpose of raising a trust fund for the payment of the debts of the corporation, or whether it created the relation of debtor and creditor directly between a creditor of the corporation and one of its stockholders."

Commenting on the case of *Bank of Poughkeepsie v. Ibbotson,* 24 Wend. (N. Y.) 473, the writer says (p. 360):

"It is clear that the circumstance that no judicial proceeding was necessary to entitle a creditor of the corporation to proceed against one of its shareholders somewhat influenced the court, in the above case, to hold that a suit at law might be maintained by the creditor against the stockholder. Moreover, it is clear that the liability of the stockholder to the corporation creditor was regarded as primary and not in any degree secondary. These considerations govern the cases which support the view that an action at law may be maintained by a corporation creditor against one of the stockholders to enforce an individual liability imposed by the statute."

For a review of the authorities upon which that case was decided, the profession is referred to its report and

we will further quote from the opinion the following extract, only (p. 367):

"In argument it was stated that there could be no question of the proposition that a receiver could not maintain an action for the benefit of the creditors of the bank, and in support of this proposition there were cited 2 Morawetz, Corporations (2d ed.), sec. 869, and Cook, Stock and Stockholders, sec. 218. A reference to the authorities cited by these text writers discloses the fact that the author, in each instance, founded this proposition on the decisions of those courts which hold that the liability of an individual stockholder is to the creditors of the corporation, and, therefore, not enforceable as a trust fund for the benefit of all creditors of the corporation. It would logically result from these premises that a receiver could not bring an action against the stockholders, for, according to this theory, the actions must be by creditors as such in their own right. Even in this, however, there is not a uniformity of views, for the action in *Stewart v. Lay,* 45 Ia. 604, was by a receiver, although the supreme court of that state, under special statute, holds that the action must be at law. The proper view to be taken of this proposition is so well expressed in *Wilson v. Book, supra,* that we quote therefrom the following language: 'If the liability is secondary and for the benefit of all the creditors, it is a trust fund for the purpose of satisfying their claims.'"

In *Van Pelt v. Gardner,* 54 Neb. 701, commissioner RAGAN, who wrote the opinion, quotes with approval from *Patterson v. Lynde,* 106 U. S. 519, the following:

"The constitution of Oregon created no new right in this particular. It simply provided for the preservation of an old one. The liability under this provision is not to the creditors, but for the indebtedness. That is no more than the liability created by the subscription. The subscription is part of the assets of the corporation, at least so far as creditors are concerned. The liability of the stockholder to the creditor is through the corporation, not direct. There is no privity of contract between them, and the

creditor has not been given, either by the constitution or the statute, any new remedy for the enforcement of his rights."

And in *State v. German Savings Bank*, 50 Neb. 734, it is directly held in an opinion by commissioner IRVINE:

"That the constitution makes the liability of subscribers for unpaid subscriptions for the purpose of paying debts of the corporation a secondary liability, to be enforced only after the amount of the debts has been judicially ascertained and other corporate property has been exhausted."

We are of the opinion that the right of the obligees under the bond in suit is several, and the liability of the obligors thereon is direct and primary; that there is privity of contract between the plaintiff and the defendants, and that this action can be maintained. No statutory or constitutional provisions have been suggested or discovered that prevent it. The decisions of this court holding the stockholders' liability under the constitution to be secondary, while holding that, by the wording of the provisions fixing such liability, an action by a general creditor to collect his individual claim from the stockholders is precluded, furnish no rule against this conclusion, while the direct holding of this court against what is termed the "trust fund theory," as applied to insolvent corporations, in *Merchants Nat. Bank v. McDonald*, 63 Neb. 363, and *Shaw & Co. v. Robinson & Stokes Co.*, 50 Neb. 403, convinces us that we have established no adverse judicial policy. An examination of chapter 8 of our statutes above referred to, discloses nothing to our minds inconsistent with the existence of the plaintiff's right to his action as commenced, while the conditions created by the action taken under that statute, strongly indicate that the intention of the legislature was to require the bond as a direct contract with the creditors, to insure full payment to each and all of them by fulfillment of the condition, or damages for its breach.

Under the statute, a receiver was applied for, and when

appointed, he would have been the one empowered to administer the trust covering the assets of the bank, enforce the statutory liability of its stockholders and distribute the proceeds. The bond sued upon was given to prevent the appointment of such receiver. The defendants contend that the trust continues and includes the bond, and that the officers of the bank are the trustees. The bank and its officers are the obligors in the bond, but deny their liability thereon. And so we have this situation—a trustee holding his own bond in trust, denying his liability thereon, while insisting that he is the only one that may bring action thereon. This can not be.

We conclude that plaintiff has right to this, his action upon the bond, and recommend that the judgment of the trial court be reversed and a new trial awarded.

BARNES and ALBERT, CC., concur.

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

REVERSED.

SEDGWICK, J., concurring.

When the assets of a bank have been so impaired as to render the ability of the bank to meet its liabilities doubtful, the law intervenes for the purpose of preserving the assets, preventing a further depreciation thereof, and insuring the fulfillment of its obligations by the bank so far as possible. If the bank can and will fulfill its obligations, there is no necessity for a receiver. The law, therefore, provides that the bank may give guaranties for the fulfillment of its obligations, and if that is done no receiver will be appointed. The fact that the law requires further guaranties for the fulfillment of its obligations on the part of the bank furnishes no reason for supposing that the intention is to change the character of the obligations of the bank in any particular. The bond, which is the contract of guaranty, provides for the carrying out of the

obligations of the bank as they were originally entered into, and the holders of those obligations may avail themselves of this guaranty, but their claims against the bank are not otherwise affected. I think, therefore, that the conclusion of the commissioners is correct.

MICHAEL MURPHY ET AL. V. FIDELITY MUTUAL FIRE INSURANCE COMPANY ET AL.

FILED JUNE 18, 1903. No. 13,132.

1. **Appointment of Receiver: NOTICE: WAIVER.** On an application for the appointment of a receiver, the five days' notice required by statute may be waived by the parties entitled thereto.
2. ———: ———: ———. Where the application is made in a suit then pending, notice may be served on the attorney of record representing the party against whom the application is made, and such attorney may waive the time required by statute and authorize the court to proceed to an immediate hearing of the application.
3. ———: COLLATERAL ATTACK. The order of a district court appointing a receiver, is not subject to collateral attack, because such order was made in a law action, or because the petition fails to disclose all the facts usually required in a petition for that purpose.

ERROR to the district court for Douglas county: GUY R. C. READ, DISTRICT JUDGE. *Affirmed.*

B. Frank Neal, Thomas J. Doyle and *George W. Berge*, for plaintiffs in error.

Howard H. Baldrige, William A. De Bord, E. R. Leigh and *Charles E. Foster, contra.*

DUFFIE, C.

September 30, 1902, the plaintiffs in error, creditors of the Fidelity Mutual Fire Insurance Company, filed their petition in the district court for Douglas county, asking the court to appoint a receiver for the defendant company. The defendant Leigh appeared and answered setting up, among other matters, his own appointment as receiver of the com-

pany by said court, prior to the filing of the plaintiffs' petition. By an amendment filed to the petition, the plaintiffs questioned the validity of the appointment of Leigh, and upon the issues thus made, a hearing was had and an order entered, denying the application of the plaintiffs. An order overruling a motion for a new trial was entered by the court; and the plaintiffs have taken error to this court.

The facts, as we gather them from the record, are as follows:

One Edward Allison, at a date long prior to the commencement of this action, had brought suit against the defendant company, on a policy of insurance issued upon property owned by him and which had been damaged by fire. W. A. De Bord, the president of the company, appeared as its attorney in this action. The company was insolvent, had ceased to do business, and its assets had been placed in the hands of one Johnson to collect. But little progress appears to have been made in realizing on the assets and A. L. Sutton, attorney for Allison in the suit above referred to, had spoken to De Bord about placing the company in the hands of a receiver. The attorneys for Murphy and other creditors of the company, some of whom had reduced their claims to judgment, had also talked with De Bord about applying for a receiver; and, to all of the parties, De Bord had said, that the company would make no objection to such a proceeding or place any obstacle in the way of any creditor who might commence proceedings for that purpose. September 17, 1902, Edward Allison filed a petition, entitled the same, and bearing the same number and docket as the case formerly filed by him to recover on his policy of insurance, asking the court to appoint a receiver to take charge of and collect the assets of the company. His claim against the company had not yet been reduced to judgment; but the petition is, we think, sufficient in its allegations of fact, to warrant the appointment of a receiver in a proper action brought by a judgment creditor. Upon filing this petition

a notice of the application was taken to the office of De Bord, and service of said notice and a waiver of the time of hearing was accepted by one Foster, a clerk in the office. The notice and acceptance of service is in the following words:

"EDWARD M. ALLISON,
Plaintiff,
v.
FIDELITY MUTUAL FIRE INSURANCE COMPANY,
Defendant.
} Notice of Application for a Receiver.

"*To W. A. De Bord and Daniel L. Johnson, Attorneys for Defendants:*

"You are hereby notified that on the 19th day of September, 1902, at 9:30 o'clock in the forenoon, or as soon thereafter as I can be heard, I will apply to Guy R. C. Read, judge of the district court for Douglas county, for the appointment of a receiver of all the property and assets of the Fidelity Mutual Fire Insurance Company, on the ground that said defendant company is wholly insolvent and that the property and assets of said company are in danger of being wasted and destroyed, and upon the further ground that the directors of said company have abandoned their duties as directors of said company and are making no effort to collect from the members of said company sufficient money to pay the claims of the creditors of the company. Such application is based upon the petition of the plaintiff. I propose the name of E. R. Leigh, or H. B. Noyes, as receiver, with Isaac B. Noyes and C. B. Noyes as his sureties. I also offer Isaac B. Noyes and C. B. Noyes as sureties for myself.

"EDWARD ALLISON,
"By A. L. SUTTON,
His Attorney."

"9—17—02.

"Receipt of above notice is hereby acknowledged. Time of service waived. WILLIAM A. DE BORD, *Pt.*
"P. F."

Upon the return of this notice and on the same day, the court appointed E. R. Leigh, receiver of the company, and at the time of the application of Murphy *et al.* for a receiver, Leigh had duly qualified. It is insisted, with much earnestness, that the president of a corporation can not, on the application for the appointment of a receiver, waive the five days' notice provided by our statute. We do not think it necessary to determine this question. This application was made in a case then pending. De Bord had appeared as the attorney for the defendant in that case. It will be observed that the notice was addressed to De Bord, not as president of the company, but as its attorney. The fact that Foster, in accepting service, designated De Bord as president, instead of attorney, is wholly immaterial. It is further insisted that Foster had no authority from De Bord to accept service of this notice. The evidence is undisputed that, at the time, De Bord was out of the city, but it also shows that Foster, as a clerk in the office of Baldrige & De Bord, was in the habit of accepting notices addressed to the firm, or to a member thereof, and that his act in so doing had never been questioned. Aside from this, the evidence is undisputed that De Bord ratified and confirmed such acceptance, upon learning of it, and we do not think it can be said that a sufficient notice was never given the company or that a waiver of time has not been duly had.

In *Farmers & Merchants Nat. Bank of Holstein v. German Nat. Bank*, 59 Neb. 229, it was held:

"The party adverse to the application may waive the statutory notice, and will be held to have done so, when he has appeared and resisted the application entirely upon other grounds."

And this holding was reaffirmed in *Veith v. Ress*, 60 Neb. 52.

It is further insisted, that the court had no jurisdiction to appoint Leigh receiver, from the fact that he was not a judgment creditor of the company at the time, and from the further fact, that the appointment was made in a law

action. The rule undoubtedly is, that a receiver can not be appointed in a law action, unless some statutory authority exists therefor. It is the special province of a court of equity to take cognizance of such matters, and when the receiver is asked on general equitable grounds, the application must be made to a court of equity. So, too, in the absence of special statutory authority, the party applying for a receiver must show that his legal remedy has been exhausted or is insufficient to grant him the full relief which the appointment of a receiver would afford; but it can not be denied that the district courts of this state have general equity jurisdiction and full authority to appoint a receiver in a proper action. That a mistake may have occurred, and the appointment made upon an insufficient showing, or in an action where such appointment is not proper, does not make the order absolutely void, so that it may be ignored by everyone, though it may be erroneous and voidable and subject to be set aside when properly questioned. While it is insisted that this is a direct attack upon the order appointing Leigh receiver, we do not think that such is the case. The order is being attacked in an independent action, instituted for the appointment of a receiver. It is attacked upon the ground that the order is absolutely void; but, as we have seen, the court had jurisdiction to appoint a receiver in a proper case and this being so the order at most is voidable.

In *Howell v. Ross, ante,* p. 1, it is said:

"The district court being vested with jurisdiction of actions to quiet title, a judgment rendered by it in such an action is exempt from collateral attack, even though the petition on which it is based fails to show that the plaintiff is entitled to the relief demanded."

We are satisfied that the order of the district court was right, and therefore recommend its affirmance.

POUND and KIRKPATRICK, CC., concur.

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

AFFIRMED.

JOSEPH KELLER V. EDWARD D. DAVIS, WARDEN OF THE PENITENTIARY OF THE STATE OF NEBRASKA.

FILED JUNE 18, 1903. No. 13,125.

1. **Habeas Corpus**: SCOPE OF INQUIRY. On *habeas corpus* the inquiry is confined to matters which are jurisdictional, mere irregularities or errors, however gross, which do not render the proceedings a nullity, not being considered.

2. **Quaere.** Whether the provisions of section 488 of the criminal code, requiring the jury to ascertain and declare in their verdict the value of the property stolen, apply to prosecutions had under section 117 of the criminal code, *quære.*

3. **Criminal Law**: JURISDICTION: VALUE OF PROPERTY. In a prosecution under the provisions of section 117 of the criminal code, the jury returned a verdict of guilty, but did not include therein a declaration of the value of the property stolen. The sentence pronounced was two years imprisonment in the penitentiary. *Held*, That as the value of the property did not affect the character of the crime, the defect in the verdict was at most error, and did not deprive the court of jurisdiction to pronounce sentence.

4. **Habeas Corpus**: REVIEW OF EVIDENCE: MOTION FOR NEW TRIAL. Where, in an application for a writ of *habeas corpus*, there is a trial to the court, evidence is adduced, and judgment rendered on the merits, before the appellate court will inquire whether the judgment is supported by sufficient evidence, it must appear of record that a motion for a new trial was made and overruled.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Affirmed.*

R. C. Noleman, Thomas J. Doyle and *George W. Berge,* for plaintiff in error.

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

KIRKPATRICK, C.

This is a proceeding in error brought to reverse a judgment of the district court for Lancaster county, denying the application of one Joseph Keller to be discharged upon a writ of *habeas corpus,* and remanding him to the custody of the warden of the state penitentiary. It is dis-

closed by the record, that on the 18th day of November, 1902, Joseph Keller, petitioner, was convicted in the district court for Cheyenne county, upon an information charging him with the larceny of eight head of horses of the value of thirty-five dollars each. Upon the trial a verdict was returned, which, omitting the title of the case, was as follows:

"We, the jury in this case, being duly impaneled and sworn, do find the defendant guilty.

"L. A. GANSON, *Foreman.*"

On the return of this verdict, petitioner filed a motion for a new trial and for arrest of judgment, which was by the trial court overruled and he was thereupon sentenced to be confined in the penitentiary for a period of two years, and that he pay the costs of prosecution. After incarceration, petitioner presented his application for a writ of *habeas corpus* to the district court for Lancaster county. The writ was duly issued, and served upon the warden, who made return, setting up a copy of his *mittimus,* under which he held plaintiff in error, and setting up that plaintiff in error was duly and legally convicted of the crime of horse stealing in the district court for Cheyenne county; that no appeal or error proceedings had been prosecuted to the supreme court from the judgment and sentence; and denied generally all other matters contained in the petition.

Section 488 of the criminal code is in the language following:

"When the indictment charges an offense against the property of another by larceny, embezzlement, or obtaining under false pretenses, the jury, on conviction, shall ascertain and declare in their verdict the value of the property stolen, embezzled or falsely obtained."

It will be observed that the verdict quoted fails to declare the value of the property stolen; and by plaintiff in error it is claimed that for that reason the verdict is a nullity; the trial court, as a consequence, being without

authority to pronounce sentence. Our attention has not been called to any decision expressly holding that the section quoted is applicable to the larceny of horses, yet, by analogy at least, *Holmes v. State,* 58 Neb. 297, holds that it is, and, in the further consideration of this case, we will assume that it is.

The rule is certainly well settled that on an application for a writ of *habeas corpus* mere errors or irregularities, not jurisdictional, are unavailing and will not be considered. *In re Fanton,* 55 Neb. 703. The rule applicable to such proceedings may be said to be not open to question; that the only subjects of inquiry are, the jurisdiction of the court of the person and the subject matter of the offense, and jurisdiction to pronounce the particular judgment or sentence.

Plaintiff in error was duly and legally informed against by the county attorney, under the proper section of the code. That the district court had jurisdiction of the subject matter of the charge, and the person of the defendant, is not questioned. The sole question is: Did the court have jurisdiction to pronounce the sentence which it did pronounce, under the verdict containing the defect mentioned? The verdict and sentence are assailed upon no other ground. It is conceded that to entitle plaintiff in error to a discharge, the sentence must be shown to be a nullity.

Manifestly, the object of the provision quoted is, that where the grade of the punishment is dependent upon the value of the property stolen, as in grand or petit larceny, the value must be determined by the jury, that the court may determine the punishment. But there is no such crime as petit larceny of horses known to our law. There is, however, a wide discretion in the trial court, as to the length of the sentence imposed upon the defendant found guilty of the larceny of horses. If, then, the determination of the value by the jury in their verdict is matter of right to the defendant, it is because the value of the property stolen would serve to enlighten this discretion. Their

failure to declare the value could be attended by only two consequences, either a punishment too high, or a punishment too low. The trial court had jurisdiction of the person of the defendant, the subject matter of the charge, and had power to sentence him to the penitentiary, if found guilty, for a term not exceeding ten years. Plaintiff in error could not complain that his sentence was too short. His only complaint, therefore, would seem to be, that the sentence of two years may possibly be in excess of what it would have been, had the verdict found the value of the property stolen. Such a complaint, made on error to this court, would doubtless result in a reversal. *Holmes v. State, supra.* But the writ of *habeas corpus* is not a corrective remedy, and is never allowed as a substitute for appeal or error. *State v. Crinklaw,* 40 Neb. 759.

If it were made clearly to appear from the record that plaintiff in error had been sentenced for a period in excess of the statutory period, it would seem that, under the rule announced in *In re Fanton, supra,* he would be without right to the relief sought in this proceeding. Such an excess of punishment is there said to be erroneous, merely, and not void, and hence not to be inquired into on *habeas corpus.* The most that can be said of the record herein is, that the sentence might have been lighter, had the value been declared in the verdict. This, we are sure, does not make the sentence a nullity, however fatal it might have been on error to the appellate court.

Ex parte Dover, 75 Ala. 40, seems, on analogy, to be in point. The Alabama statute separates murder in the several degrees, requiring the jury's verdict to declare the degree. In the case cited, the verdict returned was:

"Guilty as charged in the indictment, and assessing the punishment to imprisonment for life in the state penitentiary."

The discharge of the prisoner by the trial court was held error; the supreme court, in disposing of the case, quoting, with approval, the following language from 1 Bishop, Criminal Procedure, sec. 1016:

"If the jury bring in a defective verdict, it is equally within the power of the prisoner and the prosecuting attorney to have it set aside; and suppose the prisoner charged choose not to interfere, but suffer the defective verdict to be entered, as his interest would always prompt him to do in preference to a verdict of guilty in due form, he, by thus failing to interfere, waives his objection to be a second time put in jeopardy for the same offense."

And it was in that case held that while the verdict was erroneous, it did not deprive the court of jurisdiction to pass sentence. And, in this case, while the defect in the verdict would be held error, and ground for reversing the judgment and remanding the case, it can not, we think, be said to have deprived the court of jurisdiction to pronounce sentence.

Holmes v. State, supra, relied on by plaintiff in error, is cited because therein is language to the effect that the value of the property is an essential element of the crime. The *Holmes* case is certainly not in conflict with the principle announced in *In re Fanton, supra,* nor, do we believe, in conflict with the conclusion announced herein. The language, in that case, must be understood with reference to the facts of that case, and the kind of proceedings in which the question was presented. The error under consideration was certainly fatal on error proceedings, but it does not follow that it is equally fatal, on application for a writ of *habeas corpus.*

There is still another reason why this judgment must be affirmed. One of the assignments in the petition in error is, that the judgment is not sustained, and is contrary to the evidence. The record discloses that no motion for a new trial was filed and ruled on by the trial court. It would seem that in order to obtain a review of the judgment of the trial court, upon an application for a writ of *habeas corpus,* where a trial was had and the petitioner's right to his discharge determined, a motion for a new trial must be filed and ruled on. *In re Van Sciever,* 42 Neb. 772.

It follows, from what has been said, that the judgment of the trial court should be affirmed, and it is recommended that the same be done.

HASTINGS, C., concurs.

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

AFFIRMED.

W. C. LEMMERT V. GUTHRIE BROTHERS ET AL.

FILED JUNE 18, 1903. No. 12,068.

1. **Guarantor:** DEFAULT OF MAKER: NOTICE. The failure of he holder of a negotiable note to notify the guarantor of the default of the makers within a reasonable time after default, does not absolutely discharge the guarantor, but only to the extent that he is damaged by the delay.
2. **Guarantor's Contract.** The guarantor's contract is a guaranty of the maker's solvency, and unless there is a different intention expressed in the contract, he is entitled to reasonable notice of the default of the maker.
3. **Guarantors:** DISCHARGE. Guthrie Brothers signed the following guaranty upon the back of a note: "For value received, we hereby guarantee payment of the within note, and waive demand and notice of protest on same, when due." The makers failed to pay at maturity, although solvent, and demand was not made upon guarantors until eighteen months after maturity, when makers had become insolvent. *Held*, That guarantors were discharged from liability.
4. **Waived.** *Held, further*, That they did not thereby waive notice of the nonpayment of the note by the makers.
5. **Evidence.** Evidence examined, and *held* to justify a peremptory instruction for defendants.

ERROR to the district court for Nuckolls county: SAMUEL H. SORNBORGER, DISTRICT JUDGE. *Affirmed.*

T. W. Cole, E. D. Brown and *George W. Seevers*, for plaintiff in error.

F. H. Stubbs and *W. F. Buck, contra.*

KIRKPATRICK, C.

This is an action brought in the district court for Nuckolls county, by plaintiff in error, against Guthrie Brothers, a partnership, and Robert Guthrie and David Guthrie, the members of such partnership, upon the guaranty of a promissory note. The undisputed testimony shows that in the spring of 1893, A. J. Briggs, George F. Cotton, and J. G. Meek, were engaged in the brick business, and purchased from the Frey-Sheckler Company, an Ohio corporation, some brick making machinery, for something more than $6,000, and in payment therefor they executed to the Frey-Sheckler Company various promissory notes for $1,074.90 each, coming due at different dates. It is further disclosed that the above named parties, before delivering the notes, procured defendants in error to guarantee their payment. All of these notes were paid except the one maturing last, which the Frey-Sheckler Company disposed of to plaintiff in error, W. C. Lemmert, the president of the corporation, but who seems to have paid full value for the note. Shortly before the maturity thereof, the makers, Briggs and others, desiring an extension, wrote to Frey-Sheckler Company, requesting such extension; the company informing them that they had sold the note to plaintiff in error, but would take the matter of extension up with him, and an extension was accordingly subsequently arranged for; plaintiff in error stipulating that he would grant the extension, if Briggs and others would sign the note, individually, as makers, and procure the same guaranty on the note that appeared upon the old one. Accordingly, the note in suit, dated June 1, 1894, payable in sixty days, was signed by Briggs, Cotton and Meek, naming Frey-Sheckler Company, as payee. Before sending the note to the company, the makers took it to defendants in error and requested them to guarantee the note. It is disclosed that the guarantors had no knowledge that the note had been transferred by the Frey-Sheckler Company to plaintiff in error. When the machinery

was purchased in the first instance, the company took a contract, by the terms of which the title to the property was to remain in them, until the full payment of the purchase price. This was understood by defendants in error. They signed their firm name upon the renewal note under a guaranty in the words following:

"For value received, we hereby guarantee payment of the within note, and waive demand and notice of protest on same, when due. GUTHRIE BROTHERS."

The undisputed evidence discloses that, at the time of the execution and delivery of the note, the makers were engaged in the brick manufacturing business; were the owners of a valuable plant; and were also engaged in the banking business; and all of them were solvent. No notice was given to the guarantors of the dishonor of the note, until about eighteen months after its maturity, and, at that time, the undisputed evidence discloses that the makers were, each, wholly insolvent. In the meantime, they had disposed of all of the machinery purchased of the Frey-Sheckler Company, to parties having no notice of the lien of that company thereon, the company having failed to place of record its contract reserving title in itself.

The petition filed in the case sets out a copy of the note, together with a copy of the guaranty, and charges defendants in error as guarantors and indorsers. To this petition defendants in error interposed an answer, setting up four distinct defenses as follows: (1) A denial of any consideration for the note and for the guaranty; a denial that plaintiff in error ever purchased the note for the payee therein named, or that plaintiff in error ever paid any consideration for the note; (2) laches, in not giving defendants in error notice of the nonpayment of the note; and consequent damages, which released them from liability on their guaranty; (3) the wasting and disposing of security, which released defendants of all liability on the note; (4) a diversion of the guaranty, which absolutely released defendants as guarantors.

There seems to have been practically no dispute in the evidence introduced at the trial, and at the close of the evidence, the trial court, at the request of defendants in error, instructed the jury to find a verdict for them. From a judgment rendered on such verdict, and from the ruling denying the motion for a new trial, plaintiff in error brings the cause to this court upon error.

If any one of the defenses pleaded is conclusively established by the evidence, and is in fact a complete defense, the peremptory direction was justified, and the judgment must be affirmed. In our view of the case, it will only be necessary to consider the second defense pleaded. Inasmuch as the evidence clearly establishes the solvency of the makers at the maturity of the note, and their insolvency at the time of notice to the guarantors, if the guarantors were entitled to notice, they were damaged in the amount due upon the note, by reason of the failure to give notice. Some diversity in the decisions is found to exist upon the question, whether, under an instrument like that in this case, the person signing is entitled to notice of the default of the maker. From an extended examination of the cases, we are led to the conclusion that the diversity arises because of a failure to recognize the distinction between the liability of a guarantor and that of an indorser. This distinction is stated in apt language in 2 Daniel, Negotiable Instruments (5th ed.), sec. 1754:

"The liability of a guarantor also differs materially from, and is more onerous than, that of an indorser. The indorser contracts to be liable only upon condition of due presentation of the bill or note on the exact day of maturity, and due notice to him of its dishonor. And he is absolutely discharged by failure in either particular, although he may suffer no actual damage whatever. The guarantor's contract is more rigid, and he is bound to pay the amount upon a presentment made, and notice given to him of dishonor, within a reasonable time; and in the event of a failure to make presentment and give notice

within such reasonable time, he is not absolutely discharged from all liability, but only to the extent that he may have sustained loss or injury by the delay."

That a guarantor is entitled to such notice, and that a failure to give it within a reasonable time releases him from liability to the extent that he may be damaged, seems to be sustained by the better text-writers, and by a very great weight of authority. 2 Parsons, Notes and Bills (2d ed.), pp. 137-139; Tiedeman, Commercial Paper, sec. 421; *Second Nat. Bank of Oxford v. Gaylord,* 34 Ia. 248; 1 Brandt, Suretyship and Guaranty (2d ed.), sec. 197; *Oxford Bank v. Haynes,* 8 Pick. (Mass.) 423; *Wildes v. Savage,* 1 Story (U. S. C. C.), 22.

This court, at a very early date, in *Newton Wagon Co. v. Diers,* 10 Neb. 284, speaking by a late judge, said:

"When a guarantor is not notified of a default of his principal within a reasonable time, he is released from liability to the extent that he may be damaged by the omission. And if it appear that the principal was solvent at the maturity of the obligation, but became insolvent before the demand of payment was made or notice given, except under special and peculiar circumstances, damages will be presumed."

The case cited was, where Herman Diers was acting as the agent of the wagon company in the sale of its wagons. He sold a wagon to certain persons and took their note in payment; but before delivering the note to the wagon company, he indorsed his name in blank on the back thereof. It was disclosed in that case that by the terms of his contract with the company, he agreed to guarantee notes taken, and for that reason this court seems to have determined his liability as one of guaranty. This determination of the rights and liabilities of a guarantor seems never to have been overruled in this state. It seems based upon sound reason and supported by authority, and we are not inclined, at this time, to announce a different rule.

It is contended by plaintiff in error that this court in

Huff v. Slife, 25 Neb. 448, has adopted a rule exactly contrary to that announced in the *Newton Wagon Company* case. In the *Huff* case, Zenus Farier executed a note to one I. L. Huff, as payee. Huff, desiring to sell the note, wrote on the back thereof, and signed, the following guaranty:

"I guarantee the payment of the within note.

"I. L. HUFF."

It is thus disclosed that Huff, being payee of the note, and transferring it as he did, became not only an indorser, but a guarantor of the note as well. As indorser, he was absolutely bound to pay the note, if at maturity the note was protested for nonpayment, and he was duly notified. The holder need not have sued the maker, or might have joined Huff, as indorser. In either case there could be no question of Huff's liability. By adding to his indorsement the words, "I guarantee the payment of the within note," he also made himself a guarantor, and this waived his right to notice of protest and nonpayment. As indorser, he was made liable by the terms of his contract, but protest and notice thereof would have been required to fix his liability. But as guarantor, he waived this right, so that, beyond question, he was absolutely liable, and his liability in no way depended upon proper steps being taken to collect from the maker of the note. As stated in 2 Daniels, Negotiable Instruments (5th ed.), sec. 1754:

"The same person may be guarantor, and also indorser of a note; and in such case, while failure to give him due notice of demand and nonpayment will discharge him as indorser, he will still be bound as guarantor."

Huff v. Slife, supra, seems to rest for authority upon *Bloom & Co. v. Warder, Mitchell & Co.*, 13 Neb. 476, and *Hungerford v. O'Brien*, 37 Minn. 306, 34 N. W. 161. In the *Bloom* case, the guaranty was as follows:

"For value received, we guarantee the payment of the within note, and hereby waive protest, demand, and notice of nonpayment."

It will thus be seen that the guarantor had waived the very defense upon which defendants in error were allowed to recover in this case. The guarantor in the last case cited, having expressly waived notice of nonpayment, of course, could not be heard to insist upon want of notice. It follows, therefore, that *Bloom v. Warder* is not an authority in the case at bar, is not in conflict with the conclusion we have reached; nor is it an authority in support of *Huff v. Slife,* because the questions involved are distinctly different. In the *Hungerford* case, also cited in *Huff v. Slife,* the payee signed a guaranty, as follows:

"For value, I hereby guarantee the payment of the within note to Cassie Hungerford or bearer."

It thus appears that he was an indorser, as well as a guarantor, and his liability being fixed by the double character of his contract, it was absolute. The case, accordingly, does not furnish an authority contrary to the rule announced herein.

It is also contended that *Gibson v. Parlin & Orindorff,* 13 Neb. 292, supports a different rule. There, the payee indorsed the note, waiving demand upon the maker, protest and notice of nonpayment, and it was held that a right of action accrued against him as soon as the note became due. As we have seen, the rule, in this case, has no application to the case at bar, where it is sought to charge a party, as guarantor only upon the note.

Flentham v. Stewart, 45 Neb. 640, is cited, as announcing a view contrary to *Newton Wagon Co. v. Diers, supra.* The *Flentham* case arose in the following manner: Dawes & Foss, a copartnership, doing business at Crete, Nebraska, were engaged in the farm mortgage business, and made a loan to one Stewart. It seems they were paid a commission for negotiating this loan by appellant Flentham, and in addition took a second mortgage for a commission due them upon the same land. Default having been made upon the mortgage, appellant began foreclosure, making Dawes, Foss and Charles C. White, who in the meantime had been appointed receiver for the co-

partnership, defendants. A decree was entered upon the first and second mortgage, an order of sale issued, and the property sold for satisfaction of the decree; and there remaining a deficiency due upon the first mortgage, appellant Flentham filed a motion for a deficiency judgment against Dawes, Foss and the receiver, upon the ground that Dawes and Foss had guaranteed the payment of the note and coupons. Objection seems to have been interposed to this by Dawes, Foss and the receiver, and the motion was by the trial court denied. Appellant, Flentham, brought the cause to this court upon appeal. Two principal questions seem to have been litigated in this court; the contention by Dawes and Foss that, inasmuch as a receiver had been appointed for the copartnership, a suit could not be maintained against them or the receiver without permission of the court, with reference to which it was held that the objection was waived by taking a decree upon the second mortgage; the further contention that no notice had been given to Dawes and Foss of the application for a deficiency judgment, as to which it was held that due notice was given, and that they had appeared and asked time to answer; a further contention seems to have been made, namely, that no guaranty had been made of the note and coupons, as to which defense this court said:

"This contention is wholly without merit. The guaranty made by Dawes and Foss, of the payment of the mortgage debt, was in writing, and became and was a joint and several obligation of the members composing the copartnership."

While the form of the guaranty is not disclosed in the opinion, it is disclosed by an examination of the record, that it differed from the one in the case at bar, in that the guarantors waived "notice," but it is readily apparent that no defense was tendered, that Dawes and Foss had been in any way damaged by want of notice, and, in fact, it was disclosed in the entire record that they had notice all the way through, and appeared in the foreclosure proceedings, taking a decree upon their second mortgage.

The case seems not in point, and not an authority in conflict with *Newton Wagon Co. v. Diers, supra.*

Again, it is contended that a recent case, *McKibbin v. Ripley,* 1 Neb. (Unof.) 648, is contrary to the doctrine announced in the *Newton Wagon Company* case. From an examination of the record, in the case cited, it is disclosed that the guaranty in controversy was in the language following:

"For value received, we guarantee the payment of the within note at maturity, and waive protest and notice of nonpayment."

It will thus be seen that in the case just cited, the guarantor waived notice of nonpayment, which defendants in error herein did not, and it follows that the case does not conflict with the *Newton Wagon Company* case, or with the view announced herein. The cases cited by plaintiff in error from other states, we do not find sufficiently in point to demand consideration.

It must be kept in mind that defendants in error are not indorsers of the note sued upon. They were strangers to the original contract. As guarantors, they had a right to fix the terms of their contract. Whether, in the absence of evidence to the contrary, had they simply signed their names on the back of the note in blank before its delivery, they would have been held as accommodation indorsers, guarantors or sureties, is not involved in this case, and need not be decided. As makers of an independent contract, they had a right to limit their liability to that of guarantors. This court has many times held the indorser on a note liable who had, in addition to his liability as such, made himself liable as guarantor, but it has been said that he was simply an indorser with an enlarged liability. *Heard v. Dubuque County Bank,* 8 Neb. 10; *Helmer v. Commercial Bank,* 28 Neb. 474; *Weitz v. Wolfe,* 28 Neb. 500.

The soundness of the rule in *Newton Wagon Co. v. Diers* has been recognized in *Lininger & Metcalf Co. v. Wheat,* 49 Neb. 567, where it is said:

"The neglect to notify the guarantor of the default of his principal does not operate to discharge the guarantor, unless such neglect is, on its face, unreasonable in view of all the circumstances of the case."

And in *Pollard v. Huff*, 44 Neb. 892, the rule is affirmed.

It is finally contended that, by the use of the words in this guaranty, "waive demand and notice of protest on same, when due," defendants in error waived all notice of nonpayment by the makers. We are unable to see merit in this contention. The guaranty seems to have been placed on the back of the note with a stamp, and under it the name of "Guthrie Bros." was written. It is very apparent from the language used that the words, "waive demand and notice of protest on same, when due," have no application, and are not intended to waive the notice of nonpayment, to which a guarantor is clearly entitled. The language used would be proper to fix the liability of an indorser, and is only a waiver of the protest, and notice of protest of the law merchant, necessary to charge an indorser as such.

Again, it is contended that the following language on the face of the note, "the drawers and indorsers severally waive presentment for payment, protest and notice of protest, and nonpayment of this note," is a sufficient waiver. As we have seen, defendants in error are neither drawers nor indorsers. The settled rule is that the contract of guaranty is a contract separate and apart from the note itself. This court has said that a guarantor and maker of a note can not be joined in one action, while a maker and indorser can be joined, thus clearly recognizing the distinctive character of the two contracts.

In the case at bar, the undisputed evidence shows that for six months after the maturity of the note the makers were solvent, and that during the succeeding twelve months, before their failure to pay was brought to the attention of the guarantors, they had become wholly insolvent. It is further disclosed by the record, that this failure to give notice seems to have been occasioned by plaintiff

in error having mislaid the note in his deposit vault, so that it was not found until about the time the notice was given and suit brought. For this delay, defendants in error were not responsible, and should not be prejudiced thereby. From what has been said, it clearly appears that defendants in error were damaged, by failure to give the notice, to the full amount of the note. It follows that the judgment of the trial court, upon the verdict directed in their favor, was 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.

ALMIRA C. VAN EVERY v. ABISHA SANDERS.

FILED JUNE 18, 1903. No. 12,947.

1. **Judgment: VACATION: EQUITY.** Equity will not interfere with a judgment, on a mere showing of a nominal or technical violation of the plaintiff's rights; substantial injury must be shown.
2. **Petition: SUFFICIENCY.** Hence a petition for relief against a judgment, which goes no further than to allege the rendition thereof, without stating its nature or setting forth facts showing that it operates or might operate to the prejudice of the plaintiff in some substantial particular, does not state a cause of action.
3. **Statute Declaratory of Power of Court of Equity.** Subdivision 4 of section 602 of the code is declaratory of the power of courts of equity under the old practice, and does not authorize the vacation of a judgment, after the term, in the absence of some substantial injury.

ERROR to the district court for Kearney county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

E. C. Dailey and *Lewis C. Paulson,* for plaintiff in error.

John L. McPheely, contra.

POUND, C.

This is a suit in equity to set aside and vacate a judgment by reason of alleged fraud, whereby the plaintiff was induced not to make a defense to the action in which the judgment was rendered. A demurrer was sustained in the district court, and the plaintiff stood upon her petition and brings the cause here by petition in error.

The petition alleges that, by reason of certain fraudulent representations set forth therein, the plaintiff made no appearance in the cause in question and the defendant "caused a default to be taken of plaintiff and her said husband, the said P. M. Van Every, and each of them, and caused a judgment to be rendered and entered in said court on the 8th day of April, 1901, against said plaintiff and her said husband." There is no allegation as to the nature of the judgment and no showing that it operates, has operated, or will operate to the prejudice of the plaintiff in any way. Nothing is better settled than that equity will not interfere with a judgment on a mere showing of a nominal or technical violation of the plaintiff's rights. Indeed this is a general principle in the law governing injunctions. 1 High, Injunctions (3d ed.), sec. 9. Substantial injury must always be shown. *Whitlock v. Consumers Gas Trust Co.*, 127 Ind. 62, 26 N. E. 570; *Wakeman v. New York L. E. & W. R. Co.*, 35 N. J. Eq. 496; *Head v. James*, 13 Wis. 718. In consequence it would seem clear that a petition for relief against a judgment, which goes no further than to allege the rendition thereof, without stating its nature or setting forth facts showing that it operates or might operate to the prejudice of the plaintiff in some substantial particular, does not state a cause of action. *Taylor v. Charter Oak Life Ins. Co.*, 17 Fed. 566; *McNair v. Toler*, 21 Minn. 175. It is contended however that the petition must be sustained under the fourth subdivision of section 602 of the code. In *Monro v. Callahan*, 55 Neb. 75, this court, construing said section 602, said:

"But this statute is merely a legislative adoption of the

doctrine of the equity courts in force when it was enacted." Being declaratory of the power of courts of equity under the old practice, manifestly said section does not authorize the vacation of a judgment, after the term, in the absence of some substantial injury.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

ROBERT A. BATTY ET AL., APPELLEES, V. CITY OF HASTINGS ET AL., APPELLANTS.*

FILED JUNE 18, 1903. No. 11,671.

1. **Appeal:** QUESTIONS NOT CONSIDERED BELOW. This court need not consider upon appeal questions which were not presented to or adjudicated by the trial court.

2. **Questions Not Raised in Briefs.** An appellant should present in his briefs all the grounds upon which he seeks a reversal or modification of the decree appealed from; he will not be permitted to seek a modification as to matters not challenged in his briefs, when defeated in an attempt to secure reversal of the entire decree.

3. **Case Distinguished.** *Orr v. City of Omaha*, 2 Neb. (Unof.) 771, distinguished.

APPEAL from the district court for Adams county: ED L. ADAMS, DISTRICT JUDGE. Motion for rehearing and to modify judgment of affirmance. *Motion denied.*

L. J. Capps, for appellants.

J. B. Cessna and *Batty & Dungan, contra.*

W. C. Lambert and *James H. Adams, amici curiæ.*

* See former opinion, *Batty v. City of Hastings*, 63 Neb. 26.

POUND, C.

Two motions for a rehearing have been denied. A motion is now made to vacate the order denying a rehearing and to modify the judgment of affirmance in accordance with the case of *Orr v. City of Omaha*, 2 Neb. (Unof.) 771. It seems desirable to state the reasons for denying this motion.

This suit was brought to enjoin the collection of certain paving assessments. The petition sets up the levy of the assessments and their invalidity, and the decree finds the allegations of the petition to be true, and grants an injunction, as prayed for. The decree relates to paving assessments only, and the allegations of the petition throughout, with a solitary exception where, in describing a paving assessment, the word "curbing" is added, are directed to assessments for paving only. There are no allegations sufficient to challenge a curbing and guttering assessment, valid or invalid, if one ever existed, and the decree does not purport to enjoin any such assessment. It may be true that the assessments described and enjoined as paving assessments contain curbing and guttering assessments also. If so, this matter should have been brought to the attention of the district court. Instead, the appellant treated the case throughout as one involving paving assessments only. This court need not consider, on appeal, questions which were not presented to or adjudicated by the trial court. *Busch v. Hagenrick*, 10 Neb. 415; *Laughlin v. Kavanaugh*, 15 Neb. 39; *Fuller v. Cunningham*, 48 Neb. 857; *Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622. In *Mills v. Miller*, 2 Neb. 299, the court said (p. 317):

"Appellate courts are provided to review the proceedings and correct the errors of inferior ones. Before a party is entitled to be heard here, he must have exhausted his remedy in the court below. For that purpose he must have presented the several questions of law fairly and fully, and must have obtained an unequivocal ruling thereon."

It is also well settled that an appellant must present, in his briefs, all the grounds upon which he seeks a reversal or modification of the decree appealed from. We do not say that he may not afterwards assign additional reasons in support of objections already taken. But this court has announced repeatedly that it would not consider objections not raised in the briefs. It follows that an appellant will not be permitted to seek a modification, after judgment of affirmance, as to matters not challenged in his briefs, when defeated in an attempt to secure reversal of the entire decree.

The foregoing considerations, of themselves, suffice to dispose of this motion. But we think it proper to point out that *Orr v. City of Omaha* can have no application to the case at bar. In *Orr v. City of Omaha,* the pleadings referred to paving assessments only. Nevertheless, the decree enjoined collection not only of the paving assessments set forth in the petition, but also of curbing and guttering assessments. The court was unable to determine from the record whether there ever was an assessment for curbing and guttering the street in question. So far as the pleadings showed, there was but one assessment, which was for paving, and was properly enjoined. It was held, in consequence, that such portion of the decree as purported to enjoin a curbing and guttering tax was unsupported by the pleadings and must be stricken out; since, if there was a separate and valid curbing and guttering assessment it ought to be upheld, while if such curbing and guttering assessment was invalid, it was not challenged by the pleadings and was not before the court. In the case at bar, the decree does not purport to enjoin a curbing and guttering assessment. If the paving assessment enjoined contains also an assessment for curbing and guttering, that was a matter which should have been brought to the attention of the trial court. Having tried the case below on the theory that paving assessments alone were in question, the appellant is in no position at this late day to urge the contrary. *Omaha Brewing Ass'n v. Wuethrich,* 47 Neb.

920; *Morrill v. Crawford,* 51 Neb. 284; *Woolworth v. Parker,* 57 Neb. 417.

We therefore recommend that the motion be denied.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motion be denied.

MOTION DENIED.

OMAHA BRIDGE & TERMINAL RAILWAY COMPANY V. ABRAHAM L. REED ET AL.*

FILED JULY 3, 1903. No. 12,337.

1. **Eminent Domain: MORTGAGEE: APPEAL.** A mortgagee is an owner within the meaning of the statute providing for the taking of land under the power of eminent domain; and as such owner he has the right to prosecute an independent appeal from the freeholders' award.
2. **———: AWARD: LIENHOLDERS.** In proceedings for the condemnation of land under the power of eminent domain, the money awarded by the freeholders, or by the district court on appeal, stands in place of the land and belongs to lienholders to the extent of the value of their liens.
3. **———: APPEAL BY MORTGAGEE.** On appeal by a mortgagee from an award made by freeholders in a condemnation proceeding, the question to be tried and determined is, the value of appellant's lien on the property appropriated.
4. **Appeal: EFFECT.** An appeal by a mortgagee in a condemnation proceeding is not effective as to the landowner against whom no summons has been issued.
5. **———: NEW PARTIES.** If the landowner is not brought into the district court by the mortgagee's appeal, the corporation, at whose instance the condemnation proceeding was initiated, may bring him in, if it is necessary to do so for the protection of its rights.
6. **Conclusiveness of Award.** A landowner who fails to appeal from the freeholders' award in a condemnation proceeding, is conclusively bound by it.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, DISTRICT JUDGE. *Rehearing denied.*

* See opinion, *Omaha B. & T. R. Co. v. Reed,* 3 Neb. (Unof.) 793.

John C. Wharton and *William Baird,* for plaintiff in error.

Richard S. Hall and *James H. McCulloch, contra.*

SULLIVAN, C. J.

After carefully examining the questions involved in this litigation, we conclude that the judgment of affirmance should be adhered to. We find it necessary, however, to modify in one particular the commissioner's opinion. It being settled that a mortgagee is an owner, within the meaning of the statute providing for the taking of land under the power of eminent domain, it seems to follow that his right to an independent appeal for the protection of his interests can not be denied. His security having been taken for public purposes, he is, of course, entitled to have the money paid as compensation, applied upon his claim. The condemnation money stands in place of the land and belongs to the mortgagee to the extent of the value of his lien. *Union Mutual Life Ins. Co. v. Slee,* 123 Ill. 57; *Chicago, B. & Q. R. Co. v. Chamberlain,* 84 Ill. 333; *Calumet River R. Co. v. Brown,* 136 Ill. 322; *Michigan Air Line R. Co. v. Barnes,* 40 Mich. 383; 1 Jones, Mortgages (6th ed.), sec. 78; 7 Ency. Pl. & Pr. 637.

Upon the trial of this case in the district court, it was, in effect, determined that the mortgagees' interest in the land equaled or exceeded the damages assessed by the jury. In other words, the mortgagees, claiming to be owners within the meaning of the statute, presented their claim to the district court for adjudication. They asserted and proved that they were owners, and that the value of their ownership was, at least, equal to the amount named in the verdict. The Omaha Bridge & Terminal Company had been duly summoned; it was in court and had ample opportunity to controvert and disprove the mortgagees' claim. It knew the issue presented for trial was the value of the mortgage lien, and if it was of opinion

that the presence of the owner of the fee was necessary for the protection of its rights, it was its privilege to have him brought in. It failed to have him brought in; in effect, it consented to have the issue tried and determined without him, and it must now abide by the result. *Chicago, K. & N. R. Co. v. Ellis,* 52 Kan. 41; *Washburn v. Milwaukee & L. W. R. Co.,* 59 Wis. 379.

In condemnation proceedings, notice of appeal must be given when the statute so provides. *Maxwell v. La Brune,* 68 Ia. 689; *Butte County v. Boydstun,* 68 Cal. 189; *Morris v. Jones,* 36 N. J. Law. 206. In this case, the statute with respect to notice was not complied with; no notice of appeal was given to the landowner, and no effort made by either the mortgagees or the company to make him a party to the action in the district court. This being so we must confess that we were wrong in holding, as we did in the former opinion, that the appeal was effective as to him. It was not effective; and the freeholders' award, so far as he is concerned, is conclusive.

The motion is overruled.

REHEARING DENIED.

GEORGE P. HOY V. STATE OF NEBRASKA.

FILED JULY 3, 1903. No. 13,085.

1. **Record:** PRESUMPTION. When the evidence upon which the trial court decided an issue of fact is not preserved in the record, it will be presumed that the decision is right.

2. ———. Affidavits used on the trial of an issue of fact, do not become part of the record by being certified to this court by the clerk of the district court. The law, and not the clerk, determines what shall constitute the record.

3. **Criminal Law:** SELF-DEFENSE. A person attacked, or formidably threatened, by three persons acting in concert, may avail himself of the right of self-defense by using commensurate force against the nearest assailant, although it is not from him, but from the others, that great bodily harm is apprehended.

4. ———: ———. The right of self-defense does not belong alone to

persons engaged in the pursuit of their lawful business; it is available to every person, regardless of the nature of his business, who is assaulted, or who, upon just grounds, apprehends an immediate unlawful attack.

5. **Bill of Exceptions.** This court is under no obligation to consider a bill of exceptions which is not fairly and reasonably legible.

ERROR to the district court for Cuming county: GUY T. GRAVES, DISTRICT JUDGE. *Reversed.*

Ole Anderson, Harry Keefe and *George L. Loomis,* for plaintiff in error.

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

SULLIVAN, C. J.

George P. Hoy, who was convicted of an assault and battery in the district court for Cuming county, seeks by this proceeding a reversal of the sentence.

The assignments of error which call in question the action of the trial court in appointing Mr. Valentine to conduct the prosecution, on the assumption that the county attorney and his deputies were under disability, can not be sustained. The court acted upon evidence and, the evidence not having been preserved in the bill of exceptions, the presumption will be indulged that the action was right and proper. *Madsden v. Norfolk Mill Co.,* 15 Neb. 644.

Attention is directed by counsel for defendant to certain affidavits bearing upon this question and certified by the clerk of the district court as part of the record. These affidavits can not be considered. The law, and not the clerk of the court, determines what shall constitute the record. Affidavits used upon the trial of an issue of fact are merely evidence and can only become a part of the record by being included in the bill of exceptions. *Kyle v. Chase,* 14 Neb. 528; *Frederick v. Ballard,* 16 Neb. 559; *Mercantile Trust Co. v. O'Hanlan,* 58 Neb. 482.

As every litigant is entitled to have his theory of the case submitted to the jury, it must be assumed, in dealing

with the exception to the seventh instruction, that the facts which defendant's evidence tended to prove were established. His account of the transaction upon which the prosecution was grounded, is in substance this: While traveling on horseback on the "Blair road" he encountered a fence, which he was in the act of tearing down, when he discovered three men advancing toward him from an adjacent field uttering oaths and opprobrious epithets. These men were Peter Hart, Harry Murray and the complaining witness, William Murray. Knowing that they claimed the road had not been legally established and that he was a trespasser, he abandoned his purpose to tear down the fence, mounted his horse and was about to ride away, when William got in front of him and attempted by force to detain him. Shocked and surprised by the oaths and epithets, and fearing that Hart and Harry Murray would come upon him and in their fury kill him, the defendant struck the complaining witness several blows with a cane, in order to make him release his hold upon the horse's bridle. Failing in this, he dismounted and fled, leaving his horse behind him. Upon this evidence, defendant requested the court to charge that if he had, when the blows were struck, a reasonable and well-grounded belief that he was in imminent danger of receiving great bodily harm from Hart or either of the Murrays, it was lawful for him, as a measure of self-defense, to use such force as appeared reasonably necessary to break away from William and make his escape. The court refused this instruction and, in its stead, gave the following:

"The jury are instructed, that if you from the evidence believe that at the time the defendant is alleged to have committed the assault and battery upon the person of William Murray, the circumstances surrounding the defendant were such as, in sound reason, would justify or induce in his mind an honest belief that he was in danger of receiving from the said William Murray great bodily harm, and that the defendant in doing what he then did, was acting from the instinct of self-preservation, then he

is not guilty, although there may, in fact, have been no real actual danger."

The instruction requested should have been given; and the one here set out should have been refused. The danger which threatened defendant was not from William Murray, alone; it was chiefly from Hart and Harry Murray; it was their language and conduct that surprised, shocked and terrified him, and finally caused him to abandon his horse and seek safety in flight. It was clearly error to require the jury to deal with the case on the assumption that William was the only person who had made, or was about to make, an unlawful attack. From the whole evidence it seems to us that the beating of the complaining witness was unjustifiable, and that the verdict is right; but we can not say that the jury would have reached the same conclusion if the court had properly instructed them with respect to the law of self-defense.

The sixth paragraph of the court's charge is criticised because it suggests the idea that the right of self-defense is available only to those who are at the time in pursuit of their lawful business. We do not condemn the instruction. When read in connection with the seventh paragraph of the charge it is probably not misleading, but still, in view of the peculiar facts of this case, it would, we think, be better to clearly indicate that the right of self-defense is the right under all circumstances to repel with commensurate force an unlawful attack really or apparently imminent.

Some other assignments of error are discussed in the briefs, but we deem them unimportant.

The bill of exceptions in this case is scarcely legible and we would be justified for that reason in refusing to consider it. Manifestly the reporter of the eighth district stands greatly in need of a modern typewriter. Those who accept the work of the machine which he is now using, do so at their peril.

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

REVERSED.

ALFRED VAN SYOC V. STATE OF NEBRASKA.

FILED JULY 3, 1903. No. 13,228.

1. **Larceny: PLEAS: VARIANCE.** When it appears that the charge in the complaint is substantially the same as that set forth in the information, a plea of a want of a preliminary examination, or a variance between the complaint and the information, is unavailing. *Hockenberger v. State*, 49 Neb. 706.

2. ——: **INFORMATION.** An information charging a person with larceny can not be said to be bad for duplicity or uncertainty because, after alleging the felonious taking of the property charged to have been stolen, it is specifically alleged that such felonious taking was "with the intent to unlawfully and feloniously convert the same to his own use against the will of the said Jesse W. McNiel" (the owner).

3. ——: **CIRCUMSTANTIAL EVIDENCE: INFERENCE.** The fact that property alleged to have been stolen was taken without the consent of the owner, may be inferred from circumstances shown in evidence as well as by direct testimony that none was given.

4. **Instruction: REASONABLE DOUBT: BURDEN OF PROOF.** An instruction which in substance advises the jury that the presumption of innocence remains with the accused till by competent evidence the state establishes guilt beyond a reasonable doubt, is not subject to the objection that the burden of proof is thereby shifted to the defendant.

5. ——: **EXCEPTIONS.** Rulings of the trial court on certain instructions given and refused, examined and found without prejudicial error.

6. **Evidence: EXCEPTIONS.** Testimony admitted over objections on the ground of being too remote, *held*, properly admitted.

7. **Sheriff as Witness.** A deputy sheriff was a material witness for the state in a criminal prosecution for larceny; he also had charge of the jury during its deliberations. *Held*, That the fact of his having been called as a witness would not, of itself, disqualify him from serving in the latter mentioned capacity.

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

ERROR to the district court for Kearney county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

L. W. Hague and *C. P. Anderbery*, for plaintiff in error.

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

HOLCOMB, J.

The defendant was tried for and adjudged guilty of the larceny of money of the value of $50. By these proceedings he seeks to reverse the judgment pronounced against him; and one of the errors assigned is that the court should have sustained his plea in abatement, on the ground that he was given no preliminary examination on the charge of which he was found guilty. This contention is based solely on the fact, as disclosed by the record, that the information in the district court sets forth with more fullness and specificness, by the use of additional verbiage, some of the elements of the crime charged. It does not appear that a different offense was charged, nor can it be said that no crime was charged in the complaint on which the preliminary hearing was based. The complaint filed before the examining magistrate charged that the defendant "then and there did, then and there, unlawfully and feloniously take, steal, and carry away a certain sum of money to wit, the sum of $75 being lawful money of the United States and of the value of $75, being the property of Jesse W. McNiel, the said money being in bills of denominations unknown to affiant," etc. The information on which defendant was tried and to which the plea of abatement was interposed, contains the identical language quoted and added thereto, after the word affiant, the following, "then and there with the intent to unlawfully and feloniously convert the same to his own use against the will of the said Jesse W. McNiel."

It can not be doubted that the complaint on which the preliminary hearing was based charged not only substantially, but almost in the identical language, the same crime for which the defendant was tried in the district court. The filing of the complaint and the hearing had thereunder appear to have been in strict compliance with the statute regarding preliminary examinations of persons accused of crime, before they are proceeded against by information in the district court. *Cowan v. State,* 22 Neb. 519; *Hock-*

enberger v. State, 49 Neb. 706. The complaint before the examining magistrate charged the crime substantially in the language of the statute, and disclosed all essential facts necessary to constitute the crime of which the defendant was accused and can not be said to be so defective as even to require an amendment; and for stronger reasons, it can not be said to charge no crime at all or one different from that for which the accused was tried. *Martin v. State,* 67 Neb. 36; *Rema v. State,* 52 Neb. 375; *Chezem v. State,* 56 Neb. 497. The plea in abatement was properly overruled.

In this connection it is further contended that a motion to quash and a demurrer to the information which were interposed in the district court, should have been sustained because of the alleged duplicity in the information, by reason of the added allegation in charging the crime in the district court, which we have quoted. All that was done by the change adverted to was, as has been said, to state with more fullness and specificness the essential ingredients constituting the crime; that is, the unlawful and criminal intent of the taker of the property, alleged to have been stolen, to permanently deprive the owner of his property against his will and convert it to the use of the taker. But one offense is charged in the information and, in the charging, there is no such uncertainty or duplicity as to render the information vulnerable to a motion to quash or to a demurrer, and no error was committed in overruling each of the pleas thus interposed. An instruction was given the jury which was excepted to, on the ground that it permitted the finding of nonconsent, on the part of the owner, to the taking of the property alleged to have been stolen, from circumstances shown in evidence, and not by any direct proof. The instruction was proper. The owner, it was shown, was, at the time, lying on his deathbed and wholly unconscious of what was passing around him. As was said in *Wiegrefe v. State,* 66 Neb. 23:

"All the circumstances surrounding the alleged larceny were inconsistent with a taking with the consent of the

owners; and want of consent may be inferred from circumstances shown in evidence, as well as by direct testimony that none was given." See also *Rema v. State, supra.*

An instruction, which told the jury, in substance, that the burden of proving the defendant's guilt beyond a reasonable doubt, rested upon the state throughout the entire trial and that the presumption of innocence should be indulged in at all times during the deliberations of the jury, unless overcome by competent evidence on the part of the state to satisfy them beyond a reasonable doubt of the defendant's guilt, is excepted to, because, as alleged, it results in a shifting of the burden of proof. The position is untenable. The instruction does nothing more than to advise the jury that the presumption of innocence remains with the accused, till by competent evidence the state establishes his guilt beyond a reasonable doubt.

Some other instructions are excepted to because of the giving or refusing to give the same. An examination of the rulings complained of, satisfies us that no prejudicial error is disclosed by the record relative thereto.

One witness was permitted to testify, over objections, that on Thursday or Friday, preceding the Sunday night when it is alleged the offense was committed, he had given to the person from whom the larceny was committed twenty or twenty-five dollars in bills and that the owner at the time had forty or fifty dollars in bills in addition thereto, all of which were placed in a pocket memorandum book belonging to the owner and in which he kept his money. The evidence was offered for the purpose of proving the amount of money in the possession of the owner which was alleged to have been stolen, and was objected to as too remote. The circumstances shown in evidence as to the movements of the owner after the incident testified to and the nearness in time between the two transactions, satisfy us that the evidence was admissible, and that the court properly overruled the objection on the ground stated.

Because a deputy sheriff who had charge of the jury during their deliberations, had also been a material witness on behalf of the prosecution, it is claimed that this situation resulted in prejudice to the substantial rights of the defendant. This contention, if we understand counsel, is upon the theory that the officer was not, because of his having been a witness for the state, wholly disinterested, and was not a proper person to have charge of the jury, and that the jury may have been subjected to baneful influences interfering with a free and untrammeled deliberation of the evidence in the case. There is no charge and no evidence to support a charge of any actual misconduct by the officer who had charge of the jury or of any prejudice to the defendant by reason thereof. Such being true, it can not be said that the verdict is vitiated or that there has been a miscarriage of justice, by reason of the fact that the officer having charge of the jury during its deliberations was a material witness for the prosecution. *State v. Wart,* 51 Ia. 589; *State v. Bailey,* 32 Kan. 83; *Jenkins v. State,* 41 Tex. 128; *Ned and Taylor v. State,* 33 Miss. 364; *Gainey v. People,* 97 Ill. 270. Lastly, it is contended that the evidence is insufficient to prove the crime charged. We are of the opinion the verdict of the jury can not rightfully be interfered with on the ground that it is unsupported by the evidence. While there is no positive evidence that the money found in the possession of the accused soon after the alleged commission of the crime, was the identical money belonging to and in possession of the owner immediately prior thereto, the circumstances, and there are many of an incriminating character, all tend to prove that the owner did possess the money in currency and bank bills of the amount testified to by one or more witnesses, that he kept it in a pocket memorandum book found in the possession of the accused, that the accused had no money or but a small amount prior to the alleged theft, and that his explanations as to how he came in possession of the money found on his person soon after, and how he became possessed of the owner's pocket

book, were so unsatisfactory and at variance with other credible testimony, as to warrant rejection by the jury and justify the conclusion which they evidently reached. The evidence, we think, warrants a finding that the defendant, while attending the owner in his last sickness and when none others were present, abstracted the pocket book and the money in it from the pocket of his coat, which was hanging on the wall of the room in which he was lying at the time, and that the book contained the amount of money the accused was found guilty of stealing, and that the money found on his person at the time of his arrest was, in fact, a part of the money he was charged with having stolen. The evidence is sufficient to support the verdict, and there appearing no error in the record of the trial, the judgment of conviction should be, and accordingly is,

AFFIRMED.

HENRY MCVEY ET AL. V. ALEXANDER PEDDIE.

FILED JULY 3, 1903. No. 12,449.

Appeal: UNDERTAKING: VOID STATUTE. The principal and sureties upon an undertaking in an appeal, prosecuted, under a void statute, to a court to which in fact no lawful appeal lies, are liable on the instrument, if the court without objection entertains the appeal, and upon a retrial of the issues renders a judgment adverse to the appellant.

ERROR to the district court for Antelope county: JAMES F. BOYD, DISTRICT JUDGE. *Affirmed.*

Elbridge D. Kilbourn, for plaintiffs in error.

Sidney D. Thornton, contra.

AMES, C.

On the 8th day of July, 1899, the defendant in error, Peddie, in a suit in justice's court against the plaintiff in error, McVey, for forcible detention, recovered a judgment

for the restitution of the demanded premises. For the purpose of prosecuting an appeal to the district court, McVey and the two other plaintiffs in error, Carrabine and Libbey, as sureties, executed an appeal undertaking, conditioned as provided by section 1030 of the code as it was attempted to be amended by the laws of 1883. The case was thereupon docketed, as upon appeal, in the district court, and, a jury being waived, proceeded to trial and a judgment for restitution. In this proceeding and judgment, all parties appear to have acquiesced, no objection having at any time been made to the jurisdiction of the district court. This is an action against the principal and sureties upon the appeal undertaking, upon which the defendant in error obtained a judgment in the district court. In *Armstrong v. Mayer,* 60 Neb. 423, this court held that the attempted amendment providing for an appeal in such cases, is unconstitutional and void, and the sole contention of the plaintiffs in error is that, because of that fact, the undertaking is void also, and that therefore no action can, or could have been, properly founded thereon. If the defendant in error had ignored the attempted appeal, and sued out a writ of restitution from the justice's court, as he might, doubtless, have lawfully done, or if by objection or motion he had attacked the jurisdiction of the district court, as it must also be presumed he could have successfully done, a subsequent action upon the undertaking would have raised an issue differing from that presented upon the record before us. It is not necessary to decide now what would have been the liability of the appellant or of his sureties, in such a case, or whether they would have been liable at all. In this case the appellant obtained, by his proceeding, all that he stipulated for in the instrument in suit. He had a trial upon the merits in the district court, where a judgment was rendered in which all parties acquiesced, and during the pendency of the proceeding he remained in possession and enjoyed the fruits of the demanded premises. The absence of jurisdiction in the district court did not affect him injuriously, and

whether the judgment which was there recovered was void or voidable, it was rendered at his instance, and he can not justly be permitted to attack it collaterally, in an action upon an undertaking by which he deliberately promised to respond in damages, if it should be adverse to his desires. The question was recently before this court in *Stevenson v. Morgan,* 67 Neb. 207, and was decided adversely to the plaintiffs in error.

The issues of law arising in the two cases are substantially identical, and the conclusion in the opinion cited appears to us to be supported both by reason and authority. Perhaps the leading authority upon the subject is that of *Daniels v. Tearney,* 102 U. S. 415, 26 L. ed. 187, in which the principles involved are sufficiently elucidated. We think that the considerations in view of which the obligation of the principal is upheld, apply with equal force to his sureties. They are not thus held beyond what is "nominated in the bond" nor called upon to respond for any consequence for which they did not expressly stipulate to respond in the instrument which they deliberately executed.

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

HASTINGS and OLDHAM, 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.

PETER GINGRICH, BY CHRISTIAN GINGRICH, HIS GUARDIAN, APPELLANT, V. JAMES B. ROGERS, APPELLEE.

FILED JULY 3, 1903. No. 13,010.

1. **Deed of Insane Person.** The deed of an insane person may be avoided, as against a grantee, for value, without notice of his grantor's insanity. *Dewey v. Allgire,* 37 Neb. 6, followed.

2. **Burden of Proof.** The burden of showing that a conveyance was made by an insane person during an interval of lucidity, is upon the party claiming under the instrument.

3. **Ratification.** Neither the county court, nor a person under guardianship because of insanity, nor the guardian of the latter, nor all together, can ratify or confirm a conveyance of lands by the ward made previous to the guardianship but while he was insane.

APPEAL from the district court for Hamilton county: BENJAMIN F. GOOD, DISTRICT JUDGE. *Reversed with directions.*

John A. Whitmore and *O. A. Abbott,* for appellant.

Eugene J. Hainer and *Jerome H. Smith, contra.*

AMES, C.

From the briefs and arguments of counsel, we are led to believe that it is not controverted that the record establishes, by substantially uncontradicted evidence, that Peter Gingrich was and had been, for more than a year immediately prior to the happening of the transaction which is the subject of this investigation, mentally insane to a degree incapacitating him for the transaction of business. Our own opinion of the evidence directs us to the same conclusion, but under the circumstances of the case a discussion of it seems to be uncalled for. On July 12, 1898, he conveyed a farm, of which he was the owner, to the appellee Rogers, for a gross consideration including a mortgage lien, assumed by the purchaser, of about $3,370. A preponderance of the evidence is to the effect that this price was, if not adequate to the then value of the land, at least, not so widely inadequate thereto, as to be indicative of fraud or undue means, and the trial court would have been abundantly justified, by the evidence, in finding especially that the purchaser was ignorant of the mental incapacity of his vendor. For some time prior to this date, however, Peter had been offering to sell the property at a price of $3,800 or $4,000, and his brothers Christian Ging-

rich and another had proposed to pay him therefor $5,500, and to enter into obligations for a conveyance of it to him at any time upon demand, upon a return of the purchase price and interest at the rate of six per cent. per annum, and this offer we infer to have been subsisting at the date of the sale.

In the month of September, following the conveyance, Peter was taken into custody by the board of commissioners of insanity, and committed by them for treatment to the hospital for the insane at Lincoln, and on the 22d day of November, in the same year, Christian Gingrich was by the county court of the proper county duly appointed the guardian of Peter and his estate, and duly qualified as such. Within three or four weeks after his appointment, the guardian offered to refund to Rogers the purchase price of the land, with lawful interest, and to pay him the value of improvements put upon the place by the latter, and demanded a conveyance to his ward, but met with a refusal. Rogers, however, avers that he offered to reconvey, if reimbursed his expenditures to a slightly larger amount, and with the highest legal rate of interest, but that his offer was declined by the guardian. It is not contended that, during any of the times hitherto mentioned, Peter's mental capacity had been permanently restored to him; nor has he since been relieved from guardianship, although he has been set at large from the custody of the hospital for the insane.

This action was begun by the guardian on the 25th day of April, 1901, to compel the appellee Rogers to accept the above mentioned offer and reconvey the lands to the ward. Thus far, this case is in all important particulars identical with that of *Dewey v. Allgire*, 37 Neb. 6, which establishes both that the guardian has capacity to sue, and that he is entitled to recover upon the facts stated. But the appellee seeks to distinguish this case in two particulars. The answer, although admitting the guardianship, denies the insanity, generally, and alleges specifically that on the date of the sale, July 12, 1898, Peter was of sound mind and

capable of transacting the business in question. In argument, counsel supports this allegation by saying that on that day no one testifies to having seen the vendor, except the appellee and a real estate agent, who negotiated the sale, neither of whom saw anything in his conduct which led him to suspect his sanity, and that no one testifies to having observed any such conduct during the entire month of July, hence it is contended that, although he may have been insane both before and after that time, it may have been that on the day of the sale he was enjoying a lucid interval. The fact that he conveyed, for $3,370, property for which he appears to have had a continuing offer of $5,500, is not significant in support of this contention and, besides, it having been shown, as we said, by apparently indisputable testimony, that he had been continuously insane, both for several months previously, and for at least as great a length of time subsequently, we think both the natural and legal presumptions are, that his mental incapacity throughout the period was uninterrupted, and that the burden of proving a lucid interval by clear and satisfactory evidence is upon an interested party claiming an advantage by reason of it. We do not think that this requirement has been met.

An attempt is also made to distinguish this case from *Dewey v. Allgire, supra,* by the contention that the sale in question was ratified, or at least acquiesced in, for such a length of time as amounted to an affirmance of it. The mental incapacity of the vendor continued uninterruptedly from the date of the conveyance until the 22d day of November following, when his affairs were put in the hands of a guardian who has not since been discharged from his trust. Whether, since the latter date, he has recovered the normal use of his mental faculties, is much disputed in the record, but in our opinion is immaterial. If he has done so his legal status has remained unchanged. Counsel for the appellee cites us to no authority, and offers no argument for holding that a person under guardianship can enter into contracts or make conveyances, although act-

ually of sufficient natural capacity so to do. Manifestly such a rule would lead to inextricable confusion and would, in practical effect, annul the office and powers of a guardian, and it follows, of necessity, that the ward can lawfully ratify or affirm no contract or conveyance which he is legally incapacitated for making. The principal, if not the only, argument seriously urged by counsel in support of the claim of ratification, is based upon other grounds. At the time the land was conveyed to Rogers, he gave, in part payment therefor and as directed by his vendor, a bank check for $215, payable to the order of the real estate agent, out of which the former received $100, which he deposited in a bank, and for which he received a certificate of deposit payable to his own order; and further, in part payment, Rogers executed his bank check for $1,413, payable to the order of Peter, and delivered it to him. The guardian, upon his appointment, found both of these latter mentioned papers in the possession of his ward. In his petition to the county court, praying his appointment as guardian, he represented the estate of Peter as consisting of these documents, and also of an interest in real estate of the value of $1,000, having reference to the land now in dispute. After an inquiry the county court was of opinion and found that the estate consisted of "notes, certificates of deposit and checks of the probable value of $1,550." The guardian, shortly thereafter, demanded and received payment of these instruments and deposited the proceeds thereof in various banks, receiving in lieu thereof interest bearing certificates, payable to his own order, in his official character. Subsequently, he expended some $450 of these funds for the maintenance and benefit of his ward. Counsel for the appellee insists that these transactions amounted to a ratification by the guardian and county court, or what amounts to practically the same thing, to an election to enforce the collection of the securities given as payment for the land, and to abandon any claim or right to rescission. Here, again, counsel fails to cite us any authority upholding the right or power of the guard-

ian or county court to make such an election, and it would be manifestly an extremely objectionable public policy which should vest such a discretion in either, or both. Untrammeled as it would be, if it should exist at all, it might frequently be employed by incompetent or dishonest officials to the detriment and destruction of the ward's estate, and once having been exercised it would, as counsel rightly contends, be irrevocable. We are cited to section 27 of chapter 34, Compiled Statutes (Annotated Statutes, 5397), as expressly conferring this power upon county courts; but it is quite evident, from the most cursory reading, that the legislature, in enacting that section, did not have in mind the subject here adverted to. When it is said by the authorities that courts of equity may exercise the right of election in such cases no more is meant than that those courts are the universal guardians of all persons under disabilities, and will see to it, when properly appealed to, that their estates are conserved, so far as is consistent with the general rules of law and with good conscience. They would be shorn of a most beneficial part of their jurisdiction, if their freedom of action could be hampered or taken away, at the discretion of the very officials and trustees whose conduct is frequently the subject of investigation by them, whose transactions it is their province to supervise and control, and whose nonfeasances and misfeasances they are required to remedy.

The district court found generally for the defendant and dismissed the action. In our opinion, the judgment is unsupported by the evidence, but, if the appellee is to be reimbursed his purchase price with interest, he should, equitably, be called upon to account for the value of the use and occupation of the premises during his possession of them, as well since as before the trial.

It is recommended that the judgment of the district court be reversed, and that the cause be remanded for a further accounting, and for the entry of a decree in accordance with the prayer of the petition and this opinion.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and that the cause be remanded for a further accounting, and for the entry of a decree in accordance with the prayer of the petition and this opinion.

REVERSED.

GEORGE SPORER V. THOMAS MCDERMOTT ET AL.

FILED JULY 3, 1903. No. 12,203.

1. **Trial:** DEMURRER. The overruling of a demurrer does not prevent a finding, after the evidence has been taken, that there is no cause of action.
2. **Agreement to Mortgage Crops Not Sown:** SPECIFIC PERFORMANCE. An agreement to execute, after they are growing, a mortgage upon crops, may be enforced specifically in equity if sufficiently definite in its terms and clearly established, and the situation of the parties and property is such that justice and equity call for such a remedy.
3. ———. It is no objection to such an agreement that the crops referred to were not in being when it was made.

ERROR to the district court for Saunders county: SAMUEL H. SORNBORGER, DISTRICT JUDGE. *Reversed with directions.*

J. K. Van Demark and *L. E. Gruver,* for plaintiff in error.

John H. Barry, contra.

HASTINGS, C.

This is an action brought by the plaintiff to obtain the specific performance of a rent contract to secure $275, the rental of a farm for one year from March 1, 1900, by a chattel mortgage upon the crops raised upon the farm. The petition includes two causes of action, and alleges removal of certain fixtures from the place, and asks an

injunction against any disposition of the crops or the removal of the fixtures.

The court finds, as to the latter, that they belonged to defendant, and plaintiff had no interest in them. Of this finding no complaint is made. The court finds, as to the claim for specific performance of the agreement to mortgage and the enforcement of the lien of such mortgage, that plaintiff owned the land; that he leased it to the defendant, McDermott, for one year from March 22, 1900; that the latter joined in the execution of the lease alleged, and knew the contents of it; that defendant raised on the place the eighty acres of corn on which the lien was sought; that he sold the corn to the other defendant, with the purpose of defeating plaintiff's lien and not in good faith; that defendant, Hotchkiss, before the purchase of the corn or the payment for it, knew of defendant's intention and fraudulent purpose, and knew that plaintiff claimed a lien on the corn for the rental of the land, and is not entitled to be considered an innocent purchaser; that the agreed rental was $275, payable February 1, 1901; that plaintiff never obtained possession of the property, and that defendant at all times repudiated and denied any liability under the agreement to mortgage the crops, and was at the time of the commencement of the action wholly insolvent. The court found as conclusions of law: First, that the agreement in the lease relating to the mortgage of crops was too indefinite to warrant a decree of specific performance; second, that it was unenforceable, because the property was not in existence when the lease was made; third, that the agreement carried no lien; fourth, that the plaintiff was entitled to no specific performance of the alleged agreement to execute a mortgage, and dismissed plaintiff's action.

Subsequently the second and third findings were stricken out, in passing upon a motion for a new trial, but the motion itself was overruled.

It should be stated that to the plaintiff's petition a demurrer was filed, on the ground of want of jurisdiction of

defendant's person; want of jurisdiction of subject matter of the action; and that the petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court, and plaintiff in error now says that such action is not consistent with the rendering of a judgment for dismissal, after finding substantially all the facts alleged to be true; and that the decree is wrong because of this ruling upon the demurrer.

It does not seem necessary to discuss this contention at any length. Nothing is cited to sustain it except the case of *Marvin v. Weider*, 31 Neb. 774, *Dolen v. Buchanan*, 43 Neb. 854, and *Kleckner v. Turk*, 45 Neb. 176. The first of these cases merely remarks that, in districts having more than one judge, any ruling made by one of them is to be respected by any other judge trying the same case. It finds the several rulings first entered to have been right, and reverses the subsequent action as being both wrong and contrary to the first ruling. The other two cases incidentally refer to this one with approval, in finding that they presented no occasion for applying the doctrine. None of them go to the length of holding that a ruling on a demurrer, in the same court, involves necessarily an adherence to that ruling throughout the case, if it is found to be wrong. It should merely be recognized as having been made and valid, until properly set aside. The ruling upon the demurrer, surely, can not conclude a trial court from passing upon the evidence in any way, and, in this instance, two causes of action are found against by the trial court, and no complaint is made as to one of them. The alleging of this cause of action may have led to the overruling of the demurrer.

The real question in this case arises upon the first and fourth conclusions of law, as found by the court when applied to the agreement in question; that agreement is as follows:

"Sporer hereby leases the southeast quarter section 32, town 14, R. 5, Saunders county, Nebraska, for a period of one year from the first day of March, 1900, on the following conditions:

"Two hundred and seventy-five (275) dollars, payable on the 1st day of Feby., 1901, drawing ten per cent. interest after maturity, said note to be secured by a chattel mortgage on all the crop planted and sown on the above described land, except a small parcel of land to be planted to corn containing one acre, more or less, and a garden patch for vegetables, said mortgage to be executed as soon as crops are planted on or about the 10th day of June, 1900. Thomas McDermott agrees to take good care of dwelling house, other houses, barns, sheds, granaries, pens, cribs and fences and return the same in as good condition as they now are, wear and tear and accidents excepted, and to receive them as they now are, except three dollars repair on the dwelling house.

"Signed this 22d day of March, 1900.

"GEO. SPORER,

"In presence of THOMAS his X mark. MCDERMOTT.

"J. K. VAN DEMARK."

As there was no complaint or objection on the part of the defendants to any of the trial court's findings, and they are seeking to uphold the decree, they are concluded by them; these findings show that the farm was rented to defendant, McDermott, in accordance with this agreement, that the agreement was for $275 rent, and that it was duly executed by McDermott. In all these particulars, the contract is rendered sufficiently definite, by performance, by each of the parties. The only question is, whether or not the contract was definite and precise enough to call for its specific performance in the single matter of mortgaging the crop. The trial court, by implication, in its original two findings, had determined that there was an agreement on the part of the defendant to mortgage this crop. It distinctly ascertained the amount of that mortgage and when it was payable; the agreement is certainly specific as to both what was to be secured and how, and upon what the security was to be given. The status of the property as found by the court clearly warrants the interposition

of a court of equity, if the agreement is plain and distinct enough to be specifically enforced, in the particular respect in which performance was refused. The doctrine stated in 3 Parsons, Contracts (9th ed.), 354, cited by plaintiff in error, seems clearly applicable:

"The contract of which performance is sought must be clearly proved, and its terms should be so specific and distinct as to leave no reasonable doubt of its meaning. But the court is bound by no technical rules in this respect. Nor does it greatly regard the form of the contract."

It seems clear that plaintiff was entitled to have his mortgage, and to its enforcement as against the defendant, McDermott, and his fraudulent grantee, Hotchkiss.

It is, however, claimed by defendants in error that the two findings, as originally made by the trial court, that this agreement to mortgage a crop not yet planted, was wholly void, is the true rule of our state, and that the decree should be upheld, notwithstanding the trial court afterwards struck out those findings. This is asked on the ground that the decree is right, and any want of consistency in the findings and decree would be error without prejudice.

It is true that there are several cases cited by the defendants in error from this court, holding that a mortgage upon property not then in being creates no lien. None of these decisions, however, go so far as to say that an agreement thereafter, and when the property shall be in existence, to mortgage it, is invalid, and we do not see how such a rule of law could be sustained. An executory contract for the sale at some time in the future of property not then in existence is entirely valid; indeed, the right to make it is almost essential to the carrying on of many manufacturers' and producers' business. It would seem that if an agreement, at a future date to transfer absolutely the title to property thereafter to be produced, is good and valid, an agreement to transfer such title conditionally, and by way of mortgage security, would be equally good and valid, notwithstanding that the property

was not at that time in existence. Of course, if the property never should come into existence, there could be no recovery of damages or of specific performance of the agreement to mortgage it. But where, as in this case, it did come into existence, and all of the circumstances contemplated by the agreement arose, it would seem that there could be no doubt of its validity. In the recent and carefully considered case of *Battle Creek Valley Bank v. First Nat. Bank,* 62 Neb. 825, contracts of sale and of mortgage are distinctly placed upon the same footing. It is, of course, necessary in this state, as there set forth, that, in order to create a legal right in a legal thing, there must be a legal conveyance of that thing, while in existence. In a court of law an executory contract of sale conveys no right to the thing itself, but in a court of equity, and in an action for specific performance, the legal doctrine would seem out of place. The action itself is brought to supply and obtain performance of the intervening act, which is necessary to convert a mere contract right against the promisor, into an actual lien against the thing itself. As against such an action, where the facts pleaded and proved rendered this remedy appropriate, and even necessary, it would seem absurd to say that the legal right does not yet exist. This action is brought expressly to enable plaintiff to acquire it when inequitably refused. It is held, on good authority, to apply to contracts relating to things not then in being. 3 Pomeroy, Equity Jurisprudence (2d ed.), secs. 1236, 1237.

It is not necessary, however, in this case to decide whether or not such an executory agreement is enforceable generally. It seems clear that it must be so as to crops on land where the agreement is to secure rent. At the place in Pomeroy's Equity, above cited, after stating that a sale or mortgage of things not in being gives no legal title, he excepts things which have a potential existence, and in the note cites crops to be grown on lands demised in consideration of such an agreement. A right in such crops under such an agreement, has been so often upheld that it

is not necessary to cite cases. Examples are *Arques v. Wasson,* 51 Cal. 620, 21 Am. Rep. 718, and *Apperson & Co. v. Moore,* 30 Ark. 56, 21 Am. Rep. 170.

It appears that the corn crop was sold to one who was entirely aware of the agreement and of the plaintiff's claim under it, and that it brought about $800.

It is recommended that the decree of the district court be reversed and the cause remanded with directions to enter a decree for the plaintiff for $275 and interest at seven per cent. per annum from February 10, 1901, and costs.

DAY 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 for the plaintiff for $275 and interest at seven per cent. per annum from February 10, 1901, and costs.

REVERSED.

HOLCOMB, J., dissenting. (Filed September 17, 1903.)

The majority opinion in this case provides an effectual landlords' lien law, in the absence of statutory authority, and as I view the former utterances of this court, runs counter to a long line of decisions beginning with *Lanphere v. Lowe,* 3 Neb. 131. Of course it can make no difference with the tenant whether provisions for a lien in favor of his landlord for rents due are incorporated in his contract of lease or become a part of it by virtue of a statutory enactment. In either event, all of his crops, even though produced in the future, are pledged for the payment of rent and he can neither use nor dispose of the smallest part thereof, lawfully, until the demands of his landlord are satisfied. If all the prior decisions of this court are to be thus brushed aside, it seems to me that they should be squarely repudiated, so that there may be no ground for confusion on the part of the bench and bar, or of the laity.

It is said in the opinion formulated by the commissioner, which is adopted by the majority of the court, that an action for specific performance, for the purpose of establishing a lien on property not *in esse* at the time of the execution of the contract, is held, on good authority, to be maintainable in a court of equity; citing as authority in support thereof 3 Pomeroy, Equity Jurisprudence (2d ed.), secs. 1236, 1237. This summary disposition of the question, involves no great amount of labor, and, possibly, is the best that can be made of a very troublesome proposition. But it is to be noted that in almost every decision of this court on the subject, a conflict in the authorities is recognized. As is said in *Cole v. Kerr,* 19 Neb. 553:

"There is, to say the least of it, great confusion of the authorities on the point being considered."

In the language of another who has wrestled with the question:

"One might write a volume, if inclined, to review all of the adjudged cases on the subject." *New Lincoln Hotel Co. v. Shears,* 57 Neb. 478, 483.

Or, as stated by another:

"The question thus presented is one upon which the authorities are by no means harmonious." *Steele v. Ashenfelter,* 40 Neb. 770.

My own views of the subject are stated at some length, with numerous citations of authorities, in *Brown v. Neilson,* 61 Neb. 765. The mere assertion, in the majority opinion, that the authorities sanction the enforcing of an equitable lien on property mortgaged, or agreed to be mortgaged, which at the time is not in existence, in view of the conflict of authority and in the face of the doctrine accepted and adopted by our own prior decisions, is neither satisfactory nor convincing to me.

An attempt is made in the opinion to distinguish between the case at bar and the case of *Battle Creek Valley Bank v. First Nat. Bank,* 62 Neb. 825, which is too subtle for my comprehension. The two cases are in sharp conflict, and the attempted distinction appears unsound

both on principle and in logic. On principle, what distinction can there be drawn between an executory contract to give a mortgage on property not *in esse* and provisions in a mortgage in form, which, by its terms, undertakes to pledge property to be acquired in the future? Both are, so far as such future acquired property is concerned, at least, executory contracts, resting for a right of enforcement upon the same legal and equitable principles, and all the authorities I have examined so regard and treat them. In those jurisdictions where such contracts are specifically enforced, both are held to create no legal interest in the property attempted to be incumbered, and that an equitable lien only attaches when the property comes into existence, which will be specifically enforced by a court of equity. The form or particular nature of the agreement which it is intended shall create a lien, say the text-writers, is not material, for equity looks at the final intent and purpose rather than at the form, and an equitable lien will follow where it appears that such was the intent of the parties. The intent to give a security being clear, equity will treat the instrument as an executory agreement for such security. In *Apperson & Co. v. Moore,* 30 Ark. 56, cited in the majority opinion, is collated a number of authorities, all of which recognize a mortgage of property not *in esse,* and an agreement to mortgage such property as being controlled by the same equitable principles. If no reasonable distinction can be drawn between a mortgage of property not in existence and an agreement to give such a mortgage, which I contend can not, then the majority opinion is in conflict with the very case it seeks to distinguish and approve. It should be borne in mind that under our reformed system of administering justice the forms between actions at law and suits in equity are abolished. Under the blending of the two systems, it becomes immaterial what the form of the action is. Relief is to be administered, whether legal or equitable, according to the facts as disclosed by the pleadings and the evidence. The distinction, therefore, which

is sought to be made can have no place in our practice. Whatever relief either of the parties is entitled to, should be awarded regardless of the distinctions formerly existing between actions at law and proceedings in equity. *Steele v. Ashenfelter, supra. Alter v. Bank of Stockham,* 53 Neb. 223.

Again it is stated, in the opinion, that an equitable action to enforce a lien on such property by virtue of an executory contract, is itself brought to supply and obtain performance of "the intervening act" which is necessary to convert a mere contract right against the promisor into an actual lien against the thing itself. My conception of the true rule governing the rights of parties under such an agreement is and has been altogether different. I had supposed that "the intervening act" spoken of by the authorities regarding such executory contracts to make them effective, was the voluntary act of the promisor, the promise being, at most, until such intervening act took place, a mere license. It had not occurred to me that a coercive decree of a court of equity could supply the place of this intervening act, nor am I yet convinced that it rightfully can. Lord Bacon's maxim from which the rule is deduced, is to the effect that when the grant of a future interest is invalid, yet a declaration precedent may be made which will take effect on the intervention of some new act. The "new act" must, however, in all cases, come from the grantor. In Broom, Legal Maxims, *482, it is said:

"A power contained in an indenture to seize future crops, if unexecuted, would be of no avail against an execution levied, as giving no legal or equitable title to any specific crops, yet, if the power be subsequently executed by the grantee taking possession of the then growing crops, the seizure will be good as against an execution afterwards levied; for the act done by the grantor is sufficient to give effect to the antecedent declaration within the scope and meaning of Lord Bacon's maxim."

The authorities also hold that the license contained in a mortgage conveying future acquired property, from

which the right to take possession of it after it comes into existence arises and which when done satisfies the rule as to the performance of the new intervening act, is revocable at the will of the grantor and can not be executed against his will. *Chynoweth v. Tenney,* 10 Wis. 341; Jones, Chattel Mortgages (3d ed.), sec. 165. If the license is revocable at the will of the grantor; if the intervening act must be voluntarily performed by him, I can not understand how it may properly be said he may be coerced in doing that which is to be done voluntarily, or that he may be denied the right to, at will, revoke a license by which the same act may be accomplished. It is quite true that if this court should repudiate all that it has heretofore said on the subject, and hold to the doctrine, as is held in some jurisdictions, that the mortgaging of property not in existence, or agreeing to mortgage the same, creates an equitable lien specifically enforceable in a court of equity when the property comes into being, then the opinion is right; but I maintain that in this state, according to all our decisions, such contracts create neither a legal nor equitable lien, until, as the books say, there has been "a new intervening act," and, consequently, the grantee in such an instrument has no standing either in a court of law or of equity. *Brown v. Neilson, supra,* and the authorities there cited.

The right to enforce the lien, in the case at bar, on the crops of the grantor which were planted and grown long after the execution of the instrument which is the basis of the action, can be justified only on the ground that the written instrument of lease operated as a reservation of title, or an interest therein in favor of the landlord of the demised premises, which can be defeated only by a payment of the rent due, and this, I understand is the view entertained by my associates, and which led them to adopt the opinion prepared by the commissioner. I readily concede that a landlord may retain and reserve to himself an interest in or title to all the crops grown on the premises which he has leased, by suitable stipulations in a lease contract with his tenant. He may reserve to himself a third

or a half of the crop for his share of the rents; and the title thereto would be his absolutely, to the exclusion of any right which might be asserted by the tenant; or he might retain an interest in, and title to, the crops until the rental was paid, by making an agreement in the nature of a conditional sale; but as I construe the instrument which is made the basis of the present action, nothing of this kind was attempted. What was done, was to lease to the tenant the premises for a cash rental, payable at a stipulated time, each year, to be evidenced by a note which was to be secured by a chattel mortgage on all the crops planted and sown on the leased land. This, I construe to be simply an agreement for the lease of the premises at a cash rental, with the further agreement that the tenant, to secure the rental due each year, will mortgage property which at the time was not in existence, either actually or potentially, and, for that reason, the contract to mortgage created neither a legal nor equitable lien on the property agreed to be mortgaged after it came into existence. The case at bar is to be distinguished from *Brown v. Neilson, supra;* for, in the latter case, there was no attempt to mortgage or to agree to mortgage, in specie, the crops which were raised on the demised premises, but simply a provision that all property, which should be brought on the premises during the existence of the lease, should be held as security for the amount to be paid as rental. There is nothing in that contract indicating an intention to reserve to the landlord any interest whatever in the crops grown on the demised premises. The true reason and sound doctrine under which the landlord is permitted to hold the crops grown on the leased premises, for the rents due, is stated quite accurately and succinctly in *De Vaughn v. Howell,* 82 Ga. 336, 14 Am. St. Rep. 162. Say the court:

"Here was a landlord who made a rent contract with his tenant, and the tenant not only agreed to sell the crop, but went *further* and *agreed that the title to all the crops made on the farm should remain in the landlord* until the landlord was fully paid for his rent and all advances.

* * * The reasoning upon which our decisions go is, that the owner of the land being also the owner of the fruits or products of it, in parting with the use of it to another, may make such conditions and reservations in relation to the land itself or the products grown from it as he chooses, instead of parting with the full right. The principle is the same as that upon which conditional sales of personal property are upheld."

I find nothing in the leasehold agreement, in the case at bar, from which it seems fairly inferable that the landlord, Sporer, reserved any interest in the crops grown on the land he leased to McDermott, or title thereto, and certainly there is an entire absence of any element of a conditional sale of personal property. The majority opinion appears to me to be in direct and irreconcilable conflict with the case of the *New Lincoln Hotel Co. v. Shears, supra.* It is to be observed that the lease of the hotel, in the case referred to, contained a provision that it should operate as a lien on all the personal property of the lessee, which should be placed in the hotel on the leased premises, to secure payment of rent, whether then acquired or not. The lessees afterwards mortgaged the property, subject to this attempted lien, but with notice to the mortgagees of the provisions contained in the lease. It was there held that the mortgagees were entitled to a superior lien, and that the question of notice in no manner affected their rights. The same rule should, I think, be applied in the present case. I am of the opinion that Sporer, the landlord, by his agreement, obtained neither a legal nor an equitable lien or interest in the crops raised in the future on the demised premises, nor was there any reservation, interest or title therein in the landlord; and that the judgment creditor who had levied on the property was entitled to it as against the former; and the judgment of the district court should, therefore, be affirmed. Hence, I dissent.

S. N. TAYLOR, SHERIFF OF HALL COUNTY, NEBRASKA, V. HARLE-HAAS DRUG COMPANY.

FILED JULY 3, 1903. No. 12,953.

1. **Replevin:** PLEADING. An allegation of possession under a chattel mortgage, by agreement with the mortgagor, renders unnecessary any allegation of demand of payment of demand notes secured by the mortgage, in order to show the mortgagee's right of possession.
2. **Chattel Mortgage:** FRAUD. The open and admitted inclusion of a small claim on behalf of another creditor, in a chattel mortgage given to secure *bona fide* indebtedness, will not, of itself, render such mortgage and possession fraudulent and unlawful as against attaching creditors.
3. **Evidence.** Evidence *held* to support finding, that the drug company was in actual possession under its mortgage, when the attachments were levied.

ERROR to the district court for Hall county: JAMES N. PAUL, DISTRICT JUDGE. *Affirmed.*

Harrison & Pearne, for plaintiff in error.

Fred W. Ashton, A. C. Mayer and *Willard A. Prince, contra.*

HASTINGS, C.

This action was a replevin suit brought by the drug company, plaintiff below, claiming as mortgagee in possession, to recover a quantity of drugs, which the sheriff had taken under attachment against one D. E. Wilcox. On June 21, Wilcox, who had a drug store in Wood River, gave a chattel mortgage to the drug company to secure the payment of two notes, one for $368.60, representing an amount due from Wilcox to the drug company, one for $15.75 drawn in favor of the drug company, but in reality in settlement of an account of the Nebraska Mercantile Company; these two claims were presented at the same time and by the same attorney; and the chattel mortgage was given to secure both of them in the drug company's name. The at-

torney then, ostensibly, put in possession the witness D. D. O'Kane on behalf of the mortgagee and so left the matter, with the agreement that O'Kane was to hold possession and no proceedings in foreclosure were to be instituted for ten days, by which time Wilcox claimed he could get aid to liquidate the amounts due under the mortgage. The notes were payable on demand. The drug company's attorney, Mr. Ashton, says that he made demand at once, took possession and delivered such possession with Wilcox's assent to O'Kane; that Wilcox objected to O'Kane's not being a registered pharmacist, and it was finally agreed that O'Kane should have possession and control, but that Wilcox should remain in attendance, as pharmacist. June 27, the sheriff levied two writs of attachment, one for E. E. Bruce & Company and the other for Jerry Bowen, or Jerry Bowen & Company, on the goods in question. Almost immediately, Wilcox seems to have filed a petition in voluntary bankruptcy, and, on July 10, he was adjudged a bankrupt, and sometime in August the goods which had been levied upon and were still retained by the sheriff, were set off to him, as exempt. In a day or two after such allowance of exemptions by the trustee in bankruptcy, the drug company replevied the goods from the sheriff in the county court of Hall county. A trial was had in that court, and a finding entered for the plaintiff. An appeal was taken; another trial had in the district court, resulting in another judgment for the plaintiff, rendered after a trial to the court, a jury being waived. From that judgment the sheriff brings error, and urges in brief and argument that the plaintiff's petition and affidavit failed to disclose a cause of action, because plaintiff's claim of ownership was by a chattel mortgage to secure notes payable on demand, and neither petition nor affidavit contained any allegation that demand had been made, and, therefore, it is claimed that the notes were not due. The petition and affidavit both allege that the notes were due, and also allege that the property had been by the plaintiff reduced to possession, by agreement with Wilcox.

It seems clear that, even if the allegation that the notes were past due should be treated as a legal conclusion, the allegations that the property had been reduced to possession by the plaintiff, and that it was in plaintiff's possession at the time the officer levied upon it, would cure any question as to plaintiff's right of possession, because the mortgage had not matured. The only objection made to the sufficiency of the petition in this case is after the judgment. It does not appear to have been made at the trial in any way whatever, and defendant's pleading was a general denial. Under such circumstances, it would seem that the allegation that the notes were past due and unpaid should be held sufficient. If defendant desired an express allegation as to demand, it should have complained by way of motion.

It is also complained, that the chattel mortgage was given to secure the payment of two distinct debts due to different parties, but the notes, like the mortgage itself, were in favor only of the plaintiff. It is claimed that this constituted a secret trust in favor of the undisclosed creditor, the Nebraska Mercantile Company, and rendered the mortgage void, under the ruling announced in *Stewart v. Stewart,* 36 Neb. 558. The rule there announced does not seem to us applicable to the present case. In that case the trusteeship of the German bank was denied, and an endeavor made to claim that the whole indebtedness represented by the mortgage was the bank's. The evidence was not held sufficient to sustain any such contention, and the mortgage was held fraudulent. The main ground for annulling the mortgage in the *Stewart* case, was the since discredited doctrine of *Bonns v. Carter,* 20 Neb. 566, that such mortgages are against the policy of the state assignment law. In the present case, no claim was ever made by the drug company to own the $15.75 note, taken in its name by its attorney. We can not see anything in the transaction fraudulent or in violation of the rights of other creditors.

The real question in the case seems to be, as to the act-

uality of the possession claimed by the drug company, through its attorney, Ashton, and through O'Kane. Ashton and O'Kane both swear that full possession and control of these premises were given to them, to be held on behalf of the drug company. It appears from the sheriff's statement that, when he went to levy his attachments, he found both O'Kane and Wilcox in possession, the former claiming to have entire control, and supported in this claim by Wilcox. There is some testimony tending to show that Wilcox, during the few days intervening between the mortgage and the levy, sold some cigars from the stock and placed the money in his pocket. There also appears an arrangement between Wilcox, O'Kane and a wholesale grocer, named Porter, by which the latter was permitted to take out of the stock thirteen or fourteen boxes of unopened cigars, which he himself had sold to Wilcox and for which he had not been paid. The cigars in the stock were included in the mortgage. It seems that it was agreed, when O'Kane was ostensibly put in possession, that Wilcox should pay his wages. After Wilcox had filed his petition in bankruptcy, O'Kane filed a claim for care of the stock during these few days before the levy, and it was allowed and paid; but that O'Kane was acting on behalf of the drug company in such possession and control as he actually had, is clear from the testimony of all the parties.

There is evidence, by the attorney for the levying creditors, that on the day before the levy he visited the drug store; found Wilcox alone in possession and behind the counter; saw him sell five cents' worth of sulphur and put the money in his pocket. But, as before stated, it is clear that, at the time the levy was made, Mr. O'Kane was present, and both he and Wilcox were claiming that he held possession on behalf of the drug company. It is clear that the drug company was simply trying to collect a *bona fide* claim. There is nothing to indicate that it or its attorney was in any way attempting to assist Wilcox in any concealment of his property. There was no attempt at concealment of the fact that the $15.75 note belonged to the

Nebraska Mercantile Company, in reality; and we are not prepared to say that the trial court's finding, that the weight of evidence indicated that O'Kane was in actual possession of the stock and entitled to hold it for the drug company under the mortgage against these attachments, is contrary to the weight of evidence.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

JULIUS M. MCLEOD ET AL., APPELLANTS, V. LINCOLN MEDICAL COLLEGE OF COTNER UNIVERSITY ET AL., APPELLEES.

FILED JULY 3, 1903. No. 12,913.

1. **Corporation**: CHARACTER AND PURPOSE OF ORGANIZATION. The character of a corporation is determined from its articles of incorporation and the statute authorizing its formation.
2. ———: ———. The fact that an educational institution may acquire and convey property necessary to the accomplishment of its object, and may charge tuition for instruction, does not render it an incorporation for the pecuniary benefit of its members.
3. **Evidence.** Evidence examined, and *held* sufficient to sustain the judgment of the trial court.

APPEAL from the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Affirmed.*

Carrol S. Rainbolt, Orpheus B. Polk, Robert S. Mockett, T. L. Norval, Richard S. Norval and *B. F. Norval,* for appellants.

Addison Tibbets, Robert Ryan, George W. Tibbets and *W. L. Anderson, contra.*

OLDHAM, C.

The Lincoln Medical College of Cotner University was organized and incorporated in 1896, under the provisions of section 15, chapter 16, Compiled Statutes (Annotated Statutes, 4168). The object of the corporation, set forth in its articles, was to "carry on the Medical Department of Cotner University in the city of Lincoln, Lancaster county, Nebraska; and to establish schools of dentistry and pharmacy in connection therewith." The organization had a theoretical capital stock of $50,000, of which $5,000 was treated as having been fully paid at the time of the incorporation of the school. It appears, however, from the testimony contained in the bill of exceptions, that the school was incorporated by a number of physicians, who were allied with the school of medicine known as the eclectic school; that as a matter of fact, no part of the capital stock was actually paid up at the time the articles of incorporation were filed, but that each of the incorporators and stockholders of the institution undertook and agreed to lecture and give instruction to the students of the school at the rate of $6 per hour, $1 of which was to be paid in cash and $5 in stock. The dollar that was to be paid in cash was procured by delivering scholarships of the value of $125 to each instructor when he had earned that amount, and permitting him to sell the same to the students; consequently, under this arrangement the amount of the capital stock owned by each of the faculty of the institution stood for so many hours' service as lecturer and instructor in the institution at the rate of $5 per hour. The affairs of the institution were conducted in this manner until 1901, at which time three of the instructors and stockholders of the institution seem to have apostatized from some doctrinal points of the faith taught by the eclectic school of medicine, and to have become impregnated with certain heretical theories taught by the allopathic or regular school. This caused trouble and dissension in the faculty, and, as the result, two or three of the professors were

dropped from the roll of instructors. The dissension increased after this until August, 1901, when, by a three-fourths vote of the board of directors of the incorporation, it was dissolved.

In the meantime, the Lincoln Medical College, a new corporation, was formed under the same provisions of the statute and for the same purpose as that of the original corporation. This corporation was composed of all the members and officers of the original corporation, except the three dissenters; when the original association was dissolved, a committee was appointed by the board of directors to appraise and value the tangible assets and good will of the defunct corporation. This they did, and valued the tangible assets at about $1,400 and the good will at $500, and, by a unanimous vote of the board of directors, transferred these assets to the new corporation, which also assumed and agreed to give instruction to the students owning scholarships purchased from the old institution. The new corporation entered into a contract with Cotner University to continue its course of instruction as an adjunct to that institution, and opened its school at the usual time in the year 1901. Thereafter the plaintiffs, two of the stockholders of the original corporation, instituted this action against the new corporation and its officers and stockholders, alleging that the transfer of the assets and good will of the original corporation were fraudulently made by a majority of the officers and agents of such corporation to the new corporation, of which they themselves were the stockholders and persons beneficially interested, and that such transfer was made for an inadequate consideration, and for the fraudulent purpose of excluding these plaintiffs from participating in the affairs of the corporation, and for the purpose of destroying the value of the stock held by them. They asked that the sale from the original corporation to the new corporation be set aside; that a receiver be appointed to sell the tangible assets and good will of the original corporation, and that the new corporation be enjoined and restrained from proceeding to give instruc-

tion in Cotner University under the name of the Lincoln Medical College. Defendant, Reynolds, another minority stockholder of the original corporation, filed a cross-petition, alleging substantially the same matters set up in plaintiffs' petition, and joined in their prayer for relief. The defendant, the Lincoln Medical College, and the individual stockholders and faculty thereof, filed answers alleging that the transfer from the original corporation to the new corporation was made in good faith, for a valuable consideration, by a three-fourths vote of the board of directors of the original corporation; that such transfer was necessitated because of a conspiracy entered into by plaintiffs and cross-petitioner, Reynolds, for the purpose of defeating the object for which the original corporation was instituted. Twenty-one students of the institution, who had purchased scholarships from the original corporation, filed a cross-petition on their own behalf and on behalf of forty others similarly situated, alleging that they had purchased scholarships which entitled them to a four-years' course of instruction, while the plaintiffs and cross-petitioner, Reynolds, were stockholders of the original corporation, and that the new corporation was performing the conditions of the contract entered into by the old corporation with them, and giving them proper and orthodox instruction, and also alleging that it would work an irreparable injury upon them, if plaintiffs' petition were granted and the Lincoln Medical College was restrained from giving them further instruction. On issues thus joined, the trial court found the transfer from the old to the new corporation was made in perfect good faith and for an adequate consideration, and dismissed the petition of plaintiffs and of cross-petitioner, Reynolds, and from this order and judgment an appeal is taken to this court.

The character of a corporation is determined from its articles of incorporation and the statute authorizing its formation. In this case it is apparent from both the articles of incorporation and the provisions of section 15, chapter 16, Compiled Statutes, that this organization is

an educational and not a "business" or "trading corporation" for the pecuniary profit of its members. While incorporated educational institutions may be authorized to hold all kinds of property acquired by purchase, donation, devise or otherwise, and to convey the same at their pleasure, they may only do this for the purpose of accomplishing the legitimate ends of the corporation, and the fact that such an institution may charge tuition for instruction, does not change its nature and make it an incorporation for pecuniary benefit. 1 Clark & Marshall, Private Corporations, p. 84; *Santa Clara Female Academy v. Sullivan,* 116 Ill. 375. It would, therefore, follow that the transfer of the assets from the old to the new corporation in the instant case, and also the change of the name of the school, was not a departure in any sense from the original intent and purpose of the old organization. In fact, the power to make such a change, when done in good faith, is anticipated and authorized by section 172, chapter 16, Compiled Statutes (Annotated Statutes, 4188).

An examination of the testimony of the physicians and instructors connected with each of the institutions, as well as a comparison of the articles of incorporation of each, show that the new is but a reincarnation of the old; the only change being that extra precautions have been taken in the by-laws of the new to protect its faculty from the invasion of the schismatics and heretics to its established medical faith. No question is raised in this case as to the right of plaintiffs to exchange their proportionate share of stock in the original corporation for a like share of capital stock of the new organization. They have not asked for the enforcement of this right, if it does exist. It is virtually conceded, that the tangible property of the old institution was sold to the new for its actual cash value. The only contention is that the good will of the old institution should have brought a greater price than $500. Without determining whether or not the good will of a corporation of this character should be treated as a commercial asset, it is sufficient to say that all the testimony showed

that the institution had been run at a loss to its incorporators and stockholders, with the exception of such benefit as they received from their association and investigation of scientific questions in connection with their students. Hence if the good will of this institution was treated as an asset, its commercial value would have to be indicated by a minus quantity.

From a careful examination of the entire record, we are fully satisfied with the judgment and findings of the learned trial court, and we therefore recommend that the judgment be affirmed.

HASTINGS and AMES, 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 February 17, 1904. *Judgment of district court reversed:*

1. **Corporation:** CONTRACT. The directors of a corporation can not bind it by contract with another corporation of which they are also directors, and which they represent in making such contract.
2. **Powers of Majority Stockholders.** The majority stockholders of a corporation have no power to exclude the minority stockholders therefrom, by organizing a new corporation and transferring all the property and good will of the old to the new corporation, without the consent of the minority stockholders.
3. **Action:** ILLEGAL TRANSFER. The minority stockholders can maintain an action in their own names to set aside an illegal transfer of all property and good will of the corporation, when such transfer is made by the board of directors of the corporation pursuant to instructions of the majority of the stockholders.

SEDGWICK, J.

Upon reargument of this case, we are satisfied that the former opinion prepared by Mr. Commissioner OLDHAM is wrong. There can be no doubt that the Lincoln Medical College of Cotner University was formed for the personal profit and emolument of its stockholders, and was a busi-

ness corporation. The authorized capital stock was $50,000, and it was provided that a part of this should be paid for in cash, but the larger part was to be paid for in services of the subscribers to be rendered for the benefit of the corporation. About one-half of the authorized capital stock had been subscribed for and issued, and was held by individuals at the time of the organization of the new corporation. The principal business of the corporation was to conduct a medical college. The evidence shows that it was intended that the college should be conducted in connection with Cotner University. The plaintiffs and the intervener, Dr. Reynolds, were for several years stockholders and directors of the corporation and members of its medical faculty. During the first years of its operation, no questions seem to have been raised in regard to the different schools of medicine whose tenets were being more or less inculcated by the different members of the faculty, and when such questions arose in the faculty, there seems to have been a clash among its members; some favoring one particular school of medicine, but a large majority favoring another. The majority seem to have excluded the minority from the faculty, and no reason appears from the evidence for the fear, which seems to have arisen in the minds of the majority, as to their ability to control the school and to determine the character of the instruction to be given, as well as the personality of the faculty and the board of directors.

If we assume, as the defendants here strongly insist, that the plaintiffs and the intervener, Dr. Reynolds, had conspired together to control the policy of the school, and to cause the faculty, or at least a majority thereof, to be selected from the particular school of medicine to which they belong; and if we further assume that the plaintiffs and the intervener, Dr. Reynolds, were determined to either bring about such a change in the school or to destroy the school altogether, still the evidence fails to show that the defendants, who were a majority of the stockholders and of the directors, as well as the faculty, were not able to

control the corporation and its policies, and to protect the school from the machinations of its enemies by the usual legal and equitable remedies invoked in such cases. If they could not so protect themselves and the school, it would still manifestly be unlawful to use the means pursued by them.

"A person who is agent for two parties can not, in the absence of express authority from each, represent them both in a transaction in which they have contrary interests. * * * It follows, therefore, that the directors, or other agents of a corporation, have no implied authority to bind the company by making a contract with another corporation which they also represent." Morawetz, Private Corporations (2d ed.), sec. 528.

This principle of law has been announced by this court in *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 491, and *Miller v. Brown*, 1 Neb. (Unof.) 754. In the opinion in the latter case the following language is quoted from Cook, Stock and Stockholders (2d ed.), sec. 653:

"One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation directly or indirectly or participate in the profits of such a purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the directors paid fully as much as or more than the property is worth. * * * The corporation may reclaim the property upon payment to the director of the amount he paid therefor." Indeed the citation of authority upon this proposition is unnecessary, since it is the universal rule of all the cases. The true meaning, as well as the just application of the rule, is well shown in 10 Cyc. 285, 286, and authorities cited in the notes.

The case of *O'Conner Mining & Mfg. Co. v. Coosa Furnace Co.*, 95 Ala. 614, 36 Am. St. Rep. 251, is construed by the defendants in their brief as authority for a

different rule; but it will not bear such construction. It is merely held in that case, as it is in nearly all other cases, that the transaction complained of was not absolutely void, but was voidable; and that creditors of the corporation, who were not prejudiced in the collection of their claims, by the transaction, could not attack the transaction as fraudulent as to them, but in order to do so, must furnish proof of the insolvency of the corporation at the time of the transaction, or that it was entered into with intent to hinder, delay or defraud creditors. The language of the syllabus is:

"Such dealings are not absolutely void, but are voidable at the election of the respective corporations, or the stockholders thereof, and they become binding if acquiesced in by the corporations and their stockholders."

In the case at bar the majority of the stockholders, for the manifest purpose of getting rid of the minority stock, organized a new corporation to which they gave substantially the same name as the old one, the original name being, "Lincoln Medical College of Cotner University." In the corporate name of the new corporation they omitted the words, "of Cotner University," but the corporation had commonly been known by the name of Lincoln Medical College and was so styled even upon the records of the corporation itself. The incorporators of the new corporation were not only stockholders of the old, but also constituted in the main its board of directors; and, at the meeting at which they organized the new corporation, they made arrangements to transfer all of the property, good will, and business of the old corporation to the new. From that time until the trial of this case in the court below, they appear to have conducted the business in the same manner that it had been conducted under the old corporation, there being no change except that the troublesome minority stockholders were not allowed to take stock in the new corporation, and the words, "of Cotner University," were dropped from the corporate name as before stated.

They appointed a committee to fix the value of the as-

sets, including the property and good will of the old corporation, and, acting as the board of directors for both corporations, they made a contract of sale of this property and good will from the old to the new corporation. Further statement of the facts in the case, as disclosed in the evidence, may be found in former opinion. It may be that they have accomplished no more by this transaction than could have been done under the old corporation and in its name, but that fact makes the more apparent the illegality of the transaction. It may be that they have acted in good faith, with the purpose to promote the best interests of the school they had in charge, and that their action has been a direct benefit, not only to the school and to the majority of the stockholders, but also to the minority of the stockholders themselves who are now complaining, but this question was not for the majority to determine in the way that it was determined. No man can be compelled to dispose of his stock in a corporation, or other property interests, because, in the judgment of the parties so compelling him, it is for his interest financially and otherwise so to do. The trial court under this evidence should have found that the attempted transfer of the property from one corporation to another was void as against the old corporation and the minority stockholders who are now complaining; and that these directors who are now styling themselves directors of the new corporation, and who were, at the time of the transaction complained of, the directors of the Lincoln Medical College of Cotner University, are still the directors of that corporation and are conducting the business as such.

The decree should have canceled the transfer of the property; and should have fixed the right of the Lincoln Medical College of Cotner University to said property and good will of the college; and should have protected that corporation in the exercise of its rights.

Twenty-one of the students of the Lincoln Medical College of Cotner University have intervened in this case, and have objected to the appointment of a receiver to take

charge of the property of the college as prayed for in the petitions of the plaintiffs and the intervener, Dr. Reynolds. Their objection to the appointment of such receiver is well taken. It does not appear that there are any rights or interests of the plaintiffs or intervener, Dr. Reynolds, that can not be amply protected by a court of equity without appointment of such receiver, whereas it does appear that the appointment of a receiver to manage the affairs of an educational institution might be detrimental to the students as well as the interests of the institution itself.

Changes may have intervened since the trial of the case in the court below, making it necessary to take further evidence in order to properly determine and protect the interests of the respective parties.

The decree of the district court will be reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

HOLCOMB, C. J., dissenting.

While agreeing in the main with what is said in the majority opinion, when considered as abstract propositions of law, I can not but feel that there is a pronounced misapplication of the legal principles enunciated to the record and the facts therein disclosed in the case at bar. The corporations, both the old and the new, are educational in character, and are not moneyed or business corporations organized for pecuniary profit in the ordinary acceptation of the term. I think the most that can be said is that the articles of incorporation, and the business for which organized, contemplate that the management and conduct of corporate affairs shall be made self-sustaining as nearly as possible; and in that sense, and as an incident to its main purpose, it may be said to be a business corporation.

Its principal object and chief aim, however, manifestly is to conduct a medical school under the teachings and fostering care of those belonging to that branch of the medical profession commonly called Eclectics, afford facilities for such as desire to fit themselves to engage in

the practice of medicine, and thus enlarge the field of action and sphere of usefulness generally of this particular body of the disciples of Æsculapius.

The action is one in equity. Plaintiffs and the intervener, Reynolds, who are appellants in this court, were minority stockholders in the old corporation, and it is altogether clear to my mind that they had confederated together with a view of thwarting the majority in furthering the objects and purposes of the organization, and to prevent them from accomplishing the measure of success hoped for by those who were sincere friends and supporters of the undertaking.

As evidencing the spirit manifested toward the organization, I quote briefly from a letter found in the record written by one of appellants to a prospective student:

"The L. M. C. (Lincoln Medical College) is very shaky. Dr. —— and myself have employed three lawyers, and have applied to the court for a receiver to wind up its affairs, sell what there is, and pay its debts. The college owes about $1,500, with only a few microscopes and chairs as assets. So you see there won't be much left for the stockholders. The boys are scattering to different schools."

As a result of the internal troubles of the old corporation, the organization of the new was entered upon by those who were trying in good faith to make it a success. The alleged illegal sale and transfer of the assets and good will of the old corporation to the new is at most voidable at the instance of an injured party. The transaction is not absolutely void. The appellants have suffered nothing in a pecuniary way. If they have lost anything it is only in the infringement of a naked legal right. The sale and transfer of the assets of the old to the new corporation is an accomplished fact, and that corporation has been conducting its business for well onto three years. The appellants framed their petition and cross-petition in the lower court, and have conducted their case thereafter in the trial court and in this court, on the theory that the old corporation had outlived its day of usefulness; that it had

become incapable of accomplishing the purposes for which organized; that it was disorganized and disrupted, and could not again be placed on its feet as a living, going concern; that a receiver should be appointed to take charge of its affairs; the transfer of the property and assets from the old to the new canceled and annulled, and sold by order of the court; the debts paid, and the surplus, if any, distributed to the stockholders. This is the prayer of their petitions, and the allegations contained therein are with the view and for the special purpose of supporting their right to the relief thus demanded. The briefs in this court are pregnant with suggestions and assertions to the effect that their rights can be preserved and vindicated only by a cancelation of the contract of sale to the new corporation; a sale of the corporate assets of the old, and the winding up of its affairs through the appointment of a receiver. It is said in the majority opinion that no man can be compelled to dispose of his stock in a corporation or other property interests because, in the judgment of the parties so compelling him, it is for his interests financially or otherwise so to do. Strictly speaking, it does not seem to me that this is an accurate expression of a sound proposition of law. A majority of a corporation, of course, may ordinarily and in a proper case sell its property and wind up its affairs. They can not, however, sell to themselves, in the guise of a new corporation, in fraud of the rights of minority stockholders. It does not seem to me that either of these questions are properly in this case. The appellants want this property sold and the corporate affairs terminated. Their yearnings in this respect are so strong that it is urged that this must be done by selling under the hammer, on the auction block, at forced sale by a receiver under a decree of court. The only difference between them and the majority stockholders is as to the method by which the sale shall be accomplished. They are not content to have the property sold at voluntary sale for all that it is worth, but their love of the old corporation is so great that, to satisfy them, the property and good will

must be exposed at public vendue, and sold to the highest bidder for cash. I am quite well satisfied that the finding of the trial court, that the property and good will of the old corporation sold for all it was reasonably worth, is amply supported by the evidence. Having suffered no pecuniary loss, and coming into court in the attitude they have, I maintain, as was found by the trial court, that the appellants have no standing in a court of equity. Were these plaintiffs in court trying to preserve the old corporation, its property and assets and maintain its integrity; have its business conducted as contemplated by its articles of incorporation and in furtherance of the corporate aims and objects; and had by suitable allegations shown themselves in good faith to be endeavoring to protect their own rights and those of the corporation, they would, as I view the matter, stand in an altogether different light. To my mind, they come into court with hands perceptibly soiled.

Another view: This school must be affiliated with some larger institution. It is incapable of standing alone under the laws of this state, without having greater financial strength and property than either of the corporations has yet attained. By mutual arrangements with Cotner University this has been accomplished. The relationship of the old corporation has been terminated. The parent institution may very properly sever its relations with the old because of its internecine strife, and may very properly refuse to renew such relations because of the management as then conducted; and this court is powerless to place the old corporation upon the footing where it stood in this respect at the time of the transactions complained of.

Again, a medical school of this character is in a measure under the control of, and subject to, the approval of the state board of health as to its standing, curriculum, and the character and ability of its faculty, in order that its graduates may become entitled to certificates from that board, authorizing them to engage in the practice of the profession of medicine. The old corporation probably has lost the required standing for such purposes. The new

may be presumed to measure up to these requirements. The student body of the new corporation, who are interveners—many of them, perhaps, nearing the point when they expect to receive their diplomas, obtain certificates from the state board of health and engage in their life-work—has interests in this litigation which far outweigh any equities that can possibly be possessed by the appellants. By the judgment resulting from the majority opinion, it is proposed to cancel the transfer of the property and assets of the old corporation to the new, reinstate the old corporation in all of its corporate rights and functions, and terminate the existence of the new. I do not understand that this court is concerned further than to determine whether, in any event, the appellants are entitled to have the transfer annulled, and the old corporation revived, to continue its corporate existence in carrying out the objects of its creation. The fact is that the new corporation is a different and distinct entity. New blood has been infused into it; different officers control its affairs. A different faculty is at the head of its educational work, and different individuals comprise its student body. It has assumed contract obligations of the old; paid off its debts, and given it a cash consideration for its assets and good will; and surely it can not be deprived of what it has thus acquired, by a court of equity decreeing a rescission of the contract, without some provision being made for repayment of the consideration thus passing from it to the old corporation.

The corporate affairs of the new organization have been conducted now for nearly three years, and it seems to me, as was found by the trial court, that the appellants are absolutely without any equities entitling them to any of the relief which they pray for, or which the allegations of their petitions will warrant or justify being extended to them.

The judgment of the district court should, in my judgment, be affirmed, and the judgment in this court first entered adhered to. Hence, I dissent.

LOUIS N. ANDERSEN ET AL. V. ANDERS P. ANDERSEN.

FILED JULY 3, 1903. No. 12,819.

1. **Will:** CONSTRUCTION: JURISDICTION. Where no trust is created, neither the executor, nor the heirs or devisees, who claim only a legal title in the estate, will be permitted to come into a court of equity for the purpose of obtaining a judicial construction of the provisions of a will. Where only purely legal titles are involved, equity will not assume jurisdiction to declare such legal titles, but will remit the parties to their remedies at law.
2. ———: ———: ———. The district court has no original jurisdiction in an action to contest a will, or set aside the probate of the same.
3. ———: PROBATE: JURISDICTION. The county court has original jurisdiction in the probate of a will and its order admitting it to probate is conclusive, unless, by a direct proceeding by appeal or otherwise, it is reversed.
4. ———: CONSTRUCTION. The county court has jurisdiction to construe wills for the purposes of the administration and settlement of estates. But the construction of a will, in such a case, is for the information and benefit of the executor or administrator only, in order to advise him what course to pursue. It will protect him from any charge of maladministration of the estate, but it adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants, under the devise, will not be affected thereby.
5. **Petition:** DEMURRER. A petition in which it is alleged that the plaintiffs are the owners of and have a legal title to certain real estate, describing it, that defendant by his wrongful acts has cast a cloud on their title, and which contains a prayer for general equitable relief, states a cause of action and will resist a general demurrer.
6. ———: ———: SURPLUSAGE. If such petition contains other allegations and demands constituting a cause or causes of action over which the court has no jurisdiction, such matters will not render it vulnerable to a demurrer but should be treated as surplusage.

ERROR to the district court for Howard county: JAMES N. PAUL, DISTRICT JUDGE. *Reversed.*

F. W. Button, T. T. Bell and *William F. Button,* for plaintiffs in error.

Henry Nunn, contra.

BARNES, C.

The plaintiffs commenced this action in the district court for Howard county. The allegations of their petition were in substance as follows: "That the plaintiffs, Louis N. Andersen, Ole Andersen, and the defendant, Anders P. Andersen, were the sons of one Frederick Andersen, and his only heirs; that on the 7th day of January, 1896, Frederick Andersen executed his last will and testament, and afterwards on the 7th day of July, 1896, departed this life; that he was seized in fee simple at the time of his death of the north half of the northwest quarter of section 33, township 14, range 11, in Howard county, Nebraska; that by his said will he bequeathed all his property, both real and personal, to his sons." A certified copy of the will was attached to the petition marked exhibit "A." It was further alleged: "That the plaintiffs are, each, the absolute owners of, and have legal title to, an undivided one-third interest in the said real estate, and are entitled to the immediate possession thereof; that they claim title under the will as probated in Howard county, Nebraska, as the same appears on file in the probate court of said county, a certified copy of which is now recorded in the recorder of deeds' office of Howard county, Nebraska. Further said plaintiffs claim title by virtue of the fact that they are the legal heirs and sons of Frederick Andersen, deceased." It was further alleged: "That at the time of the death of Frederick Andersen, the plaintiff, Louis N. Andersen, visited Howard county, Nebraska, and was shown by the defendant what purported to be a copy of his father's will; that the plaintiffs learned afterwards, in June, 1901, that the will shown them by the defendant was not a true copy of the will of Frederick Andersen, deceased; that it purported to bequeath all of the property belonging to the deceased, both real and personal, to the defendant Anders P. Andersen, the purported copy reading to my son, Anders P. Andersen, while the true will reads, to my sons; that

plaintiff believed the said defendant was acting honestly; that said copy was a true copy of his father's will, and thereupon notified his brother, Ole Andersen, of the fact, and returned to his home in Kansas. That the defendant petitioned the probate court of Howard county, Nebraska, to probate the will of said Frederick Andersen, deceased, and these plaintiffs being nonresidents of the state of Nebraska, were constructively served, and the said will was probated; that the will probated was the true will of Frederick Andersen, deceased; and bequeathed and devised all of his estate, both real and personal, to his sons; that the defendant thereupon, by fraud and deceit, obtained a purported copy of said will and the probating hereof, which said copy of the will and the probating hereof were false, and which bequeathed and devised the property of the said Frederick Andersen, deceased, directly to his son; said fraudulent copy reading, to my son; and fraudulently procured the same to be recorded with the recorder of deeds of Howard county, Nebraska, in miscellaneous records, 4, at pages 184-6. All this with intent to cheat and defraud the plaintiffs out of their rights in and to said property; and that the said forged will, recorded with the recorder of deeds, as aforesaid, is a cloud on the plaintiffs' title and the title of each of them; that defendant, Anders P. Andersen, is made by the will executor thereof, but he failed to give a bond and take the oath of office; but that all claims presented were paid out of the personal estate of Frederick Andersen, deceased, by the said defendant; that defendant claims to be the sole owner of the real estate described in the petition, by virtue of the said forged will recorded with the recorder of deeds, and also by virtue of the true will, he having fraudulently procured the probate court to find that he is the sole legatee under the will; that there is a dispute between plaintiffs and defendant over the construction to be given the last will and testament of Frederick Andersen, deceased; that the defendant claims that the true will and the one that was probated, reads,

in the first paragraph of the devising part, son, instead of sons. Defendant further claims that if the will reads son, instead of sons, that then the following paragraph of said will naming Anders P. Andersen, executor, shows that he is the son designated, while the plaintiffs claim that if the said will does read son, instead of sons, then said will is void for uncertainty." It was further alleged that: "Frederick Andersen left a considerable amount of personal property; that said defendant has wrongfully and unlawfully appropriated all of said property to his own use, and has failed and refused to divide the same with these plaintiffs according to the terms of the will, or under the law, if the will be void for uncertainty, although he has been requested to do so; that plaintiffs each claim a one-third interest in said personal property under the will, and also under the law, if the will be declared void; that the said defendant has had the use of said real estate since the death of Frederick Andersen, and has failed and refused to account to the plaintiffs for the rents and profits of the same; that the defendant has paid the taxes on the property since his father's death, and that the plaintiffs are ready and now offer to reimburse the defendant for the taxes paid by him."

Following these allegations the petition concludes with a prayer, in substance, as follows: "The plaintiffs therefore pray that said will may be construed, and if the same be adjudged to read sons, that the same may be adjudged good in law, and these plaintiffs may each be adjudged to have an undivided one-third interest in the above described real estate; and if the said will be found to read son, that the same may be adjudged void and of no effect for uncertainty, and that each of these plaintiffs has an undivided one-third interest in the said real estate under the law. That there may be an accounting of personal property and money left by said Frederick Andersen, deceased, and the rentals and profits accruing since his demise, and the taxes paid by defendant, and the expenses incurred in settling all just claims against

the estate, that the defendant may be adjudged as holding the residue of said personal estate in trust for the heirs of Frederick Andersen, deceased, under the will; or if the will be adjudged void for uncertainty, then, under the law, that said forged will may be stricken from the records in the recorder of deeds' office and adjudged of no effect; that the finding of the probate court that Anders P. Andersen is the sole legatee be held void and of no effect, and the order stricken from the records of the recorder of deeds; that if said will be declared void for uncertainty, that said will and the probate thereof be declared void and of no effect, and that the same be ordered stricken from the records of the probate court, otherwise to remain in full force and effect; that each of these plaintiffs may be adjudged to have an undivided one-third interest in said real estate, and that they may have the title to the same quieted in fee simple in each of them; that the defendant may be adjudged to have only an one-third interest in said real estate and no claim to the interest of these plaintiffs; that the plaintiffs may have general relief in equity and recover their costs of action."

The copy of the will attached to the petition is in such a condition that it is difficult to determine, without extrinsic evidence, whether the word in dispute is "son" or "sons." To this petition the defendant demurred for the following reasons: First, because the court has no jurisdiction of the subject matter of the action; second, because the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendant. The demurrer was sustained, and the action dismissed. The plaintiffs thereupon prosecuted error to this court, and contend that the court erred in sustaining the demurrer and dismissing the suit.

Plaintiffs now claim, as the basis of their contention, that the action was one to quiet title by persons out of possession, and cite a long list of authorities showing that such an action may be maintained. There is no doubt but that our code provides, that an action to quiet title

to real estate may be maintained by one either in or out of possession, and this is the only relief plaintiffs are entitled to in this action. The allegations and prayer of the petition fairly construed seem to constitute it, first of all, an action to construe a will; and if it is construed according to the plaintiffs' contention, then, to set aside the findings and decree of the probate court in construing it for the purpose of administering the estate of the testator, and the judgment of that court declaring that the defendant was the sole legatee under the will. It is true that the district court has jurisdiction in equity of actions to construe wills, in cases where a trust relation exists by reason of the terms of the instrument itself (3 Pomeroy, Equity Jurisprudence (2d ed.), sec. 1156; *Sellers v. Sellers,* 35 Ala. 235; *Clark v. Clark,* 17 Ga. 485; *Strubber v. Belsey,* 79 Ill. 307; *Bailey v. Briggs,* 56 N. Y. 407; *Chipman v. Montgomery,* 63 N. Y. 221; *Dill v. Wisner,* 88 N. Y. 153; *Collins v. Collins,* 19 Ohio St. 469) and to determine the rights of parties thereunder; while the county court has exclusive original jurisdiction in the probate and contest of wills, and in their construction for the purposes of administration and settlement of estates. Section 140, chapter 23 of the Compiled Statutes, 1901 (Annotated Statutes, 5005); *Loosemore v. Smith,* 12 Neb. 343; *Freeney v. First Nat. Bank,* 16 Fed. 433; *Wolf v. Schaeffner,* 51 Wis. 52; *Appeal of Schaeffner,* 41 Wis. 260. In the case at bar, no trust relation is created by the terms of the will, and it is alleged in the petition that the county court has duly probated it and rendered its decree construing that instrument for the purposes of administration, and has by its judgment declared the defendant to be the only legatee thereunder. This judgment inures to the benefit of the executor only, and informs him what course to pursue. It is sufficient to protect him against any charge of maladministration of the estate. It adjudicates nothing, however, beyond his rights and liabilities in the execution of his office. Controversies between adverse claimants under the devise are in no man-

ner affected thereby. The district court has no jurisdiction in an original action to set aside, modify or annul the findings and judgment of the county court on these matters.

Again, if the plaintiffs' contention as to the proper construction of the will be not adopted, then they ask the court to declare it void for uncertainty in order to invest them with the ownership of two-thirds of the land in question, under the law of descent. This amounts to a proceeding to contest a will. The county court is the tribunal of original and exclusive jurisdiction over such a proceeding, and the matter can only come before the district court on appeal or error from the judgment of that court. However, under our liberal system of pleading, if a petition contains allegations sufficient to entitle the plaintiff to any relief whatever, a general demurrer thereto should be overruled. An examination of the numerous and apparently conflicting allegations and demands for relief, contained in the petition in this case, convinces us that the plaintiffs have alleged that they have a title to two-thirds of the land in question, and are the owners thereof, and of the personal property and proceeds thereof; that defendant by procuring a forged will, the probate thereof, a finding of the county court thereon that he is the sole owner of the land in question, and by filing such documents with the register of deeds of the county where the land is situated, has cast a cloud on their title, which they ask to have removed. It would seem, to that extent, the petition states a cause of action, and therefore the demurrer should have been overruled; and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

ALBERT and GLANVILLE, CC., concur.

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

REVERSED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. DAVID R. COLBY.

FILED JULY 3, 1903. No. 12,883.

1. **Common Carrier: FREIGHT REGULATION.** A railroad company, as a common carrier, may make reasonable rules and regulations for the reception, carriage and delivery of freights, including the classification and suitable preparation of articles for shipment; and such rules and regulations shippers are to conform to.
2. **Reasonableness, Question of Law.** The reasonableness of such rules, regulations and classification is a question of law for the court; and it is reversible error to submit that question to the jury.

ERROR to the district court for Gage county: CHARLES B. LETTON, DISTRICT JUDGE. *Reversed.*

W. F. Evans, Alfred Hazlett and *Fulton Jack,* for plaintiff in error.

Leonard W. Colby, contra.

BARNES, C.

In this action David R. Colby, the defendant in error, sought to recover the possession of a certain wagon described in his petition, from the Chicago, Rock Island & Pacific Railway Company. Such proceedings were had that the case finally reached the district court for Gage county; where, on a trial to a jury, a verdict was returned in his favor for the possession of the property, and for the sum of $13.80, damages. Judgment was rendered on the verdict, and the railway company prosecuted error.

It appears that one F. A. Matthis delivered a peddler's wagon to the Chicago & Great Western Railway Company, at Pearl City, Illinois, to be shipped to the defendant in error, at Beatrice, Nebraska; that it was transported by the initial carrier as far as its line of road extended, and was there delivered to the plaintiff in error, and was carried by it to the place of destination; that

when the defendant called for the wagon a dispute arose over the freight charges. The amount claimed by the plaintiff was $13.80, while the defendant insisted that he should be required to pay the sum of $6.62, only. Efforts were made to adjust the matter in dispute, which were unsuccessful, and, thereupon, the defendant replevied the wagon, alleging that he had tendered the plaintiff an amount sufficient to pay the proper freight charges. The record discloses that he introduced some evidence tending to show that he had made an inquiry of some one in charge of the plaintiff's office in Beatrice, to ascertain the probable cost of transporting the wagon from Pearl City, Illinois, to that place, and had been told that it would be about $6.62; that thereupon he wrote to Matthis to ship it to him. It appears that when the wagon was delivered by Matthis to the Great Western Railway Company, it was not crated or prepared for shipment in the manner required by the company's rules, and, therefore, the charge for its transportation was greater than the rate contended for by the defendant. No rate was fixed by the contract of shipment, and when the plaintiff's freight inspector saw the wagon and ascertained its condition he fixed the rate thereon which is provided for by what is called the western classification, and which it appears applied to all roads west of the Mississippi river, the plaintiff included, and directed the agent of the road at Beatrice to collect that rate from the defendant. It also appears from the evidence that if the wagon had been crated according to the regulations set forth in the western classification of freights, which classification, together with the rates prescribed thereby, appears to have been posted in the depots of all said roads, the cost of the shipment would have been $6.62, but for lack of proper crating the rate was $13.80, the amount claimed by the plaintiff. There is no conflict of evidence on these questions. The plaintiff claimed the right to hold the property until its lien for the freight charges was paid, while the defendant demanded its delivery on the

payment of the lesser rate. This was the real question in dispute, and on the trial the court submitted the question of the reasonableness of the regulations, classification and freight charges to the jury, by the following instructions:

"2. You are instructed that every common carrier in this state is entitled to a lien upon the property transported by it for the proper and reasonable freight charges thereupon, and that, unless you believe from the evidence that the plaintiff has tendered to the defendant the reasonable and proper freight charges for the shipment of said goods, the defendant will be entitled to a verdict at your hands. If, on the other hand, you find that the amount which was tendered to the defendant is the reasonable, proper and usual freight charges under the rules and regulations which have been introduced in evidence before you, adopted by various railway companies adopting such classifications, and that such regulations are fair and reasonable, then you should find for the plaintiff.

"3. You are instructed that it is competent for companies engaged in the business of common carriers to adopt rules of classification and tariffs of freight charges for the carriage of goods, and that if said classifications and tariffs are fair and reasonable, they are lawful and proper and must be recognized by persons transacting business with such common carriers.

"And in this case if you believe from the evidence that such regulations are fair and reasonable and that the goods in controversy were, by the terms and conditions of the western classification which has been introduced in evidence, entitled to be shipped at one and one-half times the first class rate, at actual weights, then you should find for the plaintiff. But if, on the other hand, you find that the goods in controversy were under the rules of the western classification entitled to be rated as first class, minimum weight fifteen hundred pounds, then you should find for the defendant."

That a common carrier has a lien for its proper freight

charges on property transported over its lines of road and may hold possession of such property until its lien is paid, is the settled law of this state. It is equally well settled that on tendering the amount of freight charges actually due the carrier, the owner may replevy his goods, and it is unnecessary to again refer to these questions.

The plaintiff's first contention is, that the court erred in giving the instructions above quoted. A common carrier may make reasonable rules as to the reception, carriage and delivery of freights; such rules and regulations shippers are to conform to. Their reasonableness is a question of law for the court to decide. Rorer, Railroads, 227; *Illinois Central R. Co. v. Whittemore,* 43 Ill. 420; *Vedder v. Fellows,* 20 N. Y. 126; *Tracey v. New York & Harlem R. Co.,* 9 Bosw. (N. Y.) 396. In *Illinois Central R. Co. v. Whittemore, supra,* the court said:

"The circuit court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and, therefore, obligatory upon the passengers. The necessity of holding this to be a question of law, and, therefore, within the province of the court to settle, is apparent from the consideration, that it is only by so holding, that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them today and another tomorrow. In one trial a railway company would be held liable, and in another, presenting the same question, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the roads and to the public."

In the case at bar, there was no conflict of evidence on the question as to what the regulations were which had been fixed by the western classification as to the manner of preparing the wagon in question for shipment. Neither

was there any dispute as to the rate fixed for its transportation, when prepared for shipment according to said rules and regulations. Therefore, it was the duty of the court to determine, as a matter of law, whether the regulations contained in the classification, which was introduced in evidence, were reasonable or not; and whether the sum charged for transportation thereunder was the proper amount. If these questions are left to the determination of juries, freight rates will soon reach a condition of chaos. What one jury might think was reasonable and just another jury might reject. And so it would soon be impossible for common carriers to conduct their business with any degree of fairness or uniformity towards their customers.

Again, it is well known and understood that railroad companies act only through their agents; that it is necessary for them to adopt rules and regulations for the guidance of such agents, and it is generally understood that persons dealing with such corporations are to be governed by these rules and regulations, if fair and reasonable. It, therefore, becomes necessary for the courts, as a matter of law, to determine the question of the reasonableness thereof in case of a disagreement between the railroads and their customers, because such rules are a part of the contract.

For these reasons, we hold that the court erred in giving the instructions complained of.

We deem it unnecessary to consider any of the other assignments of error. For the giving of the instructions above quoted, we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

ALBERT and GLANVILLE, CC., concur.

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

REVERSED.

GEORGIA A. TREPHAGEN ET AL., APPELLEES, V. CITY OF SOUTH OMAHA, APPELLANT.

FILED JULY 3, 1903. No. 12,988.

1. **Corporation:** AUTHORITY OF GENERAL MANAGER. The authority of a general manager to conduct the ordinary business of a corporation, organized for the purpose of yarding, feeding and taking care of cattle, hogs, sheep and horses consigned for sale to a certain market, is not broad enough to authorize him to sign a petition for paving a city street and thus charge the real estate of the corporation, abutting thereon, with the cost of such improvement.
2. ———: BOARD OF DIRECTORS. The act of signing the name of the corporation to such a petition is one which falls within the managing powers of the board of directors, who are, by law and by its articles of incorporation, made its managing agents.
3. **Municipal Corporation:** STREET IMPROVEMENTS: BURDEN OF PROOF. The authority to perform such an act must come from the board of directors; and the burden is upon the city which seeks to enforce a special tax against specific lots to pay for such improvement, to show that the general manager was duly authorized by the corporation to sign such petition for and on its behalf.
4. ———: SPECIAL ASSESSMENT: NOTICE. Under the statutes in force in the year 1898, no special tax could be assessed upon and made a charge against specific real estate in a city of the first class, to pay for the construction of a wooden sidewalk, without the adoption of a resolution fixing the cost of such construction, as a special assessment thereon, at a meeting of the city council of which, at least, ten days' notice had been given before holding the same, or personal service of notice thereof on the persons owning or occupying the property to be assessed.
5. ———: ———. At that time, cities of the first class had no power to levy a special tax on specific lots, for the purpose of paying the cost of removing garbage therefrom.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, DISTRICT JUDGE. *Affirmed.*

A. H. Murdock, for appellant.

Henry W. Pennock, contra.

BARNES, C.

Georgia A. Trephagen, H. L. Wilton, Mike Higgins and Kornelia Adamowicz, appellees, commenced this action in

the district court for Douglas county, to restrain the treasurer of the city of South Omaha from collecting certain special taxes or assessments levied against and upon certain lots belonging to them, situated in said city; to cancel the said special taxes and remove the cloud, created by the assessment and levy thereof, on their title to said lots. The petition alleged, in substance:

That the city had pretended to assess certain special taxes against their specific property for paving, curbing and guttering that part of "L" street from the west end of the viaduct to the west line of 33d street, situated in paving district No. 6 of said city; that prior to the attempted passage and approval of the ordinance ordering said paving, there had never been filed with the clerk of said city, or presented to the city council, a petition signed by the property owners representing a majority of the front feet or area within the limits of said paving district, as defined in said ordinance; that a paper called a petition was filed with the said clerk requesting that the street be paved with Colorado sandstone on six inches of sand; that the said paper was not a petition, but was a mere selection of materials, and was not signed by the owners of a majority of either the front feet or area of the real estate within said district; that there appears upon said paper the name of Joseph Schlitz Brewing Company, Ed. Ainscow and R. D. Mattice, but neither of said parties owned any real estate within said district at the date thereof, nor at the time defendant passed the ordinance ordering the said street to be paved; that there also appears upon said paper the name of the Union Stock Yards Company, by W. N. Babcock, G. M.; and it was alleged in the petition that said Babcock had no authority to sign the name of the Union Stock Yards Company, and the same was placed upon said paper without the authority of the said corporation, and should not be considered as a lawful signature; that no other paper purporting to be signed by property owners in said district was ever filed with the clerk, or with the city council in connection with the pav-

ing or curbing of said street, and no other proceedings were had than those mentioned in the petition, in connection with the paving of said street, and the assessment of the cost thereof on the adjacent and abutting property; that the city council failed to sit as a board of equalization, and failed to assess benefits to the property of the plaintiffs, and failed to make any finding of any character respecting said assessment, and failed to give notice of said proposed equalization by publication for six days prior to said 7th day of January, 1892, in any daily paper of said city; that by the terms of a certain special ordinance, No. 32, large amounts of special taxes were levied upon the real estate of the appellees to pay the costs of said paving and curbing, and the said ordinance was duly certified by the city clerk to the city treasurer, and was by him entered upon the tax lists and became and is an apparent charge and lien upon the plaintiffs' real estate, but the said assessments were null and void for the reasons above set forth.

For their second cause of action, appellees alleged:

That the city attempted to pass a special ordinance numbered 134 by the terms of which lot 7, block 357, was charged and assessed with the sum of $35.53 for the costs of the construction of an alleged sidewalk in front of said property; that, prior to the passage of said ordinance, no notice had been given to the owners of said property, and no notice had been published of said proposed assessment; that the owners had never been required to construct the sidewalk or notified that a sidewalk had been ordered, and had never been given any opportunity to construct the same, and that all of the proceedings of said city council with reference thereto were null and void.

For their third cause of action the appellees alleged:

That the city attempted to pass, and, thereafter, there was approved by the mayor of said city, a special ordinance, No. 87, by the terms of which lot 7, block 357, was charged and assessed with the sum of $19.64, as an alleged garbage assessment, for removing garbage from said prop-

erty; that said property was not subject to an assessment for removing garbage; that there was and is no authority of law for assessing specific real estate in said city for the removal of garbage, and all of the acts of the city council in attempting to levy and in levying an assessment therefor were and are null and void. The petition concluded with a suitable prayer for relief.

The appellant, by its answer, denied each and every allegation contained in the petition, except those expressly admitted; set up a plea of the statute of limitations; and, for a third defense, contained matters supposed to create an equitable estoppel. The reply was a general denial. The cause was duly tried, and the court found generally in favor of the appellees and rendered a decree canceling the alleged special taxes, restraining the collection thereof and removing the apparent cloud from the title to the lots described in the petition. From this decree the city appealed, and now contends that the court erred in its findings and judgment as to each of the several causes of action set forth in the petition, and that the evidence is not sufficient to sustain the decree.

The rule is, that in order to confer jurisdiction upon a city council to order paving and curbing, and authorize the assessment of the cost thereof against the abutting real estate, a petition therefor must be presented, signed by the owners of a majority of the feet frontage upon the street to be thus improved; and this rule is so well settled in this state that it is unnecessary to cite authorities in support of it. In fact, the appellant concedes this to be the rule. It may be further said that the burden is on the city seeking to enforce such a tax to show that all the proceedings made essential by the statute—which is the city charter—leading up to the special assessment, have been strictly followed; that there is no presumption coming to the aid of the city which seeks to enforce the lien of a special tax. *Merrill v. Shields,* 57 Neb. 78; *Smith v. City of Omaha,* 49 Neb. 883.

It is a recognized rule of construction, especially ap-

plicable to actions of this character, that those things which the law regards as the substance of the proceedings can not be treated by the courts as immaterial; that the record must show, affirmatively, a compliance with all the conditions essential to a valid exercise of the taxing power, and that their omission will not be supplied by presumption. It therefore devolved upon the appellant in this case to show that the special taxes complained of were legally levied.

It was stipulated, by the parties on the trial in the court below, that the property owned by the Union Stock Yards Company constituted a majority of the feet frontage abutting on the street paved, consequently the validity of the petition turns upon the purported signature of that corporation thereto. Evidence was introduced by the appellant which showed that the Union Stock Yards Company was a corporation organized for the purpose of conducting a general stock yards business; that the business of said corporation was the yarding, feeding and taking care of cattle, hogs, sheep and horses that were consigned for sale to the South Omaha market. It was further made to appear that W. N. Babcock, who signed the name of the company to the paper or petition in question, was at that time its general manager. The appellant, recognizing the fact that it devolved upon it to prove that Babcock had authority to sign the petition, introduced in evidence certain parts of the articles of incorporation under which the Union Stock Yards Company was organized, which we quote as follows:

"The affairs of this corporation shall be conducted by a board of directors of seven members, each of whom shall hold office for one year, and until his successor is elected and takes his seat at the board; they shall elect a president, vice-president, secretary and treasurer; they shall also appoint such superintendents, managers and agents as, from time to time, shall be deemed necessary for the transaction of the business of this corporation. The board of directors, at their regular meeting after each annual

election, shall elect by ballot a president, vice-president, and may also elect a secretary and treasurer, and may continue the then incumbent in office by resolution. The board of directors shall have the whole charge and management of the property and effects of the company, and they may delegate the power to the executive committee to do any and all acts which the board is authorized to do, except such acts as by law, or by these by-laws, must be done by the board itself. The board shall have the power, in the absence of the president and vice-president, to appoint a chairman *pro tempore,* and, during the prolonged absence of the president or other officers, to appoint substitutes *pro tempore.* The board of directors shall prescribe the duties and powers of the secretary and treasurer, and all subordinate officers and agents, and shall make all needful rules and regulations not inconsistent with the articles of incorporation for the transfer of stock of the company, the issuing of certificates of stock, keeping the records and accounts of the company, the management and disposition in particular of the stock, property, estate and effects of the company, and shall have power to delegate authority to do and perform specific acts not inconsistent with the articles of incorporation to special committees to be appointed by the board or presiding officer, at the option of the board."

It can not be said that these provisions authorized Babcock, as general manager of the corporation, to sign the paper or petition in question. No evidence was introduced to show, or which tended to show, that the board of directors had ever authorized him to do so. We can not presume that Babcock had power to sign the petition and thereby bind the corporation. It is true that a corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business, when performed by its president, secretary or general manager, is legally done and is binding upon the corporation, yet no such presumption prevails, when the act done by such officers does not fall within the scope of the powers con-

ferred upon and usually exercised by them as part of the ordinary business of the corporation. The act of signing the name of a corporation to a petition for the opening of a highway over its real property, or the paving of a street abutting thereon, whereby a special tax will be assessed and become a charge against the property of the corporation, is one which falls within the managing powers of the board of directors, who are by law, and by the articles of incorporation in this case, made the managing agents of the corporation; and authority to perform such an act must come from them. The appellant having failed to introduce any evidence tending to show that Babcock was authorized to sign the paper in question, by the board of directors of the Stock Yards Company, it follows that the petition or paper was void, and conferred no authority upon the city council to pave the street and assess the cost thereof against the abutting real estate. *Morse v. City of Omaha,* 67 Neb. 426; *Orr v. City of Omaha,* 2 Neb. (Unof.) 771; *Mulligan v. Smith,* 59 Cal. 206.

On the question of the equalization of the assessment for paving and curbing, it appears from the records of the city council, which are in evidence, that Friday, January 7, 1892, was the time fixed for that purpose; no meeting was held on that day, but it appears that at a meeting held on January 11, following, it was moved that the council sit as a board of equalization, on January 22 and 23, 1892, and the motion was carried. It further appears that, at the meeting of January 22, a recess was immediately taken until January 23, at 4 o'clock P. M., and the city clerk was instructed to receive all complaints in writing; that on the 23d the meeting was called to order and, on a motion made by one of the councilmen, an adjournment was taken to January 25, 1892; that the adjourned meeting, so far as the record shows, was never held, and therefore the court was right in its finding that no equalization of this paving assessment had ever been made, and that the city council never held a proper meeting for that purpose.

We therefore conclude that the finding and judgment of

the trial court as to the paving, curbing and guttering tax must be affirmed.

As to the sidewalk assessment, it appears that no legal notice of the meeting of the board of equalization to make such assessment was ever given or published. The affidavit made by the publisher of the *Daily Tribune,* the newspaper in which publication was attempted, showed that the notice of the proposed meeting for that purpose was published from October 13 to October 19, 1898; and it appears that no other notice was ever published or given to the appellees. The statute in force, at that time, relating to the construction of wooden sidewalks, required that the assessment to pay the cost thereof, should be made by the city council, at any meeting, by a resolution, fixing the cost of the construction or repairs of such work along the lots adjacent thereto as a special assessment thereon, and the amount charged against the same which, with the vote thereon by yeas and nays, was required to be spread at large upon the minutes; it was provided that notice of the time of holding such meeting and the purpose for which it was to be held, should be published in some newspaper published and of general circulation in the city, at least ten days before holding the same; or, in lieu thereof, personal service might have been made on the persons owning or occupying the property to be assessed. The appellant failed to show that personal service was ever made on the appellees, and it appearing that the notice in question was published only six days instead of ten, it follows that there was no such substantial compliance with the statute as would authorize the city to levy the special tax, for the construction of the sidewalk, complained of, and make it a specific charge on the abutting real estate.

It further appears that by special ordinance, No. 87, the appellant levied a special tax amounting to $11.10 on lot 7, block 357, South Omaha, for the purpose of paying for the cost of removing garbage therefrom. The petition charges that there was no authority of law for this special

assessment. The trial court found for the plaintiffs, and declared this tax void. We have been unable to find any statute under which the city of South Omaha, at that time, might have levied such an assessment. It is one of the elementary principles of taxation that the power to tax lies exclusively in the legislature. Without a special legislative enactment, no city, or other municipal subdivision, has any right to levy a tax or assessment upon the property of its citizens. Cooley, Taxation (2d ed.), 62, 142.

The statute not having conferred authority on the city, authorizing it to assess and levy a special garbage tax, and make it a specific charge on the lot in question, we conclude that such tax was void. The foregoing questions being the only ones argued by counsel for the appellant in his brief, no others will be considered. A careful review of the record convinces us that the findings and judgment of the trial court are amply sustained by the evidence and accord with well established principles of law. We therefore recommend that the judgment appealed from be affirmed.

ALBERT and GLANVILLE, CC., concur.

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

AFFIRMED.

MICHIGAN TRUST COMPANY, EXECUTOR OF THE ESTATE OF JOHN W. MOON, DECEASED, ET AL., APPELLANTS, V. CITY OF RED CLOUD, APPELLEE.

FILED JULY 3, 1903. No. 12,272.

1. **Appeal:** PRESUMPTIONS. The usual presumptions, in favor of a finding of the trial court, do not obtain, on appeal in an equity case.
2. **Foreclosure:** PETITION. A bank issued certificates of deposit which were guaranteed by its directors, and secured by trust deeds given by the guarantors and a stockholder on their individual

property; the guarantors giving trust deeds to secure the payment of the certificates; a petition filed by the holder of one of the certificates, for the foreclosure of the trust deed, given by the stockholder, alleges that the plaintiff recovered a judgment at law against the bank, and that an execution issued thereon has been returned unsatisfied. *Held*, That such allegation does not relieve the plaintiff from conforming to the requirements of section 850 of the code, requiring a petition for foreclosure to state whether any proceedings at law have been had for the recovery of the debt secured by the instrument sought to be foreclosed.

APPEAL from the district court for Webster county: ED L. ADAMS, DISTRICT JUDGE. *Former judgment vacated and decree of district court reversed.*

Addison S. Tibbets, George W. Tibbets and *C. F. Morey*, for appellants.

George R. Chaney, contra.

ALBERT, C.

This case is before us a second time. The former opinion is reported in 3 Neb. (Unof.) 722, where the facts are set forth at length.

1. As on the former hearing, the sufficiency of the petition is assailed on the ground, among others, that it fails to comply with sections 850 and 851 of the code, which require a petition for the foreclosure of a mortgage to state whether any proceedings at law have been had for the recovery of the debt secured by the mortgage sought to be foreclosed. The petition in this case deals with the trust deed as a mortgage, and the decree is an ordinary decree of foreclosure, hence, the sufficiency of the petition is to be tested by the rules governing pleadings in actions brought for the foreclosure of mortgages.

The sections above referred to are as follows:

Section 850. "Upon filing a petition for the foreclosure or satisfaction of a mortgage, the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part

thereof, and whether such debt, or any part thereof, has been collected and paid."

Section 851. "If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises."

The petition is wholly silent as to the matters mentioned in the sections just quoted. It does, however, allege the recovery of a judgment against the banking company on the indebtedness sought to be enforced in this action, and the return unsatisfied of an execution issued thereon. In the former opinion it was held that such allegation was a sufficient compliance with said sections. A reexamination of the question satisfies us that our former conclusion on that question is wrong. The banking company was the principal debtor and four of the grantors under the trust deeds guarantors on the certificates. The plaintiff had a remedy at law, not only against the principal debtor, but against the grantors. It also had its remedy in equity against the trust property. The object of section 850 is to prevent a creditor from pursuing its remedy at law and in equity concurrently. *Hargreaves v. Menken*, 45 Neb. 668. Hence, the allegation showing the extent to which the plaintiff had pursued its remedy at law against the principal debtor, falls far short of showing that when this action was brought, the plaintiff was not proceeding by concurrent actions at law against the guarantors of the certificates, secured by the trust deed sought to be foreclosed in this action; for that reason the petition fails to comply with the requirements of that section. That a petition for the foreclosure of a mortgage, which fails to comply with such requirements, is insufficient to support the decree is settled by numerous authorities, among which

are the following: *Jones v. Burtis,* 57 Neb. 604; *Kirby v. Shrader,* 58 Neb. 316; *Miller v. Nicodemus,* 58 Neb. 352.

2. But there is another question in this case which goes more to the merits of the controversy, and that is: Whether the written directions, prescribing the order in which the trust property was to be sold, and which accompanied the trust deeds at the time of their delivery, are binding on the beneficiaries; because, if they are, it necessarily follows that the property of the banking company and of the resident stockholders should be exhausted, before the plaintiff in this case should be permitted to resort to that covered by the trust deed sought to be foreclosed. On the former hearing, we resolved this question against the appellant, on the ground that there was sufficient evidence to support a finding that such directions were merely the result of an agreement between the grantors, to which the beneficiaries were not parties. The evidence which we held sufficient to that end is set out in the former opinion; an examination of it will disclose that, so far as it touches the precise question before us, it is more in the nature of a conclusion or an opinion of the witness, as to the legal effect of the transaction, than of what actually occurred.

Besides, its force is somewhat weakened by some inaccuracies in the testimony of the witness taken as a whole, which go to show that his recollection of the transaction is not entirely clear. For example, he testifies that the trust deeds were all alike, and in no manner different as to their terms and conditions. The record discloses a substantial difference between the trust deed involved in this case, and those given by the other grantors. Again, he testifies that the grantor under this deed was a director as well as a stockholder of the banking company. Such is not the case; he was merely a stockholder. Standing opposed to the testimony of that witness, is that of two other witnesses, to the effect, that the written directions accompanied the trust deeds at the time of their delivery in escrow, and as part of the same transaction. One of these witnesses was the mayor of the defendant city at the

time, and the custodian selected to hold the deeds in escrow. The testimony on this point is all in the form of depositions, so that the trial court was in no better position to weigh it accurately than this court. That being true, and the case being here for trial *de novo,* we cannot give full force to the usual presumptions indulged in favor of the findings of a trial court on conflicting evidence. *Gibson v. Hammang,* 63 Neb. 349. While the testimony of none of the witnesses on this point is entirely clear, as to all the details, it conclusively shows that the written directions, as to the order in which this property was to be sold, were delivered to the custodian, mayor of the defendant city, with the trust deeds and as part of the same transaction, to be delivered to the trustee. The fact, standing alone and without explanation, would show, *prima facie,* that such transaction entered into was a part of the contract, and that all prior negotiations between the parties had been included in the written documents, namely, the trust deeds and the written directions, which the parties had settled upon as containing the final propositions, to which they had given their assent. Whatever may have been the prior negotiations of the parties, it is the written contract actually delivered, which the plaintiff seeks to enforce in this action, and it must accept it as an entirety, or not at all. Assuming, then, that the plaintiff should be permitted to show by parol testimony that it was not intended that the written directions accompanying the deeds were to be binding on it and the other beneficiaries, it should be required to establish that proposition by a preponderance of the evidence. This, in our opinion, it has failed to do. On the contrary, the evidence on that question preponderates in favor of the appellants. We are forced to the conclusion, therefore, that the written directions, for the sale of the property in the order therein prescribed, were a part of the contract whereby the trust was created.

The legal effect, then, of the power of sale contained in the trust deed in question, taken in connection with those

directions, is that the trustee is authorized to sell so much of the property therein described, as may be necessary to discharge the indebtedness secured thereby and remaining unpaid after the proceeds of the sale of the other trust property has been exhausted. It is only after such other property has been exhausted, that resort may be had to the property in controversy. That such other property has not been exhausted is conclusively established by the evidence. It follows, therefore, that the decree of the district court can not be sustained.

3. In view of the recommendation we intend to make in this case, it is proper at this time to notice another feature of the trust deed sought to be foreclosed. The power of sale authorizes the trustee to sell so much of the property, not exceeding ten thousand dollars' worth, as may be necessary to pay the amount due on the certificates; then follows a provision to the effect that the grantor shall be entitled to a reconveyance of the property from the trustee, upon the payment or deposit, by the grantor, of ten thousand dollars, "or so much thereof as may be necessary to pay his *pro rata* share of the amount due on the debt secured." It is contended that as there were five parties who gave security for the payment of the certificates, the "*pro rata*" share of the appellants' testator would be one-fifth. We do not consider that a proper construction of the contract, taken in its entirety. The certificates were not guaranteed by the testator, and he was not a party to the contract of guaranty indorsed on them. He merely pledged his property, to the extent of ten thousand dollars' worth, for their payment. Hence, aside from such liability as might arise from his being a stockholder, the certificates imposed upon him no personal liability. From the transaction, taken as a whole, we think it is clear that by the use of the phrase, "his *pro rata* share," the parties did not intend to convey the idea that he was to share equally with the guarantors in the payment of the debt. The true construction of the provisions of the trust deed under consideration is, we think, that the property conveyed, to the extent of ten

thousand dollars' worth, should stand as security for the debt, and that the grantor should be entitled to redeem at any time, by the payment of that sum to the trustee, or such sum as would bear the same relation to the debt remaining unpaid at the time of redemption, as ten thousand dollars bore to the original amount of the debt. It seems to us this is the only construction that is consistent with the rest of the contract.

The conclusion reached on the second proposition discussed in this opinion is not only fatal to the decree of the trial court, but is an insuperable obstacle to a recovery in this action, in the form it is brought. But we do not think the suit should be dismissed. A part of the trust property is before the court and there is no trustee. We think the plaintiff should be permitted to reform its pleadings, and bring in the necessary parties to enable the district court to enforce the trust according to its terms.

It is therefore recommended that the judgment heretofore entered by this court be vacated, and that the decree of the district court be reversed and the cause remanded for further proceedings.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment heretofore rendered by this court be vacated, and that the decree of the district court be reversed and the cause remanded for further proceedings.

REVERSED.

SULLIVAN, C. J., concurring.

I agree entirely with the reasoning and conclusion of the commissioner, but think there ought, perhaps, to be some slight elaboration of the views expressed upon one point.

The petition must state whether any proceedings have been had at law for the collection of the debt secured by the mortgage, and whether any part of such debt has been paid. This provision was for the benefit of the debtor. It

was intended to change the former practice, which permitted actions at law and suits in equity to be prosecuted concurrently. This practice was burdensome to the debtor, and the new procedure was designed to relieve him of the needless expense which it involved. *Dimick v. Grand Island Banking Co.*, 37 Neb. 394. The debtor must in the end reimburse his surety; he must not only pay the debt, but also the costs made in collecting it by the foreclosure of a mortgage upon the surety's property. If, therefore, the plaintiff may proceed at law against the principal debtor or some of his sureties, and in equity at the same time against other sureties, it seems clear that he is denied the benefit which it was the purpose of the statute to confer upon him. Practically, there is no difference between concurrent actions against the principal debtor, and concurrent actions against his sureties. In either case the unnecessary expense falls upon him.

The following opinion on motion for rehearing was filed February 4, 1904. *Motion denied:*

SEDGWICK, J.

We are entirely satisfied that the conclusion reached upon the last hearing is right, for the reason given by the commissioner and commented upon by Mr. Chief Justice SULLIVAN. The decree in the lower court was entered upon the pleading of the city of Red Cloud, and the city of Red Cloud is nominally a defendant upon this record. It may well be doubted whether sections 850 and 851 of the code apply to a defendant whose appearance in the proceedings is involuntary, who has an interest in the land to be affected by the decree, and is compelled against his will to come into court and show what that interest is. But this suggestion seems to be without force in this case, for, as shown by Mr. Commissioner DUFFIE in the first opinion filed herein, the city of Red Cloud was not made a party to this proceeding originally, and did not become a party until some time after the issues between the defendant and

plaintiff in the case had been disposed of by the court. The city of Red Cloud then appeared voluntarily in the case, asking for affirmative relief against all of the parties to the litigation and against other parties also. The relief asked for involved the foreclosure of a mortgage for the benefit of the city of Red Cloud, the real plaintiff in these proceedings, and there was, as pointed out in the opinion of Mr. Chief Justice SULLIVAN, no showing in the pleading (which must be regarded as a petition) that there were no proceedings at law pending in which the city of Red Cloud was attempting to recover the indebtedness. This requires a reversal of the decree of the trial court. Because of the unsatisfactory and confused condition of the evidence in the record, we adhere to the conclusion at the last hearing, that this case ought to be retried in the district court, and, for the same reason, we think that this retrial ought not to be limited or affected by anything said in the opinion of the commissioner, in discussing the weight or sufficiency of the evidence upon the former hearing of conclusions of fact to be derived from such evidence. With this modification, we think that the opinion upon the last hearing is correct and the motion for rehearing is therefore overruled.

Since the opinion was prepared there has been filed, without leave of court, a second brief on the motion for rehearing, in which it is insisted that there is matter in the answer to the cross-petition which should be construed as presenting the issue, that other actions were pending on the indebtedness involved. This contention is too late to be considered for the purpose of a rehearing.

MOTION DENIED.

ISAAC N. GODDARD, ADMINISTRATOR OF THE ESTATE OF ARTHUR E. GODDARD, DECEASED, V. CITY OF LINCOLN.

FILED JULY 3, 1903. No. 12,936.

1. **Municipal Corporations:** LIABILITY. The liability of a city, for injuries resulting from defective streets or sidewalks, rests exclusively upon express or implied provisions of the statute, and it is competent for the legislature to limit such liability or remove it entirely.
2. ———: DEFECTIVE SIDEWALK: NOTICE: PLEADING. Section 110, article 1, chapter 13, Compiled Statutes, provides, that cities of the first class shall not be liable for such injuries, unless notice in writing, of the defect causing the injury, shall have been filed with the city clerk, at least five days before the injury occurred. In an action to recover of a city for such injury, *held*, that a petition failing to allege the filing of such notice with the clerk, as required by said section, is fatally defective.
3. **Constitutional Law.** The guarantee in the bill of rights, that every person shall have a remedy, by due course of law, for every injury done him in his lands, goods, person or reputation, is not a guarantee of a remedy for every species of injury in respect of such matters, but only for such as result from an invasion or infringement of a legal right, or the failure to discharge a legal duty or obligation.
4. **Duty Imposed by Legislature.** Where a duty is imposed by the legislature, that body may qualify and limit it, and one complaining of an omission to discharge such duty will not be heard to complain of the qualifications and limitations accompanying it.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, DISTRICT JUDGE. *Affirmed.*

George A. Adams, for plaintiff in error.

Edmund C. Strode and D. J. Fleharty, contra.

ALBERT, C.

The plaintiff filed a petition against the defendant, which, omitting the formal parts, is as follows:

"The plaintiff complaining of the defendant, the City of Lincoln, says:

"1. That the defendant, the City of Lincoln, is a corpora-

tion organized and acting under the laws of the state of Nebraska, and is a city of the first class.

"2. That the plaintiff, Isaac N. Goddard, was on the — day of May, 1901, by the county court of Lancaster county, Nebraska, appointed administrator of the estate of Arthur E. Goddard, deceased, who died in the county of Lancaster and state of Nebraska, intestate, on or about the 6th day of May, 1901.

"3. That heretofore, to wit; on the 6th day of May, 1901, the decedent, Arthur E. Goddard, being then of the age of 15 years, and unmarried, was passing along and upon the sidewalk on the south side of R street, in the said city of Lincoln, Nebraska, between Nineteenth and Twentieth streets of the said city, and in front of lot 5, block 8, in Kinney's O street addition to the said City of Lincoln, Nebraska, and in front of a store known as 1903 R street, at which point, the said sidewalk was, at said time, badly and dangerously out of repair, the same being constructed of a wooden substance, being a board sidewalk, constructed originally by the laying of wooden stringers lengthwise along said sidewalk and the nailing of boards crosswise of said stringers along said sidewalk space; that said sidewalk was, at said time and place, to wit; May 6, 1901, and in front of lot 5, block 8, Kinney's O street addition to said City of Lincoln, Nebraska, and in front of the store building known as 1903 R street, in said city, badly out of repair, the boards of the same, and on the same, and constituting a part of the same, at said time and place, being loose and laying loose upon said stringers, and one or two boards being entirely removed therefrom, so that said sidewalk was, at said time and place, in an unsafe and dangerous condition and had so been in such unsafe and dangerous condition for a long time prior thereto, of all of which the said City of Lincoln had full knowledge; that on said day, and at said place, the said decedent, Arthur E. Goddard, while lawfully and rightfully passing along and over said sidewalk, without any fault or negligence of his, or without any fault or negligence of the plaintiff,

Isaac N. Goddard, stepped into the hole in said sidewalk, and because of said unsafe condition of the same and without any fault of his or his said father, plaintiff herein, was thrown violently and forcibly to the ground, and upon said sidewalk, so that he was seriously, dangerously and mortally injured, and from the effects of which he soon thereafter died.

"That the death of said Arthur E. Goddard was caused by and through the negligence of the said defendant, the City of Lincoln, without any fault or negligence on his part or on the part of his father, Isaac N. Goddard, who sues herein as administrator of his estate.

"That said decedent, Arthur E. Goddard, was a bright, healthy, intelligent and industrious boy; that his services were worth to his father the sum of $500 per year; that the plaintiff herein has been put to a large expense in the burial and funeral services of said decedent to wit; the sum of $150.

"That by reason of the wrongful death of the said Arthur E. Goddard, as above stated, the plaintiff has been damaged because of the loss of his service, society and expense of burial, etc., in the sum of $5,000.

"That after the death of the said Arthur E. Goddard to wit; on the — day of May, 1901, and within thirty days from the date of his death and from the date of said injury causing his death, this plaintiff filed with the mayor and city council of said City of Lincoln, Nebraska, defendant herein, a claim for said damages in the sum and amount herein sued for, and the said city, defendant herein, failed and refused to allow or pay the same or any part thereof."

The defendant interposed a general demurrer, which was sustained by the court; the plaintiff elected to stand on his petition, and judgment was given for the defendant. The plaintiff brings error.

We think the demurrer was properly sustained. A city is a creature of the legislature; its rights, duties and liabilities are to be measured by the statute under which it exists. Early in the history of this state, a city was held

liable for injuries resulting from the defective condition of its streets, on the ground that it had exclusive control of such streets, and the legislature had placed ample means at its disposal to maintain its streets in a safe condition. *City of Omaha v. Olmstead,* 5 Neb. 446. The principle announced in that case has since been frequently applied. *City of Aurora v. Cox,* 43 Neb. 727; *City of Lincoln v. O'Brien,* 56 Neb. 761; *City of Beatrice v. Reid,* 41 Neb. 214. As the liability in such cases must rest on some express or implied provision of the statute, it is clear that the legislature may place such limitations upon it as it may deem proper, or, for that matter, take it away entirely. The defendant is a city of the first class, and is governed by the provisions of chapter 16, laws of 1901, which is chapter 13 of the Compiled Statutes of 1901. Section 110, article 1 (Annotated Statutes, 7809), of that chapter is as follows:

"Cities of the first class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof within such cities, unless actual notice in writing of the defect of such public way or sidewalk shall have been filed with the city clerk at least five days before the occurrence of such injury or damage. In the absence of such notice, so filed, the city shall not be liable and in all cases such notice shall describe with particularity the place and nature of the defects of which complaint is made."

The foregoing section clearly limits the liability of cities, for injuries resulting from defective streets or sidewalks, to such injuries as result more than five days after the filing of the notice in accordance with the provisions of such section. In other words, in order to fasten the liability upon a city, it is incumbent upon those seeking to recover for the injury, to allege and prove, not only the fact of the injury, but, that notice of the defect causing the injury had been given, for the time and in the manner provided by said section; and a petition which fails to allege that such notice was given, as thereby required, and for the length of time there specified, is vulnerable to a

demurrer, because it omits one of the ultimate facts essential to a recovery.

The plaintiff contends, that the section quoted contravenes the bill of rights, which guarantees to every person a remedy for any injury done him in his lands, goods, person or reputation. The constitutional provision invoked was not intended to guarantee indemnity against injury of every species, but, only such as result from the invasion or infringement of a legal right, or the failure to discharge a legal duty or obligation. While the charter of cities of the first class imposes upon such cities the duty of keeping their walks in a reasonably safe condition, by the provisions of section 110, *supra,* such duty does not become imperative, or active, until the notice therein provided has been given in the manner and for the time therein specified. Such duty and its correlative right, as we have seen, rests exclusively on the statute. It was competent for the legislature to relieve such cities from the duty of maintaining their walks, and from all liability for injuries resulting from their unsafe condition. If the right to recover for such injuries might have been withheld entirely, one seeking to recover for such injuries certainly can not complain of the conditions with which the legislature has seen fit to accompany the right. The law, like the rules of society, forbids that one should complain that a gift is less valuable than it should be.

The plaintiff also contends, that the petition charges that the city had full knowledge of the defective condition of the walk where the injury occurred, and consequently that a written notice, filed with the clerk, would have served no useful purpose. The section quoted should be read in connection with section 108, which precedes it, and which provides that five days' notice by publication be given abutting owners, of the unsafe condition of the sidewalks, and makes such owners primarily liable for injuries resulting from such condition after that time. The provisions of section 110 were clearly intended to enable the city to take steps to fasten the liability upon the abutting

owners. But whatever its purpose, it is clear and explicit, that the city is not liable, unless the notice, required by its terms, be given in the manner therein provided. It makes such notice a condition precedent to a recovery, and unless it be averred and proved, there can be no recovery. *McNally v. City of Cohoes,* 53 Hun (N. Y.), 202, appears to be in point. A special statute provided, that

"The city of Cohoes shall not be liable for the damage or injury sustained by any person in consequence of any street, highway, bridge, culvert, sidewalk or cross-walk in said city being out of repair, unsafe, dangerous or obstructed by snow, ice, or otherwise, or in any way or manner, unless actual notice of the defective, unsafe, dangerous or obstructed condition of said street, highway, bridge, culvert, sidewalk or cross-walk shall have been given to the common council of the said city, or the superintendent of streets and public grounds of said city, at least twenty-four hours previous to such damage or injury."

In that case, where the statute just quoted was involved, the court said:

"Previous to this statute, constructive notice would have sufficed. Constructive notice signifies that the party to be affected might reasonably have acquired or obtained actual notice, and that if he had not it was his fault; and since he could not interpose his fault to protect himself, he was without protection against the charge of notice imputed by the circumstances. Constructive notice in case of defective streets is an inference of notice, drawn from official opportunity to obtain it and from official obligation to be reasonably vigilant in keeping the public streets safe for travel.

"The many cases, somewhat similar to the one now before us, which have been before the courts, in which notice has been imputed to municipal corporations by juries, have not infrequently excited the suspicion that municipal corporations are too liable to be unjustly convicted of negligence, and that the doctrine of constructive notice affords too dangerous a temptation to juries to make such corpora-

tions the indemnitors of the injured, under the unjust pretext that their negligence caused the injury. It is not improbable that such considerations, whether just or unjust, were in the mind of the framers of this statute. Its object is to exempt the city from liability unless it has actual notice as distinguished from constructive or possible or imputed notice, which may, in fact, be no real notice. It requires that such actual notice must be given, not imputed, not derived, or obtained, or acquired. * * * The courts can not say that it is wrong for the legislature to impose upon the citizen, as a condition of the liability of the city to him, that he, or some one of his fellows, shall give some notice of the danger which exists. It may be wise to enact that the government will protect the people if only some one of the people will give notice that protection is needed. The people are many compared with the few officials, and it may not be unreasonable that the people should be accorded the privilege to summon the officials to duty."

The foregoing, we think, justifies the judgment of the district court; and it is unnecessary, therefore, to go into the other defects in the petition, which the defendant insists were sufficient to warrant the court in sustaining the demurrer.

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

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

THOMAS L. HALL v. WESTERN TRAVELERS ACCIDENT ASSOCIATION.

FILED JULY 3, 1903. No. 13,145.

1. **Beneficial Insurance Company**: AMENDMENT TO CONSTITUTION. A member of a mutual insurance company, who accepts membership subject to such provisions of the constitution as are then in force or may be thereafter adopted, is bound by a reasonable amendment to the constitution subsequently adopted.
2. ———: ———. Such companies are self-governing bodies, and courts will interfere in case of amendments to their constitution only when the amendment is unfair, operates oppressively or to the disturbance of vested rights; amendments which do not thus operate are not unreasonable.
3. **Reasonable Amendment.** On the facts stated, *held*, that the amendment was reasonable and binding on the assured.

ERROR to the district court for Douglas county: WILLARD W. SLABAUGH, DISTRICT JUDGE. *Affirmed.*

Thomas L. Hall, for plaintiff in error.

Harry E. O'Neill and *W. O. Gilbert, contra.*

ALBERT, C.

The defendant is a body corporate, organized under the laws of this state, for the purpose of creating and maintaining "a mutual fraternal insurance association, for the benefit of those who become its members." On the 28th day of February, 1894, one William R. Parks became a member of the association and received a certificate of membership, which, omitting the formal parts, is as follows:

"This certifies that William R. Parks is while in good standing a member of the Western Travelers' Accident Association, and is entitled to all its benefits under the provisions on the back of this certificate, and named in the

constitution and by-laws, and subject to the warranties, contained in the application for membership."

The provisions on the back of the certificate are:

"Payments will be made: For injuries received through external, violent and accidental means and resulting in death, loss of hands, both feet or both eyes, $5,000; permanent bodily disability, $2,500; loss of one foot, one hand or one eye, $1,250; temporary bodily disability, $25 per week, for a period not to exceed fifty-two weeks."

On the back of the certificate there is also a clause making the constitution and by-laws of the association, the application for membership and the certificate the contract between the association and the certificate holder. In his application for membership, the assured expressly agreed to accept membership "subject to the provisions and limitations of the constitution and by-laws of the association, now in force or that may be hereafter adopted." At the date of the certificate, the constitution expressly provided for its revision and amendment. Afterward, the association duly adopted the following amendment to its constitution:

"The association shall not be liable for disappearances nor shall the association be liable for injuries occasioned, wholly or partly, directly or indirectly, by any of the following acts, or causes, occurring while so engaged or affected: Disease, bodily and mental infirmity, hernia, orchitis, fits, vertigo."

On the 28th day of December, 1901, and after the adoption of said amendment, the assured, in a fit of vertigo, fell, and through the external, violent and accidental means, received bodily injuries which, independently of all other causes, wholly disabled him for a period of one week. He then made claim for indemnity under his certificate, and duly complied with the rules and regulations of the association in that behalf. Thereafter, he assigned his claim for indemnity to the plaintiff in this case. The association refused to pay the claim, and the plaintiff brought this action to recover it. The case was submitted to the district

court on a stipulation of the parties, and judgment given for the defendant. The plaintiff prosecutes error to this court.

By agreement of the parties, the sole question presented to this court is: whether the amendment to the constitution excepting injuries received as a result of vertigo from the class for which the association would pay indemnity, is binding on a certificate holder whose certificate was issued before such amendment was adopted, but whose injury occurred thereafter. That a member of a mutual insurance company, who accepts membership subject to such provisions of the constitution as are then in force or may be thereafter adopted, is bound by a reasonable amendment to the constitution, subsequently adopted, is no longer an open question in this state. In *Farmers Mutual Ins. Co. v. Kinney,* 64 Neb. 808, this court, speaking through OLDHAM, C., say:

"An examination of many adjudged cases on this question leaves no doubt in our mind that under a great weight of authority a member of a mutual insurance company, who agrees in his application to be bound by subsequent by-laws of his association, will, when such subsequent by-laws are reasonable, and enacted under properly delegated authority, be bound by those subsequently enacted in the same manner that he is bound by those in existence at the time his certificate of membership is issued."

The following authorities support the doctrine just stated: *Hobbs v. Iowa Mutual Benefit Ass'n,* 82 Ia. 107, 47 N. W. 983; *Borgards v. Farmers Mutual Ins. Co.,* 79 Mich. 440, 44 N. W. 856; *Hughes v. Wisconsin Odd Fellows Mutual Life Ins. Co.,* 98 Wis. 292, 73 N. W. 1015; *Stohr v. San Francisco Musical Fund Society,* 82 Cal. 557, 22 Pac. 1125; *Supreme Commandery of the Knights of the Golden Rule v. Ainsworth,* 71 Ala. 443, 46 Am. Rep. 332; *Ellerbe v. Faust,* 119 Mo. 653, 25 S. W. 390; *Daughtry v. Knights of Pythias,* 48 La. Ann. 1203; *Fugure v. Mutual Society of St. Joseph,* 46 Vt. 362; *McCabe v. Father Mathew Total Abstinence Benefit Society,* 24 Hun (N. Y.),

149; *Supreme Lodge, Knights of Pythias v. Knight*, 117 Ind. 489; *Montgomery County Farmers Mutual Ins. Co. v. Milner*, 90 Ia. 685, 57 N. W. 612; *St. Mary's Beneficial Society v. Burford*, 70 Pa. St. 321; *Moerschbaccher v. Supreme Council of the Royal League*, 118 Ill. 9; *Robinson v. Templar Lodge, No. 17, I. O. O. F.*, 117 Cal. 370, 49 Pac. 170; *Falcone v. Societa Sarti Italiani Di Mutuo Soccorso*, 30 Misc. (N. Y.) 106, 61 N. Y. Supp. 873.

In view of the holding of this court in *Farmers Mutual Insurance Co. v. Kinney, supra*, it would seem that the only question left in this case is, whether the amendment in question, excepting injuries received as a result of vertigo from the class of injuries against which the association would indemnify its members, is reasonable.

In the determination of that question, the nature of the association should be kept in mind. It is not maintained for the purpose of profit to itself as a legal entity, but for the benefit of its members, in order to distribute the burden of individual misfortunes of a specified class among the entire membership; mutuality is its controlling feature. It is obvious, therefore, that for a benefit bestowed on one member, there must be a corresponding burden imposed on the other members collectively, and that a proper adjustment of the benefits to the burdens is essential to its existence as a mutual organization. The constitution is the fundamental compact between the members, and usually, as in the present instance, outlines the plan for the distribution of the benefits and adjustment of the burdens among them. Unerring foresight is not the gift of any man or body of men, and experience alone can demonstrate whether the plan authorized by a constitution is the best or even practicable. The welfare of the association, if not its existence, may demand a change in the constitution and a readjustment of the relations between the benefits and burdens. The association is a self-governing body, and it is for its members to determine when such change is required or advisable. The courts will interfere only when such change is unfair or operates oppressively, or to the disturb-

ance of vested rights; when it does not do that, it is reasonable within the meaning of the term as used by this court. In this case the amendment operated not only to deprive each member of the benefits to which he would be entitled in case of an accident resulting from vertigo but also relieved each member from the corresponding burden. It operated alike on each member and gave no advantage to one over another. Such an amendment can not be said to be unfair, nor oppresive, nor to deprive any member, whose injury, as in the present case, occurred after the adoption of the amendment, of any vested right. That being true, the amendment was a reasonable exercise of the right of the association to amend its constitution, and having expressly reserved that right when it issued the certificate, the assured and his assignee are bound by the amendment. Most of the cases heretofore cited support this conclusion; none of them conflict with it.

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

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

CHARLES H. WITHNELL ET AL. V. MARTHA A. WITHNELL ET AL.

FILED JULY 3, 1903. No. 12,919.

1. **Tenant by Curtesy.** Plaintiffs' mother died in 1883, seized in fee of real property in this state, leaving their father as surviving spouse. *Held*, That the father took a life estate in the property as tenant by curtesy.

2. **Sale by Life Tenant and Remainderman: PROCEEDS.** Plaintiffs and their father sold, for $40,000, real property in which he held a life estate and they the remainder. Plaintiffs received $24,000 and the father retained $16,000, and mingled it with his own prop-

erty. The father lived nine years after the sale, his age not being shown in the record. *Held*, That these facts do not show plaintiff's ownership of the $16,000 retained and used by the father. *Held*, further, That the father's declaration of an intention to invest the same for the plaintiffs did not create a title thereto in them.

3. **Record and Evidence: EQUITABLE TITLE.** Record and evidence examined and *held*, not to show error. *Held*, further, That the trial court was justified in rejecting plaintiff's claim of equitable title to the property involved in the action.

ERROR to the district court for Douglas county: GUY R. C. READ, DISTRICT JUDGE. *Affirmed.*

A. L. Knabe and *Martin Langdon*, for plaintiffs in error.

A. S. Ritchie and *Carl E. Herring*, *contra.*

GLANVILLE, C.

This action is brought for the purpose of establishing title to certain property in the city of Omaha, in the plaintiffs, on the ground that the same was held in trust for them. The plaintiffs are all of the children of Mary Withnell and John Withnell, deceased. The defendants are Martha A. Withnell, stepmother of the plaintiffs, and widow of the deceased, John Withnell, and the administrator of the estate of John Withnell. There is no allegation or proof of any facts to indicate that the administrator has any interest in the contest, and his connection therewith will be ignored in this opinion. After the introduction of plaintiffs' evidence, the trial court, upon motion of the defendant, found, "that no resulting trust had been shown by the said plaintiffs by clear and satisfactory evidence," and rendered judgment in favor of the defendants

A motion for new trial was made and overruled, and the case is before us upon petition in error.

The facts clearly established by the pleadings and proofs are as follows: Mary Withnell and John Withnell were living with their family upon certain property in the city of Omaha, which we will designate herein as the Fifteenth

street property, prior to and at the time of the death of Mary Withnell, and at the time of her death in January, 1883, she was seized in fee of that property. John Withnell and his family continued to reside thereon until January, 1892. In the meantime, the defendant, Martha A. Withnell, was married to John Withnell in 1887, and resided with him from that time until his death, January 29, 1901.

On the 28th day of January, 1892, this Fifteenth street property was sold for $40,000, and the plaintiffs and John Withnell made the deed therefor, but John Withnell made the deal, and the money was paid to him. Of this sum of $40,000, $24,000 was, by some understanding among the parties, paid to the plaintiffs, $3,000 to each of them, unless possibly one of them may not have received her portion; and $16,000 was retained by the father. Previous to that time, those lots in the city of Omaha, which we will hereafter call the Farnam street property, were deeded to John Withnell, the consideration, as shown by the deeds, being $14,700, the deeds being dated August 4, 1887, and July 25, 1888.

Almost simultaneously with the receipt of the last half of the purchase money for the Fifteenth street property, John Withnell commenced the erection of a home on the Farnam street property, into which he afterward moved with his family. April 4, 1894, this Farnam street property was sold, the consideration named in the deed being $40,000. It was at the time incumbered by mortgages to the extent of $9,000, and in exchange, or part payment therefor, the property involved in this action, known as the St. Mary's avenue property, was taken for the consideration of $15,000. There is no pleading or proof as to how, or in what form, the other portion of the consideration was received. It is unequivocally alleged in the petition, and admitted in the answer, that John Withnell died seized in fee of the St. Mary's avenue property. It is, however, in another part of the petition alleged:

"That John Withnell, deceased, did take the title to said property last aforementioned (the St. Mary's avenue prop-

erty), in the name of himself and Martha A. Withnell, his second wife, and that the title to said property so remained and was of record at the time of the death of the said John Withnell."

And the allegations of that paragraph of the petition in which the foregoing is contained are admitted generally by the defendants. The proof shows that the deed was taken to the husband and wife, and there is no allegation or proof of any change of title thereafter. This St. Mary's avenue property is incumbered by a mortgage made by John and Martha A. Withnell, to the extent of $2,000.

Aside from what appears as above stated, there are matters in dispute. The plaintiffs in their petition allege as follows:

"That on the 28th day of January, A. D. 1892, these plaintiffs sold said property aforementioned (the Fifteenth street property) to one Bartholomew Scannel, in consideration of the sum of forty thousand ($40,000) dollars; that immediately thereafter, these plaintiffs handed to the said John Withnell the sum of sixteen thousand ($16,000) dollars, without relinquishing their rights thereto, and upon the express understanding and verbal agreement with the said John Withnell, that he, the said John Withnell now deceased, should take said money aforesaid, and invest it for the benefit of these plaintiffs.

"Plaintiffs further allege that the said John Withnell, deceased, thereupon, afterwards, did invest said money on or about the 2d day of July, A. D. 1892, in a residence building upon (here is described the Farnam street property) and in improvements upon said property."

The proof does not correspond with the first allegation, and, in fact, clearly establishes that the $16,000 were never paid to the plaintiffs, nor in any manner ever placed in their possession, nor came under their control. Neither does it establish the fact that they alone sold the property, for John Withnell necessarily joined in the deed for the purpose of conveying his interest therein, which was a life estate as hereafter shown, and it was his life estate, to-

gether with their remainder, that was sold by them and their father.

As to the use of the $16,000 in the erection of the improvements upon the Farnam street property, we are of the opinion that the proof sufficiently sustains this allegation, if the title of the plaintiffs to said $16,000 is sufficiently established by the proof.

Again it is alleged by the plaintiffs that the St. Mary's avenue property is of the value of $8,000; this is denied by the answer, which alleges that its value does not exceed $4,000. No evidence as to its value appears in the bill of exceptions.

There is also an allegation in the petition that during her lifetime, Mary Withnell sold certain real estate, "and realized therefrom the sum of $5,500, which said sum of money, without relinquishing her right thereto, she handed to the said John Withnell, deceased, to be invested for her, and that the said John Withnell did invest said money in the following described property"—then follows the description of the Farnam street property. As to this allegation, it appears by the evidence that the property mentioned was sold in 1882; that Mary Withnell died in 1883; and that the Farnam street property was purchased in 1887 and 1888. It further appears that the consideration for the property sold in 1882 was but $4,050 above the incumbrance. There is absolutely no evidence to trace any of this money into Mr. Withnell's hands, or into the Farnam street property, unless it be that one witness testified to being present a few days before the death of Mary Withnell, when she stated to her husband, "You have $8,000 of mine in your possession, and that belongs to the children," and that he said, "Yes, Mary, that is right." And the testimony of the son-in-law, E. D. Bellis, wherein he stated that John Withnell had, on one occasion, told him that he had some money that Mrs. Mary Withnell had left in his hands, a portion of which he had invested with the firm of Withnell Brothers, and had drawn out from Withnell Brothers this amount (witness did not remember what amount) to-

gether with what the profits had been on it, and he had bought two lots on Farnam street. This conversation is alleged to have taken place in 1892. This evidence is insufficient to establish any trust in the unimproved lots on Farnam street in favor of the children because of ownership of the money paid therefor, and if any trust in either the Farnam street property, or the St. Mary's avenue property, resulted in their favor, it must be because of their ownership of the $16,000 retained by their father.

It is contended by plaintiffs that this money belonged to them, not that their title thereto resulted from any contract with their father, or gift thereof by him, but that as a matter of law, their mother having died seized of the property for which this money was received, the money became their property, and that their father received and held the same in trust for them. If they can not prevail in this contention, there is no hope of their establishing a trust in the property in dispute. If the money belonged to the father, his promise to invest it for them would not pass the title to them; it would not be good as a gift *inter vivos,* because it was never delivered to the plaintiffs or invested in their name. If he had joined in the deed, and permitted the children to collect and retain the entire consideration, that might have been good as an advancement, but that was not done. As a matter of law, when Mrs. Mary Withnell died seized in fee of the Fifteenth street property, the title vested *eo instanti* in John Withnell for life, as tenant by curtesy, with remainder to the plaintiffs. Section 29, chapter 23, on decedents, in our statutes, as it stood prior to the amendment of 1887, provided that:

"When any man and his wife shall be seized in her right of any estate or inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life, as tenant thereof by curtesy."

Nothing in the bill of exceptions or the pleadings shows the age of John Withnell at any time. It is therefore impossible to determine his expectancy under the Car-

lisle table; he died January 29, 1901, nine years and a day after the date of the deed to the Fifteenth street property. He was in fact, then, the owner of a life estate in the property which would have lasted for nine years.

Had the parties recognized his right to the use for life of the entire $40,000 in lieu of his life estate in the property sold, and the whole sum had been left with him in recognition of this right, we are of the opinion that he would have been trustee for the remaindermen.

In *Cheshire v. Cheshire,* 2 Ired. Eq. (N. Car.) 569, it is said:

"A court of equity has invariably entertained a bill by one, entitled to a personal chattel in remainder after a life estate, to have the property secured, when it is alleged in the bill that it is likely to be lost by any means whatever, and when the particular property has been converted into another species of property by the tenant for life, or those who claim in privity with him, the remainderman may elect to follow and take the fund in its changed form."

The same rule is announced in *Hunter v. Yarborough,* 92 N. Car. 68.

But the $40,000 was not so left with the father, but was separated into two funds, $24,000 and $16,000. The present worth of $40,000 due in nine years, computed on the basis of seven per cent. simple interest, is in the neighborhood of $24,500, while compounding the interest, with annual rests, it is something less than $22,000, making the value of the father's life estate from $15,500 to $18,000.

It can not be supposed under the evidence that John Withnell would be willing to forego his legal interest in this property. It is shown by the plaintiff's witnesses that at that time he was not making money in his business, and it is not shown that he had any other tangible property, except the unimproved lots on Farnam street. The fact that the $24,000 were paid to the children and recognized as theirs, and that $16,000 were retained by

the father, leads us to the belief that the $16,000 were so retained by him as the agreed value of his interest in the property, computed upon some basis agreed upon between him and the children, and that the money, in fact and in law, was the property of the father. If this is correct, then no promise, on his part, to do anything with the property for the benefit of the children, would have the effect of placing the title thereto in them, until their title was made good by some delivery or investment in their name, neither of which ever took place. A resulting trust can no more be *created* by an oral contract or oral declarations of holding the property in trust, than can an express trust be so created; a resulting trust in land is created by operation of law, and only because of being created by operation of law, does it constitute an exception to the rule that a trust in land can not be created or declared except in writing. Only the *facts* upon which the *law* will raise the trust may be proved by parol. Unless the money itself belonged to the children, its investment in real property by their father did not create a trust by operation of law. While oral declarations of one in possession of a fund are admissible for the purpose of helping to trace the fund when its trust character is established, and also as evidence tending to establish such character by way of admission, yet they can not alone create ownership in the supposed *cestui que trust*, or deprive the real owner of his right thereto, unless, because of the circumstances, they create an estoppel.

Defendant has contended that, under the pleadings and evidence, if any trust is claimed and shown, it is an express trust, and void under the statute of frauds, because by parol, and that, there being an express trust, no resulting trust can be raised. These results do not necessarily follow. An express trust in the $16,000 fund could be created by parol contract if the plaintiffs owned the fund, and then, the fund being held under express trust, if it was converted by the trustee into other property, and the title thereto taken in his own name, a resulting trust

would attach to the property in which the fund was invested.

A very common case of resulting trust is where one holding a fund under an express trust, either with the duty of holding the fund intact, or with power of discretionary investment, invests the trust fund in his own name, and the law raises a resulting trust in the acquired property because of the ownership of the fund, notwithstanding it was originally held under an express trust.

All that we can say for the most favorable evidence introduced by the plaintiffs, is that it tended to establish a promise of their father to invest the $16,000 for them, without any indication or specification as to what investments would be made; and some conversations thereafter indicating that he considered the Farnam street property, which was eventually sold for $40,000, as their property, or rather, perhaps, that their money was invested therein; together with some rather loose and illy proved conversations in which the St. Mary's avenue property was spoken of as theirs. The difference between the selling price of the Farnam street property, and the incumbrance thereon added to the price of the St. Mary's avenue property, is $16,000. If by any construction of the evidence it will be sufficiently established that the original $16,000 fund was the property of the children, and that their father had promised to invest the sum for them without specifying the investment, he could undoubtedly dedicate to the trust fund any of the proceeds of the sale of the Farnam street property he saw fit, either the St. Mary's avenue property, or other portion of the consideration. That he did not dedicate the St. Mary's avenue property to such trust fund, is evidenced by the fact that he took the title thereto, jointly with his wife, the defendant, and then, with her, incumbered it by mortgage.

The lots on Farnam street for which he had paid the consideration of $14,700 appear to have been clear in his name after his marriage with the defendant, and she

had an interest therein; her signature to the deed was needed to bar her dower, and was indispensable to convey the homestead interest; moreover, there is no evidence or pleading to show that he might not at that time, make a valid advancement to her, and we think that after causing an interest in this property to be conveyed to her, when it was taken in exchange for their prior home and property, he could not then dedicate it to the trust fund so as to destroy her interest therein.

It is urged by defendant that the $16,000 fund must be directly and specifically traced into the property sought to be impressed with the trust. While under certain conditions this is the rule, yet, when the trust is clear, and the trustee has dissipated the trust fund, an instant and continuing duty rests upon him to restore the fund, and he may do so by an appropriation of any of his own property to the trust estate. In *Houghton v. Davenport*, 74 Me. 590, it is said:

"A trustee need not purchase property with the very dollars received from the trust fund, nor give any notice to the *cestui que trust* of the purchase, nor make any delivery to him, in order to create a trust estate. If he uses or loses the trust fund, he may afterwards, by some proceeding or act of his own, substitute his own money therefor, and the substituted money will be subject to the same trust that was imposed upon the money by the trustee used or lost. If a trustee commingles trust money with money of his own, and afterwards separates from the common fund a proper portion of it as the property of the *cestui que trust*, and with such portion of the fund, purchases real estate in his own name, the trust becomes impressed upon and attaches to the money thus set aside and the real estate purchased with such money."

But we think no separation and dedication is proved in this case.

It is worthy of note that the deed to the St. Mary's avenue property, carrying the title to plaintiffs' father and stepmother, was at once recorded, yet, though his

health was known to be failing, there does not appear to have been any attempt made to secure a conveyance in recognition of the alleged trust.

Upon the whole case we think the trial court was right in holding the evidence insufficient to establish a resulting trust in favor of the plaintiffs in the property in question.

Complaint is made, and error assigned, because the court ruled out certain evidence offered by the testimony of William Withnell. If the ruling of the court thereon were error, it is without prejudice, for the matter offered to be proved by this witness was well established by the evidence of another.

Complaint is also made that the court erred in admitting a certain chattel mortgage in evidence as an exhibit during the cross-examination of a witness. The matter was within the discretion of the court, and moreover, the contents of the chattel mortgage had already been read into the record upon the cross-examination, and its admission as an exhibit could not change its force.

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

BARNES and ALBERT, CC., concur.

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

AFFIRMED.

SAMUEL MOORE V. WILLIAM A. WADDINGTON.

FILED JULY 3, 1903. No. 12,993.

1. **Election Contest:** DISMISSAL. The contestant in a proceeding to contest an election may voluntarily dismiss the proceedings at any time before issue is joined.

2. ———: ———. INTERVENTION. When such dismissal has been entered, the court, until it is set aside, is without jurisdiction to

allow another party to intervene and be substituted as contestant. Whether such dismissal can be set aside, *quære.*

3. **Setting Dismissal Aside:** NOTICE. In such case, the trial court has no authority to set aside the dismissal without notice to the contestant.

4. **Review:** PARTIES. After a motion to set aside such a dismissal, and an application for leave to intervene was made by the plaintiff in error, the incumbent challenged the jurisdiction of the court to set aside the dismissal, or to allow the intervention. *Held*, That an order sustaining such challenge in the case before us is not shown to be prejudicially erroneous. *Held*, further, That contestant is a necesary party to proceedings in error to review such order.

ERROR to the district court for Gage county: CHARLES B. LETTON, DISTRICT JUDGE. *Affirmed.*

Leonard W. Colby and *A. H. Kidd,* for plaintiff in error.

Ernest O. Kretsinger, Alfred Hazlett and *Fulton Jack, contra.*

GLANVILLE, C.

This case is before us upon a petition in error from the district court for Gage county, containing the following assignment of error, only: "The court erred in affirming the order, judgment and proceedings of the county court, and in dismissing said action."

The case was in the district court upon a petition in error from the county court of Gage county, and the judgment of the district court complained of is as follows:

"Now on this 15th day of May, 1902, it being the thirty-ninth day of the February, 1902, term of the district court for Gage county, Nebraska, this cause came on to be heard upon the petition in error and the transcript of the proceedings, final judgment and order of the county court of Gage county, Nebraska, on file, and was submitted to the court, on consideration whereof the court finds no

error in said order, judgment and proceedings. Plaintiff in error excepts.

"It is therefore considered by the court that said order, judgment and proceedings be and the same are hereby affirmed, and that the defendant William A. Waddington go hence without day and recover his costs against the plaintiff herein expended, taxed at $——, and it is further ordered that execution be awarded in this court to carry into effect this judgment. Plaintiff in error excepts."

The only assignment of error in the petition, filed in the district court, is as follows: "The court erred in sustaining the objections of the defendant to the jurisdiction of the court." The statement in that petition as to the judgment or order sought to be reversed is as follows:

"The plaintiff in error complains of the defendant in error for that on the 11th day of January, 1902, the defendant herein as incumbent and contestee obtained a ruling and order of the county court of Gage county, Nebraska, in an action pending in said court wherein the plaintiff herein was plaintiff and the defendant herein was defendant, in which the said court sustained the objections of the contestee and defendant to the jurisdiction of said court, whereby a judgment was prevented."

The order of the county court complained of, shown by the record, is as follows:

"January 11th, 1902, at 9 o'clock A. M., the court being duly advised in the premises, sustains the objections to the jurisdiction of the court filed herein by the defendant and contestee; to which ruling the said Samuel Moore, by his attorneys, duly excepts.

"F. E. BOURNE, *County Judge.*"

It appears from the record that an action had been commenced in the county court of Gage county, by one Winfield S. Tilton, against the defendant in error, contesting his election to the office of sheriff of Gage county; and by the law governing such cases the action would have stood for trial on January 6, 1902, the first day of

the January term of that court. No record was brought to the district court, except a certified copy of the contents of the docket of the county court in which we find the following entry:

"January 4, 1902. Dismissal filed herein, a copy of which is as follows, to wit:

"In the County Court of Gage County, Nebraska.

"Before F. E. Bourne, County Judge.

"Winfield S. Tilton,
Contestant and Complainant,
v.
William A. Waddington, Incumbent. } Dismissed.

"Comes now the above named contestant and hereby dismisses the above action.

"Dated this 4th day of January, 1902.

WINFIELD S. TILTON, *Contestant.*"

It further appears that on that day he paid the entire costs.

The next entry upon the docket is:

"January 6, 1902. It is therefore ordered by the court that said cause be dismissed at contestant's costs, taxed herein at $6. F. E. BOURNE, *County Judge.*"

It is urged by the plaintiff in error that this entry was made prior to nine o'clock A. M., of the day of its date, and that the same is shown by affidavits. There was no bill of exceptions taken and the affidavits can not be considered.

The next entry is "January 6, 1902, at 8:20 o'clock, A. M., objections to dismissal and motion to substitute party contestant filed herein, a copy of which is as follows:" Then follows a paper entitled in the original cause, made on the part of plaintiff in error, copied in full into the docket. If we may consider this paper as a part of the record, it is sufficient to say, it is an application to intervene, and to be substituted for the contestant, showing

that the applicant is such party as by law may contest the election in question, with an offer of the bond required by statute.

The next entry upon the docket is as follows: "January 6, 1902, motion of Samuel Moore to set aside dismissal, supported by affidavit of A. H. Kidd, filed herein as follows:" The motion, omitting formal parts, is as follows: "Comes now Samuel Moore and says that he is a resident and an elector of Gage county, Nebraska, and has been for two years last past, and voted in said county at the general election held in November, 1901, and said Samuel Moore moves the court to vacate and set aside the order dismissing the above cause which was entered on the docket January 6, 1902, for the reason that said order was made by said court, and entered by said court, upon said docket about 8 o'clock, A. M., on January 6, 1902, before the opening of the January, 1902, term of the county court, at which said cause was to be heard, and before the opening of court on said day as shown by the affidavit of A. H. Kidd, hereto attached marked 'A' and made a part of this motion."

The next entry is "January 10, 1902. Notice with indorsements of service thereon filed herein, a copy of which is as follows:" Then follows a notice addressed to Winfield S. Tilton, and William A. Waddington, with indorsement of service, signed "J. W. Ashenfelter, Chief of Police."

The next entry is "January 10, 1902. Special appearance to jurisdiction of the court filed herein, a copy of which is as follows:" Then follows upon the docket what purports to be a copy of a paper filed on the part of William A. Waddington, and which, omitting signatures and formal parts, is as follows:

"Now comes William A. Waddington, defendant and contestee, and makes his special appearance herein for the sole purpose of objecting to the jurisdiction of this court to proceed further in the cause for the following reasons, to wit:

"1. Said cause was dismissed by the said Winfield S. Tilton on Jan. 4, 1902, by written dismissal and all the costs paid by him.

"2. Said cause was dismissed by the court on Jan. 6, 1902, before any papers had been filed by the said Samuel Moore or any other objector.

"3. This court has no jurisdiction to proceed further in this cause.

"4. This court has no jurisdiction to permit the said Samuel Moore to intervene in this cause.

"5. The dismissal of this cause by the plaintiff, Winfield S. Tilton, terminated said action in this court.

"6. The said Samuel Moore has no legal right to be substituted instead of said Tilton in this cause, and the court has no jurisdiction to make said substitution."

The next entry is:

"January 10, 1902, at 9 o'clock, A. M., this cause came on for hearing before the court upon the objections to dismissal, and motion of Samuel Moore to be substituted as party contestant, with the bond tendered, and the affidavits of A. H. Kidd and L. W. Colby attached thereto, and upon the motion of Samuel Moore to set aside the dismissal entered in this cause, with the affidavit of A. H. Kidd attached to said motion, and William A. Waddington defendant and contestee, by his attorneys, having filed a special appearance herein, objecting to the jurisdiction of the court to proceed further in this cause; and the court after hearing the arguments of counsel takes said matter under advisement until January 11, 1902, at 9 o'clock, A. M."

Then follows the entry of January 11, copied above as the judgment complained of.

Two questions are presented and argued by counsel. (1) Does the record before the district court show such an order of the county court as can be reviewed upon error? (2) Did the record, brought to the district court, show error of the county court in entering the order complained of? If either of these questions is answered in the nega-

tive, the judgment of the district court must be affirmed. We think at least one or the other of them must be so answered. Section 86, chapter 26, on elections, in regard to such proceedings as this, provides:

"The proceedings shall be assimilated to those in an action, so far as practicable."

In *Burke v. Perry,* 26 Neb. 414, it is said (p. 420):

"A contest of an election must be what its name implies —an adversary proceeding by which the matters in controversy may be settled upon issues joined."

And in *Spurgin v. Thomson,* 37 Neb. 39, the parties are held to the same rules of pleading as in ordinary actions. We think this proceeding is so far assimilated to an action that under section 50*a* of our code, and the rule announced in *State v. Matley,* 17 Neb. 564, the plaintiff in error had a right to intervene therein if his application was made while the cause was pending in the court, and on proper and sufficient showing. We also think it is so far assimilated to an action as to give the contestant a right, either under section 430*a,* or section 999 of our code, to dismiss his action absolutely at the time he did.

In *Harris v. Cronk,* 17 Neb. 475, it is held:

"An action in the district court, wherein no counterclaim or set-off has been filed, having been dismissed in vacation by the party plaintiff and all costs paid, according to the provisions of section 430*a* of the code, it is incompetent for the court at the next, or any subsequent term, to permit an intervention in said cause."

In *Sims v. Davis,* 48 Neb. 720, it is held:

"In an action wherein the defendant has not appeared, a dismissal filed by plaintiff, as provided by statute, ends the case, and litigation therein can not be continued."

In that case, parties seeking to intervene, moved the court, on notice, to set aside a dismissal filed and entered in vacation. The order overruling the motion was held, not erroneous.

In *Banks v. Uhl,* 6 Neb. 145, it is held, in effect, that under the provision of section 999 of the code, a plaintiff in

county court had the absolute right to dismiss his action. We think there was no action pending in the county court in which it could authorize the plaintiff in error to intervene.

If, however, we should hold that the dismissal was not absolute, and that the matter was still pending, and under the control of the court, then, so far as the record shows, it is still pending, and the application of plaintiff in error has not been denied, nor his motion to set aside the dismissal overruled, and no final order is shown in the record. If, as plaintiff in error contends, the court still had control of the cause, and the order complained of prevented a ruling upon his motion to set aside the dismissal, even then it is not a final order. An order directly overruling such a motion is held in *Sims v. Davis, supra,* not to be a final order, if the court then had jurisdiction of the cause.

Moreover, the order complained of must appear to be prejudicial to the plaintiff in error to justify a reversal thereof upon his application. Unless he had a right to an order setting aside the dismissal and allowing him to intervene, he is not prejudiced. Both his motion to set aside the dismissal, and his application to be allowed to intervene, were made on showing by affidavits, and they are not preserved by a bill of exceptions. The most that could be conceded for the power of the county court is that it may have had a discretionary power to set aside the dismissal at the time application of plaintiff in error was made, but the evidence produced to influence or control that discretion must be in the record, and be sufficient to show that it would not have been an abuse of discretion to grant him the relief asked, before prejudicial error can appear.

Again, we think if the order complained of is final, because it prevents a judgment in the action as is contended by plaintiff in error, then, before it can be reversed in error proceedings in a higher court, the contestant, Tilton, whose dismissal is sought to be set aside, must be made a party to the error proceeding, and this has not been done. Tilton was the plaintiff in the action and had furnished

the bond required by statute; he had dismissed the action and we think the dismissal could not be set aside without notice to him, and the record does not disclose such notice.

We think the judgment of the district court is right, and recommend that it be affirmed.

BARNES, C., concurs.

ALBERT, C.

I concur in the conclusion because the contestant is a necessary party to the proceedings in this court and has not been made a party.

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

AFFIRMED.

MICHAEL D. RYAN, APPELLEE, V. PATRICK DONLEY, IMPLEADED WITH LINEUS T. MARTIN ET AL., APPELLANTS.*

FILED JULY 3, 1903. No. 10,398.

1. **Appeal:** STIPULATION: WAIVER. A stipulation in an action pending in the district court, that the property which is the subject of the controversy shall be sold and the proceeds deposited with the clerk, until it shall be determined which party to the action is entitled to them, and that, if the sale shall be made before the matter shall be fully litigated, the funds shall be paid out when the court shall have made an order that one or the other party is entitled to them, is not effectual as a release of errors and a waiver of the right of review in this court. An intent by the parties to bar themselves from the right of access to the courts must be manifested by express words or by the strongest implication.

2. **Foreclosure:** INJUNCTION. The pendency of an action for the foreclosure of an alleged chattel mortgage, in which a temporary injunction has been granted restraining the defendant from selling, consuming or disposing of the property in controversy during the pendency of the action, withdraws the property from pursuit, by general creditors of the alleged mortgagor, in another court by means of the ordinary procedure of a suit at law, judgment

* Rehearing of case reported in 2 Neb. (Unof.) 6.

and execution. In such case the property is in the constructive custody of the law.

3. Covenant in Lease for Mortgage: ENFORCEMENT. A covenant in an unrecorded lease for the term of five years at an annual rental payable annually, to the effect that the lessee shall on the 15th day of June in each year execute to the lessor a chattel mortgage on the growing crops, to secure the payment of the rent for that year, will be specifically enforced against the lessee and those claiming title to the crops, acquired after the commencement of the suit to establish the lien of the landlord and to sell the property as upon foreclosure.

APPEAL from the district court for Saunders county: SAMUEL H. SEDGWICK, DISTRICT JUDGE. *Affirmed.*

Lionel C. Burr, Charles L. Burr and *Victor L. Hawthorne,* for appellants.

John H. Barry, contra.

DUFFIE, C.

In 1889, the plaintiff and appellee, Ryan, being the owner of a farm in Saunders county, executed a lease thereof to one Patrick Donley for the term of five years beginning on the first day of March, 1896, reserving an annual rent of $440 payable on the first day of January. It was covenanted in the lease that if the average yield of crops of all kinds in any one year should be less than twenty bushels to the acre, the lessor should accept one-half of the same in lieu of the cash rent reserved for that year, but that the lessee should "execute a promissory note of $440 on June 15 of each year during the term of the lease for the payment of the rent for such year, said note to be secured by chattel mortgage on all the crops to be raised on said premises for such year."

Donley went into possession under the lease, which was not filed for record, but in 1897 refused to execute the note and mortgage provided for in the above recited covenant, and on the 31st day of July in that year Ryan begun this action, alleging the breach of the covenant, and the in-

solvency of Donley, and that the latter was threatening and about to sell, dispose of and consume the growing crops, and by so doing defeat the plaintiff of his rent for that year, and that the average yield of the crops for that year would exceed twenty bushels an acre. The petition prayed for an injunction restraining the defendant from selling, incumbering or consuming the crops, or any of them, and that the plaintiff be decreed to have a mortgage on the same for the sum of $440 as of date June 15, 1897; that the mortgage be foreclosed, the property sold thereunder and the proceeds of such sale, or so much thereof as should be necessary, applied to the satisfaction of said alleged indebtedness and costs of suit. A temporary injunction was allowed as prayed, and the order therefor filed with the papers in the case, but no service thereof or of the summons is disclosed by the transcript, and it does not appear therefrom when actual knowledge thereof first came to the defendant or to the subsequent parties to the case. On the 13th day of December, Donley confessed a judgment in the county court in favor of the appellant, Lehr, for the sum of $381.30 and costs of suit, and on the same day an execution thereon was issued to the appellant, Martin, as constable, and by him levied on a quantity of grain raised on the premises in that year, and claimed to be subject to the alleged lien of the plaintiff's lease. On the 16th day of December the plaintiff filed a supplemental petition joining Lehr and Martin with Donley as defendants thereto, and setting forth the judgment, execution and levy; alleging that all of such proceedings were had, with knowledge by all the parties thereto of the pendency of the plaintiff's action and of the injunction therein, and in contempt thereof, and of the court, and were void, and praying an additional injunction restraining Lehr and Martin from selling or removing the property, or any of it, under the levy. An additional temporary injunction was granted as prayed. A motion to dissolve this latter temporary injunction was made by Lehr and Martin, and overruled. Then they filed a general demurrer to the sup-

plemental petition which was also overruled; whereupon they filed an answer thereto admitting the judgment, execution and levy, and the existence of the lease, and denying every other allegation therein contained. The plaintiff filed a reply, but it contained no new matter calling for consideration by the court. Donley entered an appearance, but did not answer either of the plaintiff's pleadings or otherwise participate in the defense. On the 11th day of January, 1898, the plaintiff and Lehr made a stipulation to the effect that the latter should haul the grain to market and sell it, and receive a certain compensation from the proceeds for his service in so doing, and that the residue of such proceeds should be "deposited with the clerk of the district court until it is determined which party, the said Lehr and Martin or Ryan, is entitled to hold the property so levied upon in favor of Lehr by the constable, Martin; and when the court shall have made an order that one or the other of the parties, viz., Lehr or Ryan, is entitled to the proceeds of the sale of said property, in the event of the sale of the same before the matter is fully litigated, then the clerk shall pay the same according to the order of said court." The property was accordingly sold and the proceeds, amounting to $474.95, deposited with the clerk pursuant to the stipulation, and out of it Lehr was paid $27, his compensation for making the sale. At the May, 1898, term Donley was adjudged in default for want of answer; and, after a trial without a jury, the court entered a judgment upholding the lease as a valid lien by way of mortgage upon the property in controversy for the sum of $440 and interest, adjudging the execution levy to be void, as in violation of the injunction of which the judgment creditor and constable were found to have notice, and making the temporary injunction perpetual, and directing that the money, the proceeds of the sale of the property then in the hands of the clerk, be applied, first, to the payment of the costs of the suit; second, the payment of $27 compensation to Lehr for selling the property pursuant to the stipulation; and third, to the satisfaction of the plain-

tiff's lien; the surplus, if any, to be retained by the clerk subject to the further orders of the court.

The circumstances are such that it will be convenient to begin with the discussion of the contentions of the appellee, plaintiff below. He insists, first, that the above recited stipulation, providing that the property should be sold and the proceeds disposed of as the court should order, amounted to a release of errors and waiver of the right of appeal, and submitted the matter finally to the judgment of the trial court. There is no such expressed agreement in the instrument, and, in its absence, an intent by a litigant to bar himself of the right of access to the courts should only be made out by the strongest implication. Such an inference can not, in our opinion, be drawn from a stipulation requiring the money to remain in the hands of the clerk until it is determined which party is entitled to it, and expressly contemplating that the matters in controversy shall be "fully litigated." In our opinion, the stipulation contemplates a final determination of the suit after it has been fully litigated, which includes the right to litigate in this court if either party desires to do so.

The more important question is the right of the plaintiff to have his contract with Ryan enforced, and a lien in his favor established against the crop in question.

While, in general, a court of equity will not take upon itself to decree specific performance where chattel property alone is concerned, its jurisdiction to do so can not be doubted, and no good reason exists against the exercise of the jurisdiction in any case where compensation in damages would not furnish a complete and satisfactory remedy, or where, as in this case, a judgment for damages would be of no benefit because of the insolvency of the defendant.

Every contract, the subject of which is susceptible of substantial enjoyment, should be enforced, provided always the circumstances surrounding and connected with the contract bring it within the rules entitling the party to equitable relief. Waterman, Specific Performance, sec. 11.

But, further than this, the rule that a contract respecting

chattels will not ordinarily be specifically enforced, does not apply to an agreement for a lien or security upon personal property, where there can be no remedy at law. Beach, Modern Equity Jurisprudence, sec. 598; Waterman, Specific Performance, sec. 20.

In *Triebert v. Burgess,* 11 Md. 452, it was held that a parol contract for a mortgage of personal property, based upon a valuable consideration, may be enforced in a court of equity, if the contract is not such as the statute of frauds requires to be in writing.

It is insisted, as we understand from the brief of the defendant, that the rule now firmly established in this state, that no valid lien by way of mortgage can be created on property not *in esse,* applies equally to an agreement to give a lien on property not *in esse,* by executing a mortgage on the same when it comes into existence. We do not think that this position can be sustained. It is evident that to support a present grant the thing granted or conveyed must have a present existence. If it has no existence, there is nothing for the grant to operate upon and in the eyes of the law it is a mere nullity. A chattel mortgage, therefore, which purports to cover property not in existence has nothing upon which to operate; and, the mortgage being an executed contract with nothing further to be done by either party, the rights of the parties are fixed and determined by the mortgage as made. If the property described therein had no existence, so that nothing was conveyed thereby, a court could not enlarge the contract as made, or amend it to include more than the parties had covered by their agreement.

The case at bar is different; the contract is executory in its character; it is an agreement to give security at a future day, and the authorities are all agreed that such an agreement may be enforced. In *Hale v. Omaha Nat. Bank,* 49 N. Y. 626, a case where, as here, the lessees were insolvent, the court said:

"Had the lessor claimed a specific performance of the agreement, and the perfecting of a lien upon the furniture

as against the lessees while they remained in possession of the demised premises, and after the furniture had been placed in the hotel, no one would have questioned the right of the landlord to the security agreed upon, and no court exercising the ordinary jurisdiction of courts of equity would have hesitated to decree specific performance and compelled the execution of the proper instrument to give the lien."

The distinction between a mortgage actually executed, purporting to cover after acquired property, and an agreement to execute a mortgage thereon after the property had come into existence, was evidently in the mind of Judge HOLCOMB when he formulated the opinion in *Brown v. Neilson,* 61 Neb. 765. At page 768 he remarks:

"The stipulation does not comprehend, within its meaning, that the lessee will, after the property is acquired, execute a mortgage or other instrument incumbering the property for the benefit of the lessor. No original and independent contract creating a new lien can be inferred as the intention and contemplation of the parties, without doing violence to the language used. It does not purport to be an agreement to give in the future, a lien on the property then owned by the lessees on the leased premises; but, by its own terms and provisions, the instrument evinces an attempt to establish a lien in future on property at the time not *in esse.* It is a contract, or attempt at contract, for a sale and transfer by way of mortgage, and not a contract to give a mortgage."

It is further insisted that if the defendant's agreement to give security upon the crop had any force or effect, it could not be greater than that created by a chattel mortgage given on goods actually owned and in the possession of the mortgagor, and that such a mortgage is void as to creditors in the absence of the recording of the mortgage. This is true, unless the mortgagee takes possession of the mortgaged property before the right of the creditor to the property has accrued by his seizure of the same. *Meyer & Raapke v. Miller,* 51 Neb. 620. This requires us to de-

termine whether, by commencing this action to enforce the agreement made by Donley to give a mortgage on the crop, and for a foreclosure and sale of the same, the plaintiff, in a legal sense, took possession of the property or placed it within the possession of the court, which, in legal effect, would be equally effective.

It is a rule well known to the profession that where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other; that where property is *in gremio legis*, if it be a court of rightful jurisdiction, no other court can interfere and wrest from it the jurisdiction first obtained; and that a sale under an order of one court, of property in the custody or possession of another, conveys no title. *Leigh v. Green*, 62 Neb. 344, and cases cited at page 354.

In the case now under consideration, the court was asked to establish a lien against the property, to foreclose the lien, and to order a sale of the property to satisfy the plaintiff's claim. The property being chattel in its nature, a sale thereof could only be made effective by delivering possession to the purchaser. The relief asked from the court could only be given by the court turning over to the purchaser at the sale physical possession of the goods. We think that, in cases of this character, to give the court exclusive jurisdiction of the property involved in the suit, a receiver need not be appointed or that any officer of the court should actually seize and hold the property. We believe and hold that, where the relief asked from the court requires it, if granted, to pass possession of the property to a purchaser at a sale which may be ordered, the bringing of the suit and the service of process places the property within the jurisdiction of the court so far as to render ineffective any sale of the same made by another court of concurrent jurisdiction in a suit subsequently commenced. *Adams v. Mercantile Trust Co.*, 66 Fed. 617, and note to same case 15 C. C. A. 6.

We recommend an affirmance of the decree appealed from.

ALBERT, C. concurs.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment hertofore rendered by this court be vacated and that the decree appealed from be

AFFIRMED.

HOLCOMB, J.

I concur in the judgment of affirmance only because it is held by a majority of the court in another opinion filed at this session (*Sporer v. McDermott, ante,* p. 533), that an agreement to give a mortgage on crops, not in existence at the time, may thereafter be specifically enforced.

SEDGWICK, J., not sitting.

GRAND LODGE, ANCIENT ORDER OF UNITED WORKMEN, V. FRANTISKA BARTES.*

FILED JULY 3, 1903. No. 13,086.

Witness: EVIDENCE OF AGE. A member of a family, living therein, is presumptively qualified as a witness to prove the age and pedigree of the other members; but when it is shown on cross-examination that the knowledge of such witness is derived, not from family tradition and repute, but from statements made by a stranger, the testimony should be excluded.

ERROR to the district court for Colfax county: CONRAD HOLLENBECK, DISTRICT JUDGE. *Reversed.*

W. P. Hall and *Matthew Gering,* for plaintiff in error.

Frank Dolezal, contra.

* Rehearing allowed. See opinion, p. 636, *post.*

DUFFIE, C.

This action is brought to recover upon a benefit certificate issued by the plaintiff in error to Joseph Bartes, the husband of the defendant in error, and in which she is named as the beneficiary. The only defense urged, and the only question tried, was the age of the decedent at the time of making application for admission to the order; section 1 of article 2 of its constitution and by-laws providing that "no person shall be admitted to membership in the order except that he be a white male of the full age of twenty-one years and under forty-five years at the time of receiving the workman degree."

Joseph Bartes' application for beneficiary certificate bears date June 29, 1894, in which he states that he was born on the 25th day of December, 1849, at Moravia, Europe. He died as the result of an accident on February 25, 1898. In the investigation following his death the plaintiff in error obtained from Mrs. Bartes what is termed a "birth certificate" of her husband, in which it is recited that he was born on the 23d of December, 1846. On the trial, no witness made any direct statement as to the age of Joseph Bartes, but his mother testified that she was married to his father on February 3, and on Christmas of the same year of the marriage her son Jospeh was born; that his father died in January, 1900; and that she had lived with him fifty years, lacking about three weeks; that they were preparing to celebrate their golden wedding at the time of his death. Accepting this as a correct statement of the facts, it would establish that Joseph Bartes, the deceased, would have been fifty years of age on the 25th of December, 1900, and that he was born in 1850. On her direct examination the plaintiff in error testified as follows:

Q. Mrs. Bartes, do you know how old Mr. Bartes was when you married him?

A. Yes, sir.

Q. You may state how old he was when you married him.

A. He was twenty-seven years old.

Q. How long were you married to him before he died?

A. It would be twenty-five years if he was living now.

Q. Would it be twenty-five years this year?

A. Yes, sir, this fall at All Saints day.

She could not give the year of the marriage but, as her husband had been dead two years, her testimony corroborates that of her mother-in-law, and fixes the age of Joseph Bartes at the time of his death between forty-seven and forty-eight years. On cross-examination Mrs. Bartes testified as follows:

Q. How long had you known Mr. Bartes before your marriage?

A. I only knew him when I was married.

Q. Did you know Mr. Bartes a year before you married him?

A. No, sir.

Q. How do you know that your husband, Joseph Bartes, was twenty-seven years of age, twenty-five years ago, when you married him?

A. From the publication of the banns. * * *

Q. Is the only way that you know the age of your husband, Joseph Bartes, at the time of your marriage, what the priest announced at the banns?

A. No other way.

Q. In speaking about the banns being announced, do you mean that the preacher or priest announced it from the pulpit to the congregation that you and Mr. Bartes were engaged?

A. Yes, sir.

Q. Announced it orally?

A. Yes, sir.

Q. Now, from the time that you heard the announcement made by the priest of the banns of marriage, have you ever had occasion to think of or consider your husband's age until this case was begun?

A. I never did.

Q. You never talked with your husband about his age?

A. No, sir.

Q. And any information about your husband's age was gained from the announcement made by the priest at the time the banns of marriage were announced?

A. Yes, sir, that is it.

At this point the defendant moved the court to strike out all the evidence of Mrs. Bartes as to the age of her husband, for the reason that there was no foundation laid for such evidence and the witness had not shown herself competent to testify as to his age, and that the only statement as to his age is the statement made by the priest who announced the banns, the same being hearsay and an improper method of proving age. This motion was overruled and defendant excepted.

The date of a person's birth may be testified to by himself or by the members of his family, although he must, and they may, know the fact only by hearsay based on family tradition. No rule is better established than this one; and when it is shown that the witness is a member of the family of the person whose age is the subject of inquiry, the presumption obtains that the witness is competent without laying any foundation therefor; but on cross-examination it may be shown that, although a member of the family and *prima facie* qualified to testify as to age or pedigree, the witness is not qualified, either because he has no knowledge in fact on the question involved, from not having heard it discussed, or that his opportunities for obtaining knowledge on the question have been insufficient to make him a competent witness. *Harland v. Eastman,* 107 Ill. 535.

In the case cited, it is said:

"Such conversations may have been such in extent and variety, and may have been held under such circumstances, as to enable a witness to say that such was the reputation in the family, but such conversations may not have been such. The witness surely could not be permitted to swear to any specific thing which his wife, or either of her uncles, had said in his hearing, because they are all living, and

their sworn testimony is better than their unsworn statements. It follows, the witness cannot properly be allowed to state his conclusion from such unsworn statements, unless all of them taken together, with their surroundings, enable him to say such was the accepted state of the case in the family, or such was the uncontradicted repute in the family."

Mrs. Bartes, on her cross-examination, gave the source of her information as to the age of her husband at the date of her marriage. This information came from the priest and not from any member of the family; and she further testified that it was the only information relating to his age, at that time, of which she was possessed. In this state of the case we have no hesitation in saying that she showed herself incompetent to testify, and that it was error not to exclude her testimony upon the motion made therefor. It is true that she was afterward recalled and the following question asked her:

Q. Mrs. Bartes, was it not talked of between you and your husband; that is, I mean, when you were together did you not sometimes talk over the fact of how old you were or how old he was?

A. We never talked about our age; once in a while he spoke of his birthday, once in a while we talked of our birthdays. She further testified that both her father-in-law and mother-in-law lived with them in their family; and was then asked this question:

Q. Now, Mrs. Bartes, in your talks—that is in your family talks between your husband and yourself and his father and mother—was it ever talked of how long you had been married to your husband and how long you lived together; that is, before his death?

A. Yes, sir, it was talked.

Q. Now, Mrs. Bartes, from your living together with the father and mother of Joseph Bartes, your husband, and they with you, do you know what day their wedding anniversary came in the year?

A. Yes, sir, it came on the 2d of February.

It is insisted that, because of these people all living together, she was qualified to speak of the age of her husband at the time of their marriage. Presumptively this is true, but, as before stated, she by her own declarations has shown her disqualification, her only knowledge upon that subject having come from the declaration of a priest whom it is not claimed would be qualified as a witness upon that question. What weight the jury may have attached to this testimony we can not of course say, but it was submitted to them with other competent testimony as to the age of Joseph Bartes and it may, or may not, have controlled their verdict. For the error in submitting this evidence to the jury, we recommend a reversal of the judgment and that the cause be remanded for another trial.

POUND 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 another trial.

REVERSED.

The following opinion on rehearing was filed February 17, 1904. *Former judgment of this court vacated. Judgment of district court affirmed:*

1. **Competency of Wife to Testify to Age of Husband.** The plaintiff, wife of the deceased with whom she had lived for twenty years before his death, and to whom she had talked regarding his birthday at different times, and who had a general acquaintance with the family history and tradition, *held* to be a competent witness to testify as to the age of her deceased husband.

2. ———: PRESUMPTION. A wife who has lived for twenty years with her husband will be presumed to know his age and to be qualified to testify thereto, unless the contrary clearly appears from the record.

3. **Date of Birth:** EVIDENCE. The date of a person's birth may be testified to by members of his family, although they may know of the fact only by hearsay founded on family tradition.

4. **Qualification of Witness.** Because the first knowledge obtained by a wife as to her husband's age is derived from an incompetent

source, this will not disqualify her from testifying as to his age, where, by reason of her membership in the family, knowledge of such fact is obtained from other sources to which no valid objection applies.

5. **Evidence.** Evidence examined and *held* sufficient to sustain the verdict of the jury.

6. **Instructions.** Alleged errors in giving and refusing to give certain instructions duly excepted to examined and *held* not well taken.

7. **New Trial:** NEWLY DISCOVERED EVIDENCE. An application for a new trial on the ground of surprise and newly discovered evidence is addressed to the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless there is an abuse of discretion shown.

8. ———: ———: DILIGENCE. Before the defendant is entitled to a new trial on the ground of newly discovered evidence, it must appear that due diligence was exercised to procure such evidence upon the original trial, and that it is through no fault or neglect of the party making the application that such evidence was not then produced.

9. ———: RULING. The ruling of the trial court on the application for a new trial, on the ground of surprise and newly discovered evidence, *held* to be without prejudicial error.

HOLCOMB, C. J.

This cause is submitted on rehearing. The consideration given the case and the recommendations contained in the former opinion (*ante*, p. 631) resulted in a reversal of the judgment of the trial court on the ground of error in not withdrawing from the jury certain evidence given by the wife of the deceased with reference to his age at the time of the execution of the contract on which is based plaintiff's right of action. The plaintiff instituted an action to recover on a policy of insurance or benefit certificate issued by the plaintiff in error, a fraternal beneficiary association, to her deceased husband, who, during his lifetime, had become a member of one of its local lodges. As a defense the association pleaded that the deceased, at the time of the issuance of the beneficiary certificate and in making application therefor, had misrepresented his age, and that he was, at the time of his admission as a member of the local lodge and the issuance of the certificate, be-

yond the age provided for by the laws of the organization and the statutes of the state, to wit, more than 45 years of age. This was denied by the beneficiary, the plaintiff in this action, and the wife of the deceased. On this issue of fact hinged most of the evidence submitted in the case. The wife as a witness in her own behalf testified as to her husband's age at the time of their marriage, and the date of their marriage, thus necessitating only a mathematical calculation to determine his age when he applied for membership in the local lodge.

The plaintiff was of Bohemian nationality and required the assistance of an interpreter in giving her testimony. On cross-examination it was developed, as is set forth in detail in the former opinion (*ante,* p. 631) that her first knowledge as to the age of her husband was gained by the public announcement of the parish priest in her native country of the marriage banns, a short time prior to its celebration, which was according to a custom there obtaining. After drawing from the witness the information that this was the first and only means by which she knew her husband's age, at the time of their marriage, the witness was further asked on cross-examination if she had ever talked with her husband about his age, and answered in the negative. She was then asked: "And any information about your husband's age was gained by the announcement made by the priest at the time the banns of marriage were announced?" She answered: "Yes, sir, that is it." Because of the source of the witness' knowledge of her husband's age as thus elicited on cross-examination, a motion was made to strike out all her direct testimony relating to his age; and the refusal of the court to strike out such testimony, it was thought and so held in the former opinion, constituted prejudicial error for which the judgment of the trial court should be reversed.

It is not altogether clear that the witness is disqualified from testifying relative to the age of her deceased husband, conceding the correctness of the premises of counsel for defendant, as to the announcement of the parish priest of

the marriage banns being the exclusive source of the witness' knowledge regarding the fact testified to.

The announcement was in its nature a public or *quasi* public proclamation. It was made as a part of a customary proceeding leading up to the performance of the marriage rite. It may be presumed to have been made upon the authority, in the presence, and with the consent of the deceased, the prospective bridegroom. It may possibly be said to be equivalent to a public declaration by him of his age, and, under a well recognized rule governing hearsay evidence of this character, since his decease, may be testified to as a declaration made by one competent to testify to pedigree, had he been living. We do not, however, care to be understood as resting our decision on this proposition, and do not do so.

An examination of the entire record satisfies us that the witness was competent for other reasons to testify regarding the age of her husband. While the cross-examination standing alone would seem to limit her knowledge to that gained from the publication of the marriage banns, taking all of her evidence, as disclosed by the record, it is manifest that such is not the case. Admitting her first information to be from an incompetent source, it is apparent that she was qualified to speak regarding the matter testified about from her relationship to her husband, as a member of the family, and because of knowledge gained thereby in relation to the general repute and tradition in the family concerning the birth, age and pedigree of her deceased husband. She had lived with him over twenty years. She says that they at times spoke about their birthdays. It is hardly conceivable that, where the family relations had been sustained for this length of time, a member of such family during the whole of such period was not qualified to speak of matters pertaining to the pedigree of other members of the family of like standing. A birthday may not be an epoch in the life of a person, but it is at least an event, an incident of which note is usually taken by the several members constituting the

family. The birthday and the age of an individual can hardly be disassociated. To talk of or discuss the birthday of one, and especially a member of the same family, comprehends ordinarily the age as well as the anniversary. The thought may be suggested in innumerable ways, without a direct discussion of the age as if it were a matter of controversy or doubt. We are quite confident that although the plaintiff says on cross-examination, when her attention was challenged directly to when she first learned his age, she had no other knowledge on the subject than that learned by the publication of the marriage banns, her subsequent membership in the family for over twenty years afforded opportunities for knowledge and information on the subject, wholly outside of and regardless of the knowledge thus first acquired, which well qualified her to testify as to his age, and that such relationship brings her altogether within the rule of law governing the competency of witnesses regarding such matters. The law presumes, and rightly so, that such a member of the family is qualified as a witness to prove the age of other members. It is also disclosed by the record that the parents of the deceased lived in his family, and as members thereof, during nearly the whole of the married life of their son; that the deceased was the oldest son; that he was born in December of the first year of their marriage which occurred in February; that the parents were rounding out fifty years of wedded life and making preparations for the celebration of their golden wedding anniversary a short time prior to the death of the father. It is scarcely believable, under these circumstances, that the wife of the deceased and daughter-in-law of the parents was not only presumptively, but actually and in fact acquainted with the exact age of her deceased husband, and of the family history and tradition, and, of course, qualified to speak on the subject. The plaintiff in her testimony speaks of the wedded life of her husband's parents, the date of their wedding anniversary and the near approach of the golden wedding anniversary. It is, we think, clearly inferable

from the record that her relationship to the family, her long membership therein, and her acquaintance with the family history and tradition were such as to qualify her to testify to the pedigree of any member thereof, as was her mother-in-law or would be her husband had he been living. The rule is uniform that the date of a person's birth may be testified to by members of his family, although they may know of the fact only by hearsay founded on family tradition. Such evidence is admitted as coming within the rule of hearsay in matters pertaining to pedigree, which embrace not only descent and relationship, but also the facts of birth, marriage and death and the times when they occurred. *Houlton v. Manteuffel,* 51 Minn. 185, 53 N. W. 541; 1 Greenleaf, Evidence (16th ed.), sec. 104; *Hill v. Eldridge,* 126 Mass. 234; *Commonwealth v. Stevenson,* 142 Mass. 466, 8 N. E. 341; *Cheever v. Congdon,* 34 Mich. 296.

Treating, for present purposes, the knowledge of the wife gained from the publication of the marriage banns as coming from an incompetent source, we can not regard this as sufficient grounds for excluding her evidence in chief touching the age of her deceased husband, or for holding her incompetent to testify on the subject. Her competency does not rest on her right to testify to declarations made by those who were qualified to speak when the declaration was made but whose testimony by reason of death or other causes can not be obtained. Her qualification to speak of the family tradition regarding age, pedigree, etc., is bottomed on her membership of long standing in the family, and the knowledge of matters pertaining to the pedigree of other members acquired thereby. That she did have such general knowledge which renders her competent to testify is, we think, disclosed by the record. The incompetent source of her knowledge first obtained could, at most, be considered only for the purpose of affecting her credibility or the weight to be attached to her evidence. Her competency to testify as a witness has its origin in knowledge and information coming from

other sources and in other respects to which no valid objection applies. *Cook v. Carroll Land & Cattle Co.*, 39 S. W. (Tex. Civ. App.) 1006. We are, for the reasons stated, of the opinion that no error was committed by the trial court in refusing, on the defendant's motion, to strike out all of the evidence of the plaintiff touching the age of her deceased husband because of her alleged disqualification.

Other errors are argued by counsel for plaintiff in error in their brief filed in the case, none of which appeal to us as of such a substantial character as to call for a reversal of the judgment entered in the court below. The whole of the controversy centered on the point relating to the age of the deceased. The testimony was directed almost exclusively to this one issue. The court, by its sixth instruction, told the jury that if the age of the deceased, at the time he applied for membership, was found to be above that allowed by the laws of the association, the plaintiff could not recover. This issue of fact was by the jury found against the defendant. While it is urged that the evidence is insufficient to support the verdict, we are satisfied from examination of the record that such is not the case. The wife and the mother of the deceased both testified regarding his age, and from the evidence of both, or either, the inference is fairly justifiable that his age was not misrepresented in his application for the benefit certificate of insurance. While there is some parol and documentary evidence apparently supporting the contention of the defendant, this evidence, as found by the jury, must give way to the positive and direct testimony of the living witnesses qualified to speak on the subject.

The giving and refusing to give certain instructions are also excepted to, but, in view of the clear cut instruction of the court, to which we have referred, submitting the issue of fact in as favorable light as the defendant could rightfully ask, no prejudicial error was committed in the ruling of the court on the instructions given and refused, of which complaint is made.

Error is also sought to be predicated on the ruling of

the trial court in refusing to grant a new trial on the ground of surprise and newly discovered evidence. The evidence which it was sought to procure, and on which the application was based, was in relation to records and documents supposed to be in existence in the foreign country, from which the family of the deceased and his parents' family emigrated to this country. Such records, it is claimed, would show the ages and date of the marriage of the parents of the deceased, and from these could be determined more accurately the latter's age. We find no ground for entertaining the view that the trial court abused its discretion in respect of the application for a new trial on the grounds advanced therefor. The issue as to the age of the deceased was raised by the pleadings in the case, and regarding which the defendant was advised from the time of the filing of the answer. No effort was made to secure the evidence now sought to be obtained. The evidence is not only in its nature cumulative, but its existence is largely a matter of conjecture or speculation. While it is urged that the defendant was misled by the character of the answer, and was led to believe the plea of waiver would probably be relied on by the plaintiff, to avoid the consequences of the alleged misstatement as to age, it is manifest that the issue of fact as to age of the deceased was put directly in issue, and, to maintain its side of the controversy, it was incumbent on the association to make all reasonable effort and exercise due diligence to procure all the evidence in support of such issue reasonably obtainable, and that the evidence now sought to be obtained might, if in existence, have been secured by the exercise of such reasonable effort and due diligence. The court's ruling in respect of the matter now being discussed was, we are disposed to think, proper, and error can not successfully be predicated thereon. From a consideration of the entire record and of the errors assigned, we arrive at the conclusion that the judgment of the trial court was right and should not be dis-

turbed. The judgment of reversal heretofore entered is vacated, and the judgment of the trial court is

AFFIRMED.

GEORGE HASLAM V. MARIE BARGE.

FILED JULY 3, 1903. No. 13,090.

1. **Verdict Contrary to Instructions.** A verdict rendered in plain disregard of the instructions, is contrary to law, and will, ordinarily, be set aside without an examination of the instructions to determine whether correct or not.
2. **Evidence of Written Contract of Marriage.** Evidence examined and *held* not to establish a written contract of marriage.
3. **Statute of Frauds.** An unwritten contract, which by its terms is not to be performed within a year from the making thereof, is not taken out of the statute by an oral acknowledgment made within a year from date of performance.
4. **Appeal:** ESTOPPEL. Where the record discloses that a defendant has raised the question and insisted in the district court that there was not sufficient evidence to warrant the submission of a material issue to the jury, and the court nevertheless insists on submitting the issue, the defendant is not estopped on appeal to raise the same question here, because he requested and obtained an instruction defining the law relating to the issue as he understands it to be.

ERROR to the district court for Dodge county. JAMES A. GRIMISON, DISTRICT JUDGE. *Reversed.*

J. E. Frick and *Frank Dolezal,* for plaintiff in error.

Thomas M. Franse, F. Cole Anderson and *Harry Keefe, contra.*

DUFFIE, C.

On the trial of this case, a verdict was returned in favor of the plaintiff below for $750. The defendant immediately filed a motion asking the court to reserve the case for further argument, and to reserve judgment. This motion was granted by the court. After this motion was filed, and pending a hearing thereon, defendant below filed a motion

for a new trial. Upon the argument of the motion to reserve the case and for judgment notwithstanding the verdict, the court entered judgment for the defendant below. From this judgment plaintiff below prosecuted error, and this court reversed the court below and remanded the case for action upon the motion for a new trial, which still remained undisposed of. 63 Neb. 296. Opinion on rehearing, 65 Neb. 656.

On October 10, 1902, the motion for a new trial came on for hearing in the district court, in pursuance of the mandate from this court, and upon consideration thereof the court overruled said motion, and judgment was entered on the verdict of the jury. Thereupon, the defendant settled and had his bill of exceptions allowed and has brought the case to this court on error. Judge Marshall, who presided at the trial and in all the proceedings up to the argument on the motion for a new trial, having deceased, the motion for a new trial was heard and passed on by another judge.

The principal errors relied on are: (1) That the court erred in overruling the motion for a new trial; (2) that the verdict is not sustained by the evidence and is contrary to law. The only question decided on the former appeal was the sufficiency of the plaintiff's petition to state a cause of action, while this appeal involves the merits of the controversy between the parties. The 8th and 9th instructions of the court are as follows:

"8th. The jury are instructed that the contract or promise of marriage set out in the plaintiff's petition, to the effect that on or about the first day of July, 1890, the defendant, orally, that is, not in writing, promised to marry the plaintiff, and the plaintiff orally, that is, not in writing, promised to marry the defendant, when the plaintiff should arrive at the age of 18 years; and from the undisputed evidence the plaintiff was at the time only a little over the age of 15 years, leaving nearly three years to intervene between the time of making the contract or promise and the time when, by its terms, it was to be per-

formed. This contract or promise under our statute of frauds was and is void, or voidable, at the instance of either of the parties thereto, and can not be enforced in this action, for the reason, as required by that statute, this contract or promise was not in writing, nor was any memorandum thereof made or signed by either of the said parties, at the time it was made.

"9th. The jury are instructed that although the contract of marriage as set out in the preceding 8th instruction is void and of no force, it would remain void and of no force and effect against the defendant, or in favor of plaintiff, unless the defendant afterward, and before the 24th day of May, 1893, signed a memorandum of said contract, which memorandum should be as broad and full as the original contract or promise, and the memorandum, to be good, should embrace all the terms and conditions of said original contract. Under the pleadings in this case, a new contract of marriage will not suffice, for such new contract is not the cause of action set out in the plaintiff's petition and can not in this case be made the ground of recovery in favor of the plaintiff. The plaintiff must recover, if she is entitled to recover at all, upon the cause of action set out in her petition, and can not recover upon a new or different contract, or cause of action."

In these instructions the jury are plainly and explicitly told: (1) That the oral contract of marriage, nearly three years intervening between the making of the contract and the time when by its terms it was to be performed, was, under our statute, void. (2) That, being void, it would remain so unless the defendant before the 24th of May, 1893, signed a memorandum of said contract as broad and full in its terms as the original. (3) That under the pleading no new contract could be made the ground of a recovery as such new contract is not the cause of action set out in the petition.

Whether an oral contract of marriage, which by its terms is not to be consummated for more than a year after the making thereof, falls within our statute, is not neces-

sary to be determined in this case. That it was void was the opinion of the district court and it so instructed the jury. For the purposes of the trial, this was the law of the case and the jury should have been governed by these instructions whether the law was properly stated or not.

In *Boyesen v. Heidelbrecht,* 56 Neb. 570, it is said:

"Under the evidence and the instructions of the court, which forcibly and perhaps too strongly stated the privileges of an innocent purchaser before maturity of negotiable paper, the plaintiff was entitled to a verdict. The verdict was rendered in plain disregard of these instructions. A verdict so rendered is contrary to law, whether the instructions be correct or not. *Aultman & Co. v. Reams,* 9 Neb. 487; *Omaha & R. V. R. Co. v. Hall,* 33 Neb. 229; *Standiford v. Green & Co.,* 54 Neb. 10. While a judgment will not be reversed for that reason if the verdict be the only one which could properly be rendered, this case does not fall within the exception."

Accepting, as we must, the instructions of the court as the law of the case for the purpose of determining whether the verdict was contrary to law, an examination of the record makes it plain that these instructions were wholly disregarded. The cause of action stated in the petition is as follows:

That on or about the first day of July, 1891, the plaintiff being then unmarried, at the request of the defendant, then promised the defendant to marry him, and the defendant at the same time promised to marry her; that said contract and promise of marriage was between the said parties, in the first instance, oral and spoken, and said contract of marriage was to be fulfilled upon the plaintiff's arriving at the age of eighteen years or over; that after said original and mutual agreement of marriage between said parties was made, said defendant at many and numerous times, both orally and in writing by letters between July 1, 1891, the date of the first promise of marriage, and November 25, 1893, renewed and acknowledged said first contract and mutual promise of marriage; that

plaintiff relied on said promise and remained unmarried; that defendant, contrary to said promise, on the 25th day of November, 1893, married another, and that plaintiff was at all times ready and willing to marry said defendant.

The answer, among other things, alleged that the promise of marriage was oral and was made about the first of July, 1890; that it was not to be consummated until plaintiff attained the age of eighteen years; that at the time the promise was made she was fifteen years of age; that no note or memorandum of said promise was ever made in writing, subscribed by the party charged, and said oral promise was, by its terms, not to be performed within one year from the making thereof.

The reply admitted that the marriage was not to take place until the plaintiff below had attained the age of eighteen years; and, in her testimony given on the trial, she stated that the defendant proposed marriage to her in May, 1890, and that she gave him her answer in August, shortly after attaining her fifteenth birthday. The only evidence of any written memorandum of the marriage contract existing between the parties was given by the plaintiff and her mother. The plaintiff testified that shortly after the defendant's marriage she burned all the letters received from him. She was allowed to testify as to the contents of one letter received in April, 1893. On being asked the contents of that letter, she replied:

"He wrote he would be up in a few days and make arrangements about our marriage."

Q. Anything further?

A. Only that he would be up in a few days.

Her mother testified that she had read the letter, and on being asked to state its contents, replied:

"V. .l he told her that the time would soon arrive when she would be of age and that he would come up in a few days and make arrangements with her about their marriage."

Q. Anything further?

A. I do not remember.

This is, absolutely, all the evidence tending in any manner to show any written contract of marriage made between the parties, and it seems incredible that a jury, under the instructions above quoted, could find that a written contract or any note or memorandum thereof was made. There is nothing in this evidence containing an offer of marriage or a promise to marry. It does refer to their marriage; and we may reasonably presume that some negotiations relating to a marriage had taken place between the parties prior to the date of the letter; but what it was and whether existing in the form of a contract of marriage, all of the terms and conditions of which had been agreed on, is not suggested and is not for the court or the jury to assume. If, as charged by the court, the contract to be valid must be in writing, that is one of the matters to be established by the evidence, and no presumption to that effect can be indulged. That there is an absolute failure in the evidence to establish any written contract of marriage is beyond question or controversy, and, unless the law allows an oral acknowledgment made less than one year from the time of performance to validate and confirm an oral agreement not to be performed within the year, there is no evidence whatever to support the verdict.

The former opinions of this court, holding that the petition stated a cause of action, were based, undoubtedly, upon the allegation therein contained, that the original oral contract of marriage had been subsequently acknowledged and renewed in writing, for the law seems to be well established, that proof of the oral acknowledgment of an unwritten contract, within the year, would not take an oral contract, not to be performed for more than a year after the making, out of the statute. *Blanton v. Knox*, 3 Mo. 343; *Odell v. Sondorfer*, 50 App. Div. (N. Y.) 579, 64 N. Y. Supp. 451.

In the latter case it is said:

"Where an oral contract of employment for a year from

the following first day of April was made in March, the contract was not exempted from the operation of the statute of frauds and validated by the restating of the terms of the contract between the parties on the first day of April.

One other question requires consideration: At the request of the defendant below certain special findings were submitted to the jury. These findings are as follows:

1st. Was there a promise of marriage made between the plaintiff and defendant other than the one testified to by the plaintiff as having been made about the 1st of August, 1890?

A. Yes.

2d. If you answer the preceding question "yes," then state at what other time said promise of marriage was made?

A. On the 13th or 14th or within two weeks prior to the 13th or 14th of April, 1893.

3d. If you find that there was such a promise as stated in the second question above, then state whether such promise was made orally or spoken, or whether it was in writing?

A. Oral and written.

4th. Did the defendant write a letter to the plaintiff on or about the 13th or 14th of April, 1893, or at any time within two weeks prior thereto, in which he wrote the statements testified to by the plaintiff and her mother?

A. Yes.

It is insisted by the defendant in error that these special findings being submitted at the request of the defendant below, he can not now be heard to say that there was no evidence to sustain the findings; and *American Fire Ins Co. v. Landfare,* 56 Neb. 482; *Farmers Bank of Nebraska City v. Garrow,* 64 Neb. 64, and *Missouri P. R. Co. v. Hemingway,* 63 Neb. 611, are cited in support of this contention. In the case first cited it is said:

"One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable

fact in a case, can not afterward be heard to assert that there was no evidence received tending to prove such fact."

The other cases follow and approve this rule, and we think that, properly applied, it is founded in good sense and that it should be enforced. Where a party, on his own motion, secures action from the court, he ought not, afterwards, to be heard to complain that such action was erroneous. He can not predicate error on what he himself has asked and secured. If we should admit that a party who asks for the submission of special findings, occupies the same position as one who makes a request for an instruction defining the law applicable to an issue in the case—and this we do not by any means concede—we still think that the cases, above referred to, do not go to the extent claimed by the defendant in error.

A careful examination of the opinions, in the cases referred to, will show that the complaining party made no claim in the district court that there was no evidence on which to base the instructions or to submit the issue to the jury, at least, they fail to disclose that such complaint was made. In the case at bar, the record discloses that Haslam, the plaintiff in error, urged and insisted that there was no evidence whatever upon which to submit the questions at issue in this case to the jury. An instruction to direct a verdict, because the plaintiff had not made a case by her evidence, was submitted and argued, and the plain question presented for our determination is this: Must a defendant in the action, between whom and the court there is a difference of opinion upon the question of whether there is evidence upon which a certain issue ought to be submitted to the jury, the court thinking there is evidence and the defendant believing there is none, sit by, knowing that the court is going to submit the issue under what he believes to be an erroneous instruction, and remain silent, or may he ask the court to amend the instruction, or give one which he himself has prepared and which embodies the law as he understands it? If the rule stated in the cases, above cited, is to be followed in all cases and under all

circumstances, then the defendant who has fairly presented his claim to the court, and who has moved for a dismissal upon the ground that there is no evidence upon which to base a verdict against him, after fairly calling the attention of the court to his position, so that no one can misunderstand his theory or be misled by his action, must sit by in silence and see the case submitted to the jury under what he believes to be erroneous instructions, in order to obtain a hearing in this court.

Under such circumstances, we do not believe that he should be estopped, here, from insisting, as he did in the court below, that there is no evidence upon which to submit the issue to the jury, even though he takes an active part in preparing and tendering instructions which the court finally includes in its charge to the jury. The district court was not misled by the action of the plaintiff in error in asking a submission of these special findings. The court knew that he was insisting that there was not sufficient evidence to warrant a verdict against him, and, under these circumstances, we do not think that a party should be estopped in this court from questioning the sufficiency of the evidence to sustain a finding by the jury, by doing all in his power to secure from the court, which insists on submitting the question, what he regards as proper instructions upon the issue. To do less than this would be unfair to the court, and a neglect of duty as an attorney.

We hold, therefore, that where the record discloses that the defendant in an action has squarely raised the question of the sufficiency of the evidence to warrant a verdict against him, or an adverse finding on some material issue in the case, and the district court, against his objection, insists on submitting the question to the jury, he does not waive his right, on appeal to this court, to raise the question of the sufficiency of the evidence to support the finding of which he complains, by asking instructions covering his theory of the law applicable to the case. For the reason that there is not sufficient evidence in the record to

support the verdict of the jury, the judgment should be reversed and we so recommend.

ALBERT, C., concurs.

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

REVERSED.

GEORGE MOORE V. STATE OF NEBRASKA.

FILED JULY 3, 1903. No. 13,119.

Gaming at Public House: INFORMATION. An information under section 217 of the criminal code must set out the names of the parties allowed to play the games complained of, if known to the prosecutor, or allege that they are unknown if such is the fact.

ERROR to the district court for Custer county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Reversed.*

Alpha Morgan, Adolphus R. Talbot, Thomas S. Allen, Nathan T. Gadd and *Charles H. Holcomb,* for plaintiff in error.

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

DUFFIE, C.

The plaintiff in error was informed against under section 217 of the criminal code for allowing games to be played at a saloon of which he was the proprietor. The information does not name the parties who were allowed to play, nor does it allege that such parties are unknown. He was convicted and fined, and now prosecutes error. Sections 216 and 217 of our criminal code were copied from an Ohio statute, approved March 12, 1831. At an early day the supreme court of Ohio held that an "indictment for permitting gambling must recite the parties, or allege that they are unknown." *Davis v. State,* 7 Ohio,

205. It is true that the indictment in that case was brought under the section corresponding to section 216 of our criminal code, but it is apparent that the same necessity existed for naming the parties, if known, in a charge brought under section 217 as when brought under the preceding section. The highest court of the state from which the statute was adopted having passed upon the question, the presumption obtains that the legislature of this state in adopting the statute did so in the light of the construction given it by the supreme court of Ohio from which it was borrowed.

The information was defective in the respect named, and we recommend a reversal of the judgment.

POUND and KIRKPATRICK, CC., concur.

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

REVERSED.

FRANK A. AGNEW V. THE OMAHA NATIONAL BANK.

FILED JULY 3, 1903. No. 12,317.

1. **Res Judicata: FINAL DECREE.** A final order or decree is conclusive as evidence in a subsequent action between the same parties or their privies, upon the matters therein adjudicated.

2. ———: ———. To constitute an order or decree final, and conclusive as evidence in a subsequent action, it must have been a complete disposition of the main thing or matter in controversy, leaving nothing for the further determination of the court.

3. **Effect of Dismissal.** When a suit is dismissed as to one of two or more defendants without prejudice, such defendant ceases to be a party to the record, and the effect of the dismissal is to leave such defendant in the same position as if he had never been a a party to the action.

4. **Dismissal After Interlocutory Decree: ESTOPPEL.** If before such order of dismissal, there has been a decision or decree upon one of several issues made by the pleadings, but such decision does not fix or determine the liability of the defendant who is sub-

sequently dismissed, such preliminary decree does not estop the defendant dismissed from litigating in a subsequent action the same issue.

5. ———: ———. Plaintiff alleged in his petition a partnership, and the conversion by one of the defendants of the assets of the partnership. Such defendant denied the partnership, and denied that it had converted the assets of the partnership. A preliminary decree was entered finding that a partnership did exist, reserving the case for supplemental proceedings and an accounting. Before final decree, said defendant was dismissed out of the case, without prejudice. *Held*, That in a subsequent action between plaintiff and the defendant dismissed, the latter was not concluded by the preliminary decree finding the existence of a partnership.

6. **Evidence:** PEREMPTORY INSTRUCTION. Evidence examined and *held* to sustain the peremptory instruction for defendant.

ERROR to the district court for Douglas county: LEE S. ESTELLE, DISTRICT JUDGE. *Affirmed.*

Joel W. West and *Timothy J. Mahoney*, for plaintiff in error.

Richard S. Hall, J. H. McCulloch and *Paul Charlton, contra.*

KIRKPATRICK, C.

This is an error proceeding prosecuted from a judgment of the district court for Douglas county in favor of the defendant below, in an action wherein Frank A. Agnew, as receiver, was plaintiff, and the Omaha National Bank was defendant. Plaintiff's petition alleged the corporate character of defendant under the laws of congress relating to national banks; that on January 5, 1894, Phil Stimmel and Frank T. Emerson were copartners in a seed growing business at Omaha and Waterloo, Nebraska; that at the date named the copartnership was the owner of chattel property of the value of $51,114, and of evidences of debt amounting to $13,124; and that on or about that date the defendant wrongfully obtained possession of the chattels, notes, bills and accounts receivable, wrongfully and un-

lawfully converting the same to its own use, and to the damage of the partnership in the sum of $64,138.57; that on January 6, 1897, in a suit pending at the time of the filing of this petition in the district court for Douglas county, wherein Emerson, for himself and all other creditors of the copartnership, is plaintiff, and Stimmel is defendant, the plaintiff herein was appointed receiver of the partnership assets, and by order of the court was directed and required to bring suits to recover all debts owing to the partnership; and that plaintiff qualified as such receiver, bringing this suit as such; the petition closing with a prayer for judgment against the defendant for $64,138.57.

Defendant answered, denying generally, but averred that on January 6, 1894, under a valid judgment in its favor, it caused execution to issue against Phil Stimmel, whereby certain property was seized, which was sold, the proceeds being applied in satisfaction of its judgment against Stimmel, and pleaded that all of its acts and doings, and those of the court and its officers, were legal and regular. Plaintiff filed a reply, admitted that defendant had seized certain property upon execution, but that such property was part of the property charged by plaintiff to have been converted by defendant; denied that the execution referred to in defendant's answer was legal and regular; alleged that none of the property so seized was liable on execution against Stimmel; alleged that in the suit theretofore pending in Douglas county, mentioned in the petition, in which suit defendant herein was defendant, a partnership between Emerson and Stimmel was alleged, and that defendant herein, as defendant in that suit, answered, denying the existence of the partnership; that a trial of that issue was had in that cause, wherein defendant herein appeared and defended; that upon consideration the court found that the partnership did exist on January 6, 1894; and on July 10, 1895, entered a decree adjudging that Emerson and Stimmel were partners; that afterwards plaintiff herein was appointed receiver; and that defendant is estopped by record to deny the existence

of such partnership. There was also a plea that defendant was estopped to deny the regularity of plaintiff's appointment as receiver, which it is not necessary to notice.

There was a trial to the court and a jury, and at the conclusion of the testimony the court, on motion of the defendant, instructed the jury to find for defendant. From a judgment rendered on such verdict, and the ruling of the trial court denying the motion of plaintiffs for a new trial, plaintiff prosecutes this proceeding. A somewhat detailed statement of the facts, as they appear in the record, is necessary to apprehend the questions presented in briefs and argument, which require determination.

It appears from the record that the following agreement was entered into on the date and between the parties named therein:

"Memorandum of agreement entered into this 19th day of January, 1892, by and between Phil Stimmel of Omaha, Douglas county, Nebraska, of the one part, and Frank T. Emerson, of the same place, of the other part, witnesseth: That it is hereby mutually understood and agreed between the parties hereto, that the said Phil Stimmel is to furnish all money necessary for all expenses in making contracts for the growing and sale of garden and other seeds for the season of 1892-1893; for the purchase of all stock; planting seeds and delivery of the same; and for all expenses of office, administration, etc., without charge for interest or use. And that Frank T. Emerson is to devote all his time and abilities, to the absolute exclusion of every other business, under the direction and in the name of Phil Stimmel, to the conduct of said business to the best of his knowledge, using all the connections which his former conduct of a like business has brought, together with such other as he may be able to secure. And further, that the said Phil Stimmel is to have sole executive charge, direction and control of the whole of said business, and all contracts of sale are to be passed upon as to their credits by the said Phil Stimmel. The net profits accruing from the afore-

said business, after paying all expenses, disbursements and losses, if any, shall be divided between the parties hereto in the proportion of 66⅔ per cent. thereof to Phil Stimmel, and 33⅓ per cent. to Frank T. Emerson, which shall be compensation in full to said Emerson for his good will, services, etc. And further, that said Frank T. Emerson is to be entitled to draw against his said proportionate share of the probable net profits of said business for said season of 1892-1893, the sum of $150 per month from February 1, 1892, to June 1, 1893, or the date when the contracts of the year shall be closed and settled, if before June 1, 1893, at which date a final settlement between the parties hereto is to be made. In witness whereof, the parties have hereunto set their hands to this, and a duplicate instrument of like tenor and effect, at Omaha, Nebraska, the day and year first above written.

"PHIL STIMMEL.
"FRANK T. EMERSON.

"Witness: GEORGE H. TOTTEN.

"OMAHA, NEBRASKA, JANUARY 20, '93.

"By mutual consent, this agreement is extended and continued in full force and effect for twelve months, excepting settlement of 1892 business, that to be on or before June 1, 1893. PHIL STIMMEL.
"FRANK T. EMERSON."

While this agreement was in full force, and on January 6, 1894, Stimmel, who was largely indebted to the defendant, the Omaha National Bank, and to a firm of attorneys for legal services, made confession of judgment in their favor, upon which executions were issued and levied upon property of Stimmel, and also upon property connected with the business which was being transacted under the agreement quoted above. Thereupon, and before any sale was had under the executions, and on January 24, 1894, Frank T. Emerson, "for himself, and on behalf of all creditors of the seed growing department of Phil Stimmel, who may desire to avail themselves of the benefits of this

action," filed a petition in the district court for Douglas county, making Phil Stimmel, Montgomery, Charlton & Hall, the Omaha National Bank and J. C. Drexel, sheriff, defendants, in which he alleged: The agreement already quoted and faithful performance by him of his part thereof; that the business had been largely profitable, but that defendant Phil Stimmel had excluded him from inspection of the books; that Stimmel had diverted the funds and assets of the said business, and refused to account to him; that the said business owed many obligations, after the payment of which, if the funds thereof were properly applied, there would be left a large surplus for division between Emerson and Stimmel under the agreement mentioned; that the conduct of Stimmel was calculated to inflict great and irreparable injury on plaintiff, Emerson; that Stimmel had confederated with the Omaha National Bank and Montgomery, Charlton & Hall, who had fraudulently procured said confessions of judgment with the fraudulent purpose of levying upon the assets of the seed growing department mentioned, with intent to defraud plaintiff, Emerson, and said creditors; that the debts due from Stimmel, upon which said judgments were based, were private debts of Stimmel, and had no connection with the business known as the seed growing and contracting department of Stimmel; that Stimmel, for the purpose of defrauding plaintiff, Emerson, out of his share of the profits of said business, had diverted the assets of that department to other departments of his business, using the same for the payment of his debts not connected therewith; and that an accounting was necessary to determine what was due to Emerson; that the said defendants had full knowledge of the relations between Emerson and Stimmel; that the defendants named had procured from Stimmel an assignment to them of a large amount of notes, bills, acceptances and accounts belonging to the partnership; and had procured possession of the books thereof in order to cover the fraud perpetrated; that plaintiff, without a discovery, was without remedy; that the character

of most of the chattels levied upon was such, that a sale upon execution would result in great and needless sacrifice; that there were large sums outstanding due to Stimmel on account of the said business, which Stimmel was collecting and converting to his own use; that many replevin suits were being prosecuted to get possession of said goods; that Stimmel was insolvent. The petition closed with a prayer for an accounting between Emerson and Stimmel, "touching the said profit sharing business enterprise"; for the appointment of a receiver, during the pendency of this suit; for an injunction against Stimmel from interfering with the assets of the business referred to; and against defendants from attempting to apply the assets of said business to the satisfaction of their claims.

To this petition of Emerson the Omaha National Bank answered, justifying its seizure, denying fraudulent intent towards Emerson; and denied that he "ever had any interest in the business, goods, property, effects, or assets of the said Phil Stimmel, as a partner of said Stimmel;" and pleaded an adjudication, by the district court for Douglas county, that plaintiff, Emerson, had no claim as against Stimmel on the ground of partnership; and pleading other matters not material here. To this answer plaintiff Emerson pleaded a general denial.

The case of *Emerson v. Stimmel* was thereupon submitted to the court, upon the single issue, whether there was in fact a partnership between Emerson and Stimmel; and upon that issue a decree was, upon July 10, 1895, rendered, adjudging that there was a partnership; that Emerson was entitled to an accounting, as between himself and Stimmel, of the assets and liabilities of the seed growing department of the business of Phil Stimmel; the decree ordered a reference, the referee to report on or before December 20, 1895. To this decree the defendants, Omaha National bank and Montgomery, Charlton & Hall, took exceptions, and were given forty days from the rising of the court to prepare and serve a bill of exceptions.

On May 29, 1896, the Omaha National Bank filed a mo-

tion in the case of *Emerson v. Stimmel* to be dismissed out of that case, at plaintiff's cost, for the reasons: First, that the real intent of the action was to obtain an accounting between Emerson and Stimmel; his prayer for an injunction against the bank having been by a prior order of the court, on July 26, 1894, denied, so that the bank was no longer a necessary or proper party: Second, because it did not appear that plaintiff, Emerson, would upon an accounting be shown to have any interest in the alleged partnership assets; that defendant was not insolvent or liable to become so: Third, that if plaintiff had an action against the bank, it was for conversion, which was an action at law and not in equity: Fourth, that there had been an interlocutory decree, on July 10, 1895, finding a partnership and ordering a reference, but that plaintiff, Emerson, had failed to prosecute his case, whereby, to its great detriment, defendant bank had been wrongfully retained in the case. On September 29, 1896, this motion was sustained; the bank being dismissed, without prejudice, at plaintiff's costs. On January 6, 1897, Frank A. Agnew, plaintiff herein, was, on motion of plaintiff, in *Emerson v. Stimmel,* appointed receiver "of all the partnership effects and assets of every kind and description," both parties being directed to deliver same to him; and he was authorized to sue for and recover all debts due the partnership. Agnew immediately gave bond and qualified as receiver.

After defendant bank had been dismissed, on its own motion, out of the action of *Emerson v. Stimmel,* Agnew, as receiver, commenced against it the action for conversion which is now here for review. However, before this action came on for trial, defendant bank asked and obtained leave again to answer and intervene in the equity suit; and obtained an injunction against plaintiff, Agnew, receiver, from proceeding in the law action herein. But when the equity suit came on for trial, defendant bank was, upon its motion, again dismissed out of that suit; and that suit went on to decree, July 25, 1899, in which judgment was

rendered, upon the report of the referee, against the partnership and in favor of several hundred intervening creditors; but the court expressly declined to give judgment against defendant bank, on the ground that, by dismissing it out of the action, jurisdiction over it had been lost, but found that it was indebted to the partnership in a large sum, directing the receiver to prosecute his action against it. Then it was that the present action was prosecuted to final judgment as already narrated.

While the record in this case is somewhat voluminous, and a statement of the facts necessary to an understanding of the case can not conveniently be embraced within a small compass, there are, at most, only two questions raised by the record, and necessary to be determined: (1) Was the defendant here estopped from denying a partnership by reason of the interlocutory decree of July 10, 1895, entered in the action of *Emerson v. Stimmel*, finding the existence of a partnership at a time when defendant was still a party to that action? (2) If it was not estopped, is the peremptory direction for defendant justified?

Plaintiff, invoking the maxim that a judgment as evidence is conclusive, as a plea, a bar, insists that the decree of July 10, 1895, pleaded in his reply, has all the elements of a final adjudication between plaintiff and defendant on the issue of a partnership, and is *res judicata* herein. It appears that, after that decree was entered and the order of reference was made, defendant bank was twice dismissed out of the action, the latter time, just before the final decree of July 25, 1899, in which decree, as already stated, the court declined to give judgment against the bank and in favor of the receiver, on the ground that, by dismissing it out of the action, it had lost jurisdiction over it. The inquiry accordingly is, what effect did the dismissal of defendant bank, prior to the decree of July 25, 1899, have as to the binding force upon defendant of the decree of July 10, 1895, as to the issue therein adjudicated? Manifestly, the decree of July 10 is *res judicata* as to all parties to the final decree of July 25, 1899.

Is it otherwise as to defendant because it was dismissed before final decree?

To hold in the negative would, we believe, be unwarranted upon sound reason and authority. The decree of July 10 was interlocutory, that is, it was not a final determination of the principal thing sought or litigated in the action commenced by Emerson. It was a separable determination of one issue, declaring that a partnership did exist, leaving still for determination whether defendant was liable, though a partnership did exist. Was that such a final determination as would have given the bank, then in that action, a standing in the appellate court? Had the bank attempted to appeal, a sufficient answer would have been found in *Lodge v. Twell,* 135 U. S. 232. There the plaintiff brought suit against three defendants, one of whom was a judgment debtor to her, under a decree for alimony, and the other two were fraudulent grantees of such debtor. By decree the conveyances were held fraudulent, reserving the case for an accounting as to the value of the property disposed of by the fraudulent grantees. It was held that the first decree, although it disposed of the equities of the case, was interlocutory, from which no appeal lay, as it was still necessary to determine in what amount an order for payment or a money decree should be entered against the defendants, fraudulent grantees. The decree of July 10, in this case, did not even dispose of the equities of the case, and did not purport to fasten upon defendant bank any liability whatever.

In *McGourkey v. Toledo & O. C. R. Co.,* 146 U. S. 536, and the many cases there cited and reviewed, the principle, that a decree ordering a reference to a master for judicial purposes, whose functions are something more than merely ministerial, is not final and not appealable, is shown to be firmly established.

It has, so far as our investigation has led us, been the uniform holding of this court, that an adjudication, to be binding as *res judicata,* must dispose of the whole merits of the case on trial, and leave nothing for the further de-

termination of the trial court. *Johnson v. Parrotte,* 46 Neb. 51, and cases there cited. Under the issues as joined in *Emerson v. Stimmel,* at the rendition of the decree of July 10, 1895, there is nothing to warrant the conclusion that the determination of the issue in that manner settled the question of the liability of the defendant bank to the partnership. Defendant bank might have shown that it had not taken partnership assets. "A judgment to be conclusive must be final and upon the merits." *Cheney v. Cooper,* 14 Neb. 415. That is, it must be full disposition of the main thing sought to be recovered or accomplished by the institution of the suit. This decree can not be said to have had these characteristics. If it was not a final order, final in the sense that it was appealable, then it would seem to follow that it would not conclude defendant bank, herein, as to the issue therein passed upon, unless it can be said—and such seems to be the contention of plaintiff—that it did become final and appealable by virtue of the rendition of the final decree of July 25, 1899. But on that date it was no longer a party to the action, having been authorized by the court to withdraw therefrom; an authorization which, in effect, told it that the final decree about to be entered was no concern of its. With the question of the correctness of the order of dismissal we are certainly not now concerned; but surely it gave to defendant bank a right to assume that it was out of the case; that so far as it was concerned, it was in the same position, no better and no worse, than if the action had never been instituted.

We believe it is the law, applicable here, well sustained by authoritative decisions, that the order of dismissal as to defendant in that action, without prejudice, before final decree, before the liability of any party thereto had been fixed, was, as to the bank, a complete nullification of all that had previously taken place, as well as an exculpation from any liability under the final decree.

In *Loeb v. Willis,* 100 N. Y. 231, it is said:

"By the discontinuance of an action the further pro-

ceedings in the action are arrested not only, but what has been done therein is also annulled, so that the action is as if it never had been."

An examination of the *Loeb* case will, we think, show that it is in point herein. There the plaintiff brought his action to foreclose a mortgage, and procured a decree and judgment for deficiency. Subsequently to the rendition of the decree of foreclosure, but before proceeding to sale thereunder, he made a motion for leave to discontinue his foreclosure suit, and begin an action against the same defendant upon the bond accompanying the mortgage. This was granted and, in the action at law, defendant sought to show matters in avoidance, which were ruled out on the theory that the judgment in the foreclosure suit was an adjudication thereof. Holding this action on the part of the trial court error, the supreme court of New York used the language already quoted. If the order of dismissal after judgment, in the case cited, nullified that judgment and deprived it of the dignity of an estoppel in the action at law, it would seem, upon the same principle, the dismissal under consideration before final decree, but after the interlocutory decree of July 10, 1895, would have like effect in nullifying that decree, so that it would not work an estoppel in a subsequent action at law.

Ogden City v. Weaver, 108 Fed. 564, was a suit in the federal court by the receiver of a water works company against Ogden City. The defendant sought to estop the plaintiff by pleading a decree in the state court, in a case in which Ogden City was plaintiff and the receiver's predecessors in interest were defendants, holding the contract declared upon by the receiver invalid. It appeared that, after rendition of the decree mentioned, the case was retained for an accounting with reference to the value of the property affected by the contract and the business transacted between the parties during the period the contract was supposed to be valid, and that the case was still pending before the master in the state court. It was held that the decree was interlocutory, and did not conclude

the receiver, in the federal court, upon the question of the validity of the contract. In the case last cited, the equity suit in the state court was still pending; but in the case at bar, the equity suit in which decree on July 10, 1895, was rendered, had, as to defendant, been discontinued.

We conclude, therefore, that the decree of July 10 did not estop defendant bank to deny the partnership.

If defendant was not concluded by that decree, was the peremptory instruction for defendant right under this record? Counsel for defendant argue at some length that the agreement between Stimmel and Emerson was not a partnership agreement, but merely a profit sharing contract, and that under it Emerson was not responsible for debts or liable for losses, other than a failure of the business to earn profits. However, in view of the conclusion already announced, that the decree in *Emerson v. Stimmel* did not estop defendant, we must inquire whether there is any competent proof of a partnership. Plaintiff alleged such a partnership; defendant denied it; and plaintiff pleaded an estoppel, but has not sustained such plea. This certainly put plaintiff upon other and independent proof of a partnership.

As we view the record, plaintiff seems to have relied for his right to recover, so far as that right must be determined by the existence of a partnership, wholly upon the plea of estoppel and the record evidence introduced in support thereof. It is true, that the agreement is contained in the bill of exceptions, but only as one of the several exhibits introduced in support of the plea of estoppel. Beyond this, the issue of a partnership is without any evidence in its support. Moreover, counsel for plaintiff, in his reply brief, does not claim that the agreement, standing alone, shows a partnership, but says that in the action in which the relationship between Stimmel and Emerson was held to be a partnership, there was much evidence in addition to the agreement, which showed that Emerson also assumed the risks of the business and was liable for the debts, and that in that action it was conclusively proven that there was a

partnership. Under this state of the record, we do not believe that the question of the legal effect of that agreement is before us. It follows that the allegation of a partnership is wholly unsupported by the evidence. Accordingly, it must be held that the judgment of the trial court is right, and it is recommended that the same be affirmed.

HASTINGS, C., concurs.

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

AFFIRMED.

NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION, APPELLANT, V. FERDINAND RETZMAN ET AL., APPELLEES.

FILED JULY 3, 1903. No. 12,728.

1. **Contracts: VALIDITY.** Contracts made in this state, by residents of this state, with foreign building and loan associations, such contracts being made through agents of such associations located in this state, are Nebraska contracts, and their construction, validity and enforcement are governed by the laws of this state.
2. **Purchaser of Equity of Redemption: USURY: ESTOPPEL.** The rule that the purchaser of the equity of redemption, who purchases subject to a mortgage, and who deducts from the purchase price sufficient to pay such mortgage, is estopped to defeat the mortgage on the ground of usury, is not applicable when the vendee and the mortgagor, at the time of sale, agree that the incumbrance is tainted with usury, and there is retained out of the purchase price only enough to pay the incumbrance, less any usurious penalties.
3. **Evidence: USURY.** Evidence examined and *held* that defendant was not estopped to set up the plea of usury.
4. **Evidence.** Evidence examined and *held* to sustain the judgment.

APPEAL from the district court for Harlan county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

C. M. Miller, for appellant.

John Everson and *Gomar Thomas, contra.*

KIRKPATRICK, C.

On December 4, 1900, The National Mutual Building and Loan Association of New York, a foreign corporation, filed in the district court for Harlan county a petition, making Ferdinand Retzman and Magdalena Retzman, his wife, defendants, alleging its corporate existence under the laws of the state of New York; that it was authorized to transact business of a building and loan association, and its authority to do business in the state of Nebraska; that in June, 1890, Alice G. Simms made application in writing for membership in plaintiff association, and subscribed for twenty shares of plaintiff association's stock, which application was accepted and the shares issued; that in July, 1890, Alice G. Simms, as such member, applied for a loan of $2,000, which was granted, payable in instalments, the last payment to be made on completition of certain buildings, as stipulated in her application; that on March 13, 1891, Alice G. Simms gave a bond mortgage and assignment of her shares of stock to plaintiff, to secure the payment of her loan. From the petition it appears that the mortgage bond contained the usual stipulations and conditions, that upon failure to pay as therein agreed, the whole principal sum, including arrearages of interest, premiums, dues and fines, at the option of the mortgagee, became due and payable; contained the description of certain lots in Alma, Nebraska, the property mortgaged. The petition alleged failure on the part of Alice G. Simms, and the defendants Retzman to pay certain monthly dues of $10 from January to March, 1899; that three months had elapsed since default; that plaintiff elected to consider the whole amount of $2,000 due and payable, including interest at six per cent. from January, 1899, together with a monthly premium of $10 from March 13, 1899, amounting on June 1, 1900, to $170 and $24.33 permiums, subject to the application thereon of the value of the aforesaid shares in accordance with a collateral agreement in the bond that upon default in the stated payments said shares might be

canceled, and their maturity value applied on the loan. It was alleged that the withdrawal value of these shares was on June 1, 1900, $1,296, that said shares were canceled, and the amount mentioned applied on the loan; that no proceedings had been had at law; that there remained due $898.13. The petition alleged the conveyance of one-half interest in the premises covered by the mortgage by deed from Alice G. Simms, and her husband B. M. Simms, on March 1, 1895, to defendant Ferdinand Retzman, subject to plaintiff's mortgage; that Retzman, on July 24, 1896, conveyed his undivided one-half to Magdalena Retzman, his wife, subject to plaintiff's mortgage; that on March 7, 1898, Alice G. Simms conveyed her remaining one-half to her husband, B. M. Simms; that on March 15, 1898, Simms and wife conveyed this remaining one-half to Ferdinand Retzman, subject to plaintiff's mortgage. The plaintiff further alleged that by accepting this deed from Ferdinand Retzman, subject to plaintiff's mortgage, Magdalena Retzman was estopped from setting up the defense of usury against the mortgage; that by accepting the deed from Simms subject to the mortgage, Ferdinand Retzman was estopped in the same manner, closing with a prayer for judgment.

Ferdinand Retzman answered, admitting the execution of the mortgage for $2,000; that Alice G. Simms subscribed for the shares of stock as alleged, but for the sole purpose of obtaining the loan; pleaded that the mortgage was a Nebraska contract, and that Alice G. Simms agreed to pay for the use and forbearance of the money loaned the sum of $240 per annum; admitted that on March 1, 1895, he bought a half interest in the mortgaged premises, Simms and wife warranting the title to be free of all incumbrances except plaintiff's for the sum of $1,237; admitted that he agreed to assume half this indebtedness, and thereafter paid his share upon the indebtedness at the rate of $240 per annum; that under this agreement he paid and plaintiff received and accepted the sum of $1,388; alleged that on March 15, 1898, he purchased of the Simmses the

other half interest, agreeing to pay the amount remaining due upon the mortgage not to exceed $85, and that as sole owner he paid to plaintiff $236; admitted the cancelation of the shares, but alleged that he had not received full credit therefor; alleged that Alice G. Simms and B. M. Simms had confederated and conspired with plaintiff to compel defendants to pay a large amount on the mortgage, although plaintiff and Simms well knew its usurious character; and that the failure of plaintiff to make the Simmses defendants was part of the conspiracy; prayed that the Simmses be made defendants; an accounting and disclosure of the assets of plaintiff, and cancelation of the mortgage with decree that it had been fully paid. Magdalena Retzman's answer denied generally, and pleaded that at the time of the creation of the alleged liability she was under coverture.

Alice G. Simms and B. M. Simms filed a joint answer and cross-petition, alleging the transfer of March 1, 1895, of one-half interest, and of March 15, 1898, of the other half interest, to Retzman; his assumption of plaintiff's mortgage; that at the time of the second transfer the stock of goods was valued at $1,033.50, the interest of the Simmses being $516.75; the value of the real estate was $2,000, the interest of the Simmses being $1,000, making the total interest of the cross-petitioners $1,516.75, which was agreed by Retzman to be paid for the interest of the cross-petitioners; that he paid $1,000, assuming to pay $500 on the mortgage; that he had paid thereon only $118; they accordingly prayed that, if the court find nothing due to plaintiff from Retzman, he be adjudged to pay to the cross-petitioners the sum of $382. They denied all allegations in both petition and Retzman's answer not admitted. Retzman's reply to the cross-petition denied generally. Plaintiff replied to Retzman's answer, pleading that the contract sued upon was a New York contract, and not subject to the usury laws of Nebraska. Trial was had and the court found generally for defendants Retzman, and dismissed both the petition of plaintiff and cross-petition

of Alice G. and B. M. Simms. From this judgment, the Building & Loan Association, and the cross-petitioners, Alice G. and B. M. Simms, prosecute appeal.

A brief outline of the evidence may conveniently be given before stating the contentions of the several parties to this appeal. In 1895, B. M. Simms was engaged in the retail drug business at Alma, Nebraska, the business being carried on in a building located on lots owned by his wife, Alice G. Simms. The real estate was mortgaged as alleged in the pleadings. In March, 1895, Ferdinand Retzman purchased from the Simmses a half interest in the real estate and drug business. The deed from Simms to Retzman contained this clause:

"This conveyance is subject to an indebtedness of twelve hundred thirty-seven dollars in favor of National Mutual Building & Loan Association of New York, and one-half of said amount grantee herein assumes and agrees to pay as part of the consideration herein named."

The parties continued to do business as partners, apparently under the name of the "Simms Drug Company," for some three years. In the course of time, however, the partnership proved highly unsatisfactory to both Simms and Retzman, and various attempts were made to separate, culminating on March 15, 1898, in the acceptance by Simms of an offer of $1,000 by Retzman for the former's half interest in all the real estate and drug business. Thereupon a deed was executed by B. M. and A. G. Simms to Ferdinand Retzman, conveying the half interest belonging to Simms for a consideration of $1,000, the deed containing the following clause:

"This conveyance is made subject to a certain mortgage given by first parties to National Mutual Building & Loan Association, of New York, for the sum of $2,000, on which a large amount has been paid, second party assuming balance unpaid, which may be found to be due."

Appellant makes two principal contentions: (1) That the contract sued on is a New York contract, and, tested by the laws of that state, is not usurious; (2) that appel-

lees Retzman, purchasers of the equity of redemption, can not set up usury as a defense, because such defense is personal to the borrower, and appellees purchased subject to the mortgage of appellant. The contention of the cross-petitioners Simms is that the trial court erred in not decreeing that Retzman should pay to them the sum of $382, inasumuch as his liability to them in that sum is a logical deduction from the conclusion that Retzman was without liability to appellant because the mortgage was usurious.

The first contention of appellant can scarcely be sustained. There is no question whatever made that, if tested by the laws of this state, the contract was indisputably usurious, and that at the time of bringing this suit the whole principal sum with legal interest had been more than paid. The only question, therefore, is whether the contract was a New York or Nebraska contract. It was doubtless the latter. Alice G. Simms was a resident of Alma, Nebraska. Appellant is a corporation of New York state. The contract was made by an agent of appellant located at Alma, Nebraska, and we must hold the contract a Nebraska contract under the test applied in *People's Building, Loan & Savings Ass'n v. Shaffer*, 63 Neb. 573, namely:

"Contracts made in Nebraska, with residents of this state, by a foreign building and loan association, if made by agents of such association within this state, are Nebraska contracts; and by their construction, validity and enforcement are governed by the laws of this state."

Appellant cites *Cheney v. Dunlap*, 27 Neb. 401; *McKnight v. Phelps*, 37 Neb. 858; *Building & Loan Ass'n of Dakota v. Walker*, 59 Neb. 456, and many cases from other states in support of the second contention, that appellee Retzman, not being a privy to the contract with A. G. Simms, but only the purchaser of the equity of redemption, can not plead the defense of usury. We think the authorities are very clear to the effect that usury is a defense personal to the borrower, his privies or representatives, to be waived by him but only available to him, and not to one who purchases his equity recognzing the validity of the

mortgage, and retaining from the purchase price a sum sufficient to pay such mortgage in full. The reason of the rule is not far to seek. Equity declares that the purchaser under such circumstances shall not be permitted to get a larger estate than he bargained for. The rule is based in the universal requirement of good faith, so that when the owner of the equity of redemption permits a reduction from his interest of the full amount of the usurious incumbrance, he never intends this as a gift or concession to his vendee, but as a waiver of the personal defense of usury; and when the vendee takes subject to the full incumbrance, including the usury, he forfeits the defense of usury, because he has already gotten all he bargained for, and the defense of usury would give him more than that, namely, the amount deducted from the purchase price by the owner of the equity upon the belief that the full amount of the incumbrance would be paid. Equity will not aid a purchaser to get an estate at a less price than he has agreed to pay for it. Hence, it is stated in *Hough v. Horsey*, 36 Md. 181, 11 Am. Rep. 484, cited by appellant herein, which was an attempt, by the purchaser of the land subject to a mortgage alleged to be usurious, to escape payment of the usury:

"If the mortgage debt were to be reduced on the present application, by reason of the alleged usury in the contract, it is manifest the complainant would get the estate purchased for less than she agreed to pay for it."

The rule is similarly stated in a quotation from 27 Am. & Eng. Ency. Law (1st ed.), 952, made by appellant. The inquiry accordingly is whether Retzman and Simms, at the time of the second transaction, by which Retzman acquired the half interest theretofore held by Simms, had in mind the usurious character of the incumbrance, and intended that there should be deducted from the purchase price only enough to pay the incumbrance, less usury.

It is established by the evidence that at the time of the conveyance to Retzman of March 1, 1895, the amount of the indebtedness was understood by all parties to be $1,237,

as stated in the deed of that date, and that by accepting the conveyance, Retzman agreed and assumed half of this indebtedness, with the full understanding as to its amount and the terms and conditions under which it was to be paid. Thereafter, and until March 15, 1898, the partnership paid regularly $32 monthly to the local agent of appellant. In March, 1898, when the efforts of the partners to separate were about coming to fruition, and it was agreed that Retzman should buy Simms' interest, an attempt was made by the parties and those representing them to figure out the amount still due to appellant association upon the mortgage. All of the evidence on the part of appellee Retzman points clearly to the conclusion that Retzman, in assuming by the contemplated conveyance to him the sum still due on the mortgage, had in mind only the principal loan and interest at lawful rates under the usury laws of this state, assuming that the contract was highly usurious, and that in no event would he or Simms be liable beyond the principal and interest divested of usurious penalties. We do not hesitate in saying that from this same evidence, and other evidence in the record, it is fairly inferable that Simms also understood that the conveyance to Retzman contemplated the assumption by the latter of the amount due less any sum tainted with usury. In the evidence on behalf of appellees Retzman, it is claimed that the computation resulted in ascertaining that there remained due on the mortgage a sum not exceeding $100, possibly not more than $85. There is evidence also in the record that the deed of conveyance last made in 1898, as originally drawn, contained a specific provision that Retzman should not be liable on the mortgage beyond the sum due less any usurious penalties, but that this provision was stricken out or erased, and the words, "assuming balance unpaid which may be found to be due," inserted in their stead, upon the suggestion of Simms himself, who explained that because of a personal feeling of kindness because of good treatment from appellant towards him in the past, he did not care to have the obnoxious provision remain in the deed, as stated

by one witness, who made the alteration, "in black and white." B. M. Simms was called on behalf of cross-petitioners, but as we read his testimony, it fails to produce upon our minds any doubt as to the truth of the evidence already set out, which was doubtless credited by the trial court.

We think that no other conclusion can fairly be drawn from the evidence than that the parties, at the time of their last negotiations in March, 1898, both treated appellant's mortgage as tainted with usury, and that under the laws of this state the original mortgagor would not have been obligated to pay more than the principal sum with legal interest; and, further, that Retzman, in taking the latter conveyance, was retaining out of the purchase price only enough to pay "the balance which may be found to be due," without usury. The difference in the wording of the assumption clauses in the two deeds goes to sustain this view.

In *Essley v. Sloan,* 116 Ill. 391, 399, 6 N. E. 449, it is said:

"It would be inequitable, after his having received the benefit of the incumbrances by deducting the amount thereof from the consideration paid for the land, to permit him to keep it himself, and not apply it to the purpose for which it was set apart and reserved in his hands."

In Wiltsie, Mortgage Foreclosures, sec. 395, it is said:

"It is a general rule that a purchaser, whose conveyance is by its terms made subject to a prior mortgage, the amount of which is deducted as part of the consideration of the purchase, whether he expressly assumes it as a part of the purchase money or not, can not plead usury as a defense to the foreclosure of such mortgage."

We think from what has already been said, it will be apparent that the doctrine announced in the citations just made, is inapplicable to the facts in this case. In the *Essley* case, the decision is based in equitable considerations, namely, that the purchaser shall not be permitted to divert to himself money left in his hands by his grantor

for another purpose. In the quotation from Wiltsie, the foundation of the rule is said to be the deduction from the purchase price of the amount of the mortgage.

The facts in this case bring it within the doctrine as announced in *Maher v. Lanfrom,* 86 Ill. 513:

"If a party purchases from a mortgagor without any deduction from the price on account of the incumbrance, the grantee thereby becomes invested with the right to interpose the same defenses as might have been made by the mortgagor. In such case the conveyance amounts to an authority to the purchaser to interpose the defense of usury."

We fail to discern any conflict between these decisions. There was a deduction from the purchase price paid by Retzman because of appellant's mortgage, but the language in the deed, as well as the evidence, amply show that this deduction did not and was not intended to include usurious interest, and if it did not, then Simms never waived the defense of usury, and intended that Retzman should have the advantage thereof. If in the transfer of Simms' half interest there had been deducted the full amount of appellant's mortgage including all charges that entered into its usurious elements, there would be manifest inequity in permitting Retzman to defeat the mortgage for usury. If, on the contrary, no such deduction was made, but only a deduction sufficient to pay the loan with legal interest, less credits, there is no injustice in Retzman's plea of usury. We conclude that the judgment of the trial court, as between Retzman and appellant, dismissing the latter's petition, is right.

With reference to the demand of the cross-petitioners, Alice G. and B. M. Simms, for judgment in their favor against appellee Retzman, in case the court determines that appellee is not liable on appellant's mortgage, it follows necessarily from the conclusion already reached, that in denying their prayer the judgment of the trial court is also right. It was the theory of the cross-petitioners that there was a deduction from the purchase price on

account of this incumbrance in the sum of about $500, and as Retzman had paid only $118 to appellant, according to one computation, he was liable to them for the difference between the amount retained out of the purchase price for payment on the mortgage and the amount paid thereon. The evidence wholly fails to sustain this theory. On the contrary, the evidence shows that Retzman paid more than the parties at the time of the transfer agreed was still due. It is therefore recommended that the judgment of the trial court be in all respects affirmed.

HASTINGS, C., concurs.

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

AFFIRMED.

BEN V. KOHOUT, TRUSTEE, v. FRANK J. CHALOUPKA, SR., ET AL.

FILED JULY 3, 1903. No. 13,009.

1. **Bankruptcy**: SECURED CREDITOR. If a secured creditor of a bankrupt, whose security is insufficient, discloses his security in proving his claim before the referee, he may retain his security and share in the dividends as to the overplus.
2. **Creditors' Bill**: INTERVENTION. The petition of a trustee in bankruptcy, asking to be substituted as party plaintiff in a creditor's bill filed by a creditor of the bankrupt who has filed his claim before the referee in bankruptcy, which does not allege that such creditor has waived his security, is insufficient to entitle the trustee to intervene and be subrogated to the rights of such creditor.
3. ———: ———. Petition examined and *held* not to state facts sufficient to entitle the petitioner to intervene and prosecute the suit.

ERROR to the district court for Saline county: GEORGE W. STUBBS, DISTRICT JUDGE. *Affirmed.*

J. A. Wild and *A. N. Dodson*, for plaintiff in error.

Archibald S. Sands, contra.

KIRKPATRICK, C.

This proceeding is prosecuted from a judgment of the district court for Saline county sustaining a demurrer to a petition of intervention filed by B. V. Kohout, trustee in bankruptcy of the estate of Frank J. Chaloupka, Sr., in the case of *Charlotte S. Flint, administratrix,* against *Frank J. Chaloupka, Sr., et al.* The case named was one in the nature of a creditor's bill pending in the district court for Saline county. The petition there recited that the plaintiff, Charlotte S. Flint, was administratrix of the estate of James Flint, deceased; that on May 12, 1897, she, as such administratrix, recovered a judgment against Frank J. Chaloupka, Sr., and Joseph F. Chaloupka on a promissory note delivered to James Flint, in his lifetime, for $1,451; that execution had been issued upon the judgment and returned *nulla bona;* and then contained certain allegations as to fraudulent conveyances by the judgment debtors, and asked to have such conveyances set aside and the property subjected to the payment of her judgment. The judgment debtors and their alleged fraudulent grantees were made defendants in her suit.

On September 9, 1901, Kohout filed his petition of intervention, alleging his appointment and qualification as trustee in bankruptcy of the estate of Frank J. Chaloupka, Sr., who had been adjudged a bankrupt some time in 1899. His petition recited the pendency in the district court for Saline county of the action by Charlotte S. Flint, administratrix, plaintiff, against Chaloupka, and other defendants, the purpose of which was "to recover possession of the following described real estate," describing the property mentioned in the petition in that action, and then contained the following paragraph:

"Your petitioner shows to the court that the action was begun before bankruptcy proceedings were instituted, and the plaintiff herein (the administratrix) has filed her claim, and said claim was allowed by the referee in bankruptcy. Your petitioner is entitled, as trustee, to what-

ever interest the plaintiff herein may have in or to the above described premises, and is entitled to the immediate possession of the same. Wherefore your petitioner prays that he may be a party plaintiff in said action and permitted to prosecute the same."

The defendants named, demurred to the trustee's petition for the reasons: (1) That the court has no jurisdiction of the subject matter; (2) because the petition did not state a cause of action against the defendants, or any of them, in favor of the said intervener. This demurrer was sustained, and the question presented in brief of plaintiff in error is whether this ruling is correct. There is no brief by defendants in error.

We are of opinion that the judgment of the trial court must be affirmed. The record does not show that the administratrix, plaintiff in the creditor's bill, pleaded to the petition of the trustee; and she is not a party to this error proceeding, the only defendants in error being the demurrants, who were defendants in the suit brought by the administratrix.

The rule invoked by plaintiff in error to sustain his position is, of course, well settled, namely, that a creditor of a bankrupt may either directly or indirectly waive his security, and prove his claim as unsecured; as where a creditor, by judgment, execution, attachment or creditor's suit, proves his claim without disclosing his lien, in which event he will not subsequently be permitted to enforce it, but will be deemed to have waived it.

But in this connection, it is important to keep in mind that a secured creditor is not, under the bankruptcy law, forced to the alternative of either relying wholly on his security, or, abandoning that, prove his claim with other creditors. It is, we think, settled by a number of authoritative adjudications that a creditor who has security for his debt, if that security is insufficient, may prove his claim for the overplus, and does not abandon his security if he makes a full disclosure of it and the value thereof. Under such circumstances he may vote upon the choice of an

assignee upon such overplus. *In re Bolton,* Fed. Cas. No. 1,614.

So, where a creditor proves for the full amount of his claim, specifying the securities held by him for the debt, he may participate in the dividends to the extent that his claim is greater than the value of the security.

Recurring now to the language of the trustee's petition, it is there said: "That the plaintiff herein has filed her claim, and said claim was allowed by the referee in bankruptcy." Clearly, the mere allegation of the filing of her claim and its allowance by the referee is not sufficient to show that she waived her security, as she may have filed her claim without waiving her security. For all that appears from the trustee's petition, she may have appeared in the bankruptcy proceedings, as she had a right to do, only for the purpose of participating to the extent that her claim was greater than her security. The allegation that by filing her claim she waived her security was a material one, and the only presumption that may be indulged from its absence is that she did not waive her security. *Humphries v. Spafford,* 14 Neb. 488.

It would seem to be a matter of chief concern to the plaintiff in the creditor's bill suit, whether the trustee in bankruptcy should be permitted to intervene, and be substituted as party plaintiff. But the only question before us is whether the ruling of the trial court upon the demurrer interposed by the defendants in that suit is correct. The one question raised by the demurrer was whether the petition disclosed a right in the trustee to prosecute the suit against them.

They had a manifest right to raise this question. If the facts alleged were insufficient to entitle him to be made party plaintiff by substitution, the defendants against whom the suit was to be prosecuted were entitled to raise that question. It is always open to the defendant to question the right of the plaintiff to sue. The right of the intervening trustee to prosecute the suit depended upon whether or not the plaintiff had in fact waived her security,

the lien by her procured by the filing of her bill. In this material respect we have already found the petition insufficient. It follows that the ruling of the trial court should be affirmed, and it is recommended that the same be done.

DUFFIE and POUND, CC., concur.

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

AFFIRMED.

HENRY BOLTON V. NEBRASKA CHICORY COMPANY.

FILED JULY 3, 1903. No. 12,984.

Manufacturing Corporation. A corporation organized to "plant, harvest, store, purchase, manufacture, market, sell and deal in chicory" *held* a manufacturing corporation within the purview of section 37, chapter 16, Compiled Statutes.

ERROR to the district court for Colfax county: CONRAD HOLLENBECK, DISTRICT JUDGE. *Affirmed.*

George H. Thomas, for plaintiff in error.

Frank J. Everett and *George W. Wertz*, *contra.*

POUND, C.

This is a suit upon a subscription to stock, and the sole question involved is whether the plaintiff corporation is a manufacturing corporation, within the purview of section 37, chapter 16, Compiled Statutes (Annotated Statutes, 4138). A question of this sort is not to be settled entirely by the construction given to the phrase "manufacturing corporation" in statutes of other states dealing with different subjects. The intention of the legislature in this particular case is to be sought for, and the policy and purpose of this particular act to be considered. The decisions in which this phrase has been construed, are fully collected in a recent work, and need not be set out. 1 Clark and Mar-

shall, Private Corporations, pp. 78, 131. It will be observed that in some cases the statute exempted manufacturing corporations from taxation, in which case it was important to prevent fraud upon the revenue laws by attaching a nominal manufacturing business to a substantial industry of another sort. In other cases, manufacturing corporations were relieved from the operation of statutory provisions as to stockholders' liability. Here, again, fraud was to be guarded against, since creditors might be prejudiced greatly if one of their statutory protections could be cut off by a mere addition of some manufacturing enterprise to an undertaking essentially of a different character. The statute here in question was obviously designed to encourage the promotion of manufacturing enterprises of all kinds, in the widest sense, by relaxing the rules as to organization. There is every reason for giving it a liberal construction, and no fraud can result from so doing. Looking at the case in this way, we are satisfied that the plaintiff corporation comes fairly within the statute. The articles of incorporation state its purpose thus: "To plant, cultivate, harvest, store, purchase, manufacture, market, sell and deal in chicory." It appears very clearly that the cultivation, harvesting and storing were incidental to and in aid of the main project of maintaining a plant for converting the raw product into marketable form. It is shown that to render chicory marketable, a certain process is necessary, extending over several days and requiring machinery and a considerable plant. The corporation actually put up such a plant, and operated it. As described in evidence, the process involved the use of molasses, as well as the chicory root, and required from three days to as many weeks, depending upon the kind and grade produced. It involved roasting, crushing, grinding, and separating, and, as to certain forms, a process of making into "sticks." This preparation of the product for market was evidently the real purpose in view. The other purposes are mentioned only so as to enable the company to procure the raw material necessary to the operation of

its mill. They do not suffice to take the case out of the statute.

We recommend that the decree be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

JOSEPH F. DUNN ET AL., APPELLANTS, V. SAMUEL M. THOMAS, APPELLEE.

FILED JULY 3, 1903. No. 12,986.

1. **Riparian Owner:** PRESCRIPTION. A lower riparian owner obtains no right to receive the water of a stream, as against an upper owner, by user for the statutory period of prescription.
2. **Easement:** PRESCRIPTION. In order to acquire an easement by prescription, the adverse user must not only be continuous in point of time, but also substantially identical, during the whole of the statutory period, with respect to manner and extent.
3. ———: ———. One who seeks to acquire an easement of maintaining a ditch over another's land by adverse user must maintain it without material change of location for the full statutory period. That he may have had a ditch somewhere upon the land for ten years, does not give him a right to maintain it in a new location, or to use an extension thereof made within the period.

APPEAL from the district court for Sioux county: WILLIAM H. WESTOVER, DISTRICT JUDGE. *Affirmed.*

Allen G. Fisher, for appellants.

W. H. Fanning, contra.

POUND, C.

Plaintiffs sue to enjoin the defendant from interfering with or preventing their cleaning out and operating an irrigation ditch, which they claim a right to maintain over and across the defendant's land. They also pray an injunction to restrain the defendant from in any manner

diminishing the flow of water in the ditch. The trial court dismissed the cause, and plaintiffs appeal.

The claim to relief against diminishing the flow of water in the ditch appears to be directed against certain ditches maintained by the defendant (who is an upper riparian owner) on his own land, and to be based on the assumption that plaintiffs (who are lower owners) have acquired a right to receive the water of the stream in question for use in their ditch by ten years' user. Of course, this claim is without any legal basis, and was properly rejected by the district court. *Crawford Co. v. Hathaway,* 67 Neb. 325. As to the plaintiffs' ditch, it appears very clearly that a ditch was run upon defendant's land in November, 1890, and that plaintiffs have taken water at a point on said land ever since. But one of their principal witnesses testifies that in 1899, two years prior to this suit, the ditch was run some distance higher up on defendant's land, and the latter claims that this extension injures his land and that his objections and the interference and obstructions sought to be restrained are directed against the new location and extension. This does not seem to be seriously disputed. In order to acquire an easement by prescription, the adverse user must not only be continuous in point of time, but also substantially identical, during the whole statutory period, with respect to manner and extent. *American Bank Note Co. v. New York E. R. Co.,* 129 N. Y. 252, 29 N. E. 302; *Cotton v. Pocasset Mfg. Co.,* 13 Met. (Mass.) 429. In consequence, one who seeks to acquire an easement of maintaining a ditch over another's land by adverse user, must maintain it without material change of location for the full statutory period. *Cotton v. Pocasset Mfg. Co., supra.* That plaintiffs may have had a ditch somewhere upon the land for ten years, does not give them a right to maintain it in a new location or to use an extension thereof made within the period.

We therefore recommend that the decree be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

NATHAN HART, APPELLEE, V. G. H. DIETRICH, APPELLANT.

FILED JULY 3, 1903. No. 13,002.

Partnership: EQUITY: ACCOUNTING. A partner who, without notice to or knowledge of his copartner, takes substantially all of the ready money of the firm and absconds, remaining away eight months without disclosing his whereabouts, has no standing in equity to demand an accounting after his copartner has wound up the business and paid the partnership debts.

APPEAL from the district court for Box Butte county: WILLIAM H. WESTOVER, DISTRICT JUDGE. *Reversed and dismissed.*

R. C. Noleman, for appellant.

William Mitchell, contra.

POUND, C.

This is a suit for accounting. The parties were partners in the saloon business at Alliance, the plaintiff residing at that point, while defendant lived at Crawford, some fifty-eight miles distant. On July 8, 1895, plaintiff, without notice to or knowledge of his partner, and without warning to the employees in immediate charge of the business, drew out substantially all the firm moneys in the bank, took the cash on hand in the saloon, and absconded. Where he went or for what purpose, he does not inform us. But he was gone some eight months, during which time he did not communicate with his partner or with his family; nor was any one able to ascertain what had become of him. The defendant, who seems to have been the responsible member of the firm, closed out the partnership business, and paid its debts. Afterwards plaintiff sued for

an accounting. The referee, who heard the evidence, found for the defendant; but the court sustained exceptions to the report and entered a decree for the plaintiff, which is now appealed from.

Without going into the somewhat complicated details of the accounting, we are of opinion that the decree ought not to be suffered to stand. Whether or not the purchase, earnings, and disposition of a roulette wheel are proper subjects for a court of equity, a partner who, in times of financial stress, such as prevailed in 1895, absconds with the ready money of the firm and leaves his copartner to settle the business as best he can, has no standing in a court of equity to demand an accounting, when it turns out that the business was closed up successfully. Defendant was on the spot to meet the claims of creditors. He was compelled to see that they were paid. If the partnership property did not suffice, he was liable. The plaintiff ran no risk. If a deficit resulted, he had only to stay away. If the property paid the debts, he could turn up and call for an accounting. Unless the maxim that he who comes into equity must come with clean hands has lost all virtue the plaintiff's case has no place in a court of equity, and should be dismissed.

It is recommended therefore that the decree be reversed and the cause dismissed.

DUFFIE 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 action dismissed.

REVERSED.

IN RE ANDERSON ET AL.

FILED JULY 3, 1903. No. 13,259.

1. **Police Power: ORDINANCE.** When a municipal corporation is expressly authorized by legislation to enact a certain ordinance in execution of the police power, such ordinance stands on the same

basis as a statute, and its reasonableness or unreasonableness is not a matter for the courts except as such question would bear on the constitutionality of a statute of the same nature.

2. ———: ———: VALIDITY. A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid because it may affect incidentally the exercise of some right guaranteed by the constitution.

3. ———: ———: CONSTITUTIONALITY. An ordinance making it unlawful to circulate or distribute printed or written dodgers, handbills or circulars upon the public streets, alleys, sidewalks or public grounds of the municipality, does not contravene section 5, article 1 of the state constitution.

ERROR to the district court for Douglas county: LEE S. ESTELLE, DISTRICT JUDGE. *Affirmed.*

John O. Yeiser and *Charles B. Prichard,* for plaintiff in error.

Frank H. Gaines, James C. Kelby, John A. Story and *George C. Martin, contra.*

POUND, C.

Section 50, chapter 12*a,* Compiled Statutes, 1901 (Annotated Statutes, 7499), governing cities of the metropolitan class, provides, among other things, that the mayor and council may by ordinance regulate and prohibit "the distribution or posting of advertisements or handbills in the street or public grounds, or upon the sidewalks." Pursuant to this statutory authority, the city of Omaha adopted an ordinance, known as No. 3413, in the following terms:

"It is hereby declared unlawful for any person or persons to circulate or distribute upon any of the public streets, alleys, sidewalks, or public grounds of the city of Omaha, or to scatter about, or to hand to any person on any public street, alley, sidewalk or public grounds of the city of Omaha any such dodgers, hand-bills, or circulars. It is further declared unlawful for any person, firm or corporation to employ any boy or other person to circulate or distribute any such dodger, handbill, or circular upon

any public street, alley, sidewalk, or public grounds of the city of Omaha. Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than two dollars ($2) or exceeding twenty dollars ($20)."

Complaint was made under this ordinance charging Sid Anderson and Si Johnson with unlawfully circulating and distributing upon the sidewalks and other public places in the city of Omaha printed dodgers, handbills and circulars. The police court found them guilty of distributing circulars on the sidewalks contrary to the ordinance, sentenced them to a fine of $2 and costs, and committed them to the city jail in default of payment. Thereupon application was made to the district court on their behalf for a writ of *habeas corpus,* and, upon hearing, they were remanded to the custody of the chief of police. Error is prosecuted from this judgment.

As the petitioners were convicted of distributing circulars upon the sidewalk, we need not, perhaps, consider the validity of that portion of the ordinance which makes it unlawful to hand to any person dodgers, handbills or circulars on the public streets. We may say, however, that that portion of the ordinance must obviously be construed in connection with the remainder, and that, from the whole context, it is evident that general distribution of printed matter in the form of dodgers, handbills or circulars to the public generally, or to considerable numbers of persons, is intended, and not a mere casual handing of one or more papers of that character to one or two individuals. So construed, we think, the whole ordinance is valid and constitutional. When a municipal corporation is expressly authorized by leglisation to enact a certain ordinance in execution of the police power, such ordinance stands on the same basis as a statute, and its reasonableness or unreasonableness is not a matter for the courts, except as such question would bear on the constitutionality of a statute of the same nature. 1 Dillon, Municipal Corporations, sec. 317.

Hence we need not consider whether some other or better means of meeting the evils aimed at might have been chosen. The legislature passed on that question and authorized the city to deal with the matter as it did. It is contended, however, that the ordinance is unconstitutional as being in contravention of section 5, article 1 of the state constitution, which provides that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." The ordinance in question is manifestly a police regulation intended to further the public health and safety by preventing the accumulation of large quantities of waste paper upon the streets and alleys, which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the streets in an unclean and filthy condition. A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid simply because it may affect incidentally the exercise of some right guaranteed by the constitution. In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached. The test in such cases is whether the regulation in question is a *bona fide* exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation. *Wenham v. State,* 65 Neb. 394. The ordinance in question is clearly a valid police regulation. It has no reference to or connection with freedom of speech or of the press, and its plain purpose is, not to interfere with the publication of sentiments and opinions of individuals, but to promote the cleanliness and safety of the municipality. In *State v. Bair,* 92 Ia. 28, a statute imposed a license tax upon itinerant venders of drugs publicly professing "by writing or printing" to treat diseases. It was held that this act did not interfere with the constitutional right of freely

speaking, writing or publishing one's opinions. In *United States v. Newton,* 20 D. C. 226, an act of congress prohibiting persons from soliciting or receiving political contributions in any room or building officially occupied by any officer or employee of the United States was held applicable to private citizens as well as to public officers, and not to contravene the constitutional guaranty of free speech. In *Beck v. Railway Teamsters Protective Union,* 118 Mich. 497, 77 N. W. 13, it was held that a court of equity would restrain the publication of a boycotting circular which would result in irreparable injury to the plaintiff and destruction of its proprietary rights, and that such an injunction was not in violation of a provision of the constitution of Michigan in substantially the same words as the provision of our own constitution under consideration. Similarly, a statute forbidding public meetings in a public park has been held valid as an exercise of the police power and not in contravention of the constitutional right of free speech. *Commonwealth v. Davis,* 162 Mass. 510, 39 N. E. 113.

We therefore recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

SEPTEMBER TERM, 1903.

PATRICK O'BRIEN V. STATE OF NEBRASKA.

FILED SEPTEMBER 17, 1903. No. 13,117.

1. **Conspiracy**: PROOF. A conspiracy, like any other fact which is the subject of judicial investigation, may be proved inferentially or by circumstantial evidence.
2. **Evidence.** The acts and declarations of a conspirator, during the pendency of the conspiracy, and in furtherance of the common purpose, are admissible in evidence against his associates.
3. **Conspiracy.** A conspiracy to steal and sell hogs for the benefit of all engaged in the illegal enterprise is pending until the sale has been made and proceeds divided.
4. **Order of Proof.** Before the acts and declarations of a conspirator are entitled to be considered as evidence against his associates, the conspiracy itself must be established, but the order of proof is a matter within the discretion of the trial court.
5. **Evidence.** The word "evidence," in its technical meaning and common acceptation, includes all the means by which any fact in dispute at a judicial trial is established or disproved.
6. **Instructions.** When the trial court gives an accurate, pertinent and intelligible instruction covering a particular point, it is not bound, at counsel's request, to give another instruction expressing the same idea in more perspicuous phrase.
7. **Evidence.** Evidence examined and found sufficient to sustain the verdict.

ERROR to the district court for Sarpy county: GUY R. C. READ, DISTRICT JUDGE. *Affirmed.*

J. J. O'Connor, I. J. Dunn and *Geo. W. Cooper,* for plaintiff in error.

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

SULLIVAN, C. J.

Frank Harrington, Frank Meister, John Hennessy and Patrick O'Brien were charged in the district court for Sarpy county with the larceny of six hogs of the value of $90. O'Brien was given a separate trial and was convicted. He claims a reversal of the sentence on the grounds: (1) That the evidence is insufficient to sustain the verdict; (2) that statements and declarations of his codefendants were received as evidence against him; (3) that the court erred in giving and refusing instructions. The main facts indicative of guilt which the evidence tends to prove are these: On August 12, the day before the theft of the hogs, four men with a team of horses and lumber wagon were seen idling near the farm of Adam Mohr, the complaining witness. One of them was O'Brien, another was Harrington; the other two have not been identified. These men when questioned as to their business said they were fishing in the Platte river, but they did not seem to have any fishing tackle or other usual equipment of the angler. One of them lay prone upon the ground and was apparently averse to showing his face. Late in the afternoon, perhaps about five o'clock, Harrington went over to the Mohr farm, but the real or pretended object of his visit is not disclosed by the record. That night the hogs were stolen. They were put into a lumber wagon and brought by Meister to the South Omaha market where they were sold about eight o'clock the next morning. Meister and Harrington were roommates. They had a room in the Aetna House in Omaha. In this room O'Brien was found, undressed and fast asleep, between three and four o'clock on the afternoon of August 13. There was hog manure upon his shoes

and hanging on the wall was a pair of wet and dirty overalls. When asked to account for his presence in the room, he at first refused to do so, but afterwards said he had been drunk the night before and that some one had brought him up there and put him to bed. When O'Brien and Meister were in jail together at Papillion, they considered the advisability of admitting an acquaintance with Harrington in case he should be arrested, and concluded, on account of some previous admissions, that it would be best to own they knew him. The defense attempted to prove an alibi. O'Brien, testifying in his own behalf, said that he visited Avoca, Iowa, on August 12, and he did not return to Omaha where he lived until after nine o'clock on the evening of that day; that on the following morning he got up early, ate breakfast and without any apparent provocation went out on a solitary spree. By noon he had taken eight glasses of whiskey and considered himself drunk. He then fell in with Harrington who took him to the room in the Aetna House to sleep and sober up.

There was other direct and positive evidence tending to sustain defendant's claim that he slept at his father's house on the night of August 12, but we can not say upon the whole record that the jury were not warranted in rejecting it. Although the evidence against defendant is altogether circumstantial, we can not say that it is insufficient.

It is alleged as error that the court received, as evidence of defendant's guilt, acts and declarations of both Harrington and Meister. We think there is no just ground for this complaint. Meister said to Williams, the person to whom he sold the hogs, that he had raised them at Elkhorn, but this statement was open to no valid objection. It was part of the *res gestæ;* it was designed to lull suspicion and facilitate the sale and was, therefore, imputable to all who were concerned in the theft. The conspiracy, if there was one, was still pending; it embraced not only the larceny of the hogs, but the disposition of them in the market and the division of the proceeds. What Meister

said to Williams being clearly in furtherance of the common design and purpose, all who were to profit by it must be held to have assented to it. *Stratton v. Oldfield,* 41 Neb. 702; *Lamb v. State, ante,* p. 212; *Baker v. State,* 80 Wis. 416; 4 Am. & Eng. Ency. Law (2d ed.), sec. 3, p. 631; 3 Greenleaf, Evidence (16th ed.), sec. 94. These remarks apply also to other objections made by counsel for defendant on the theory that the acts and declarations of the alleged conspirators, which were given in evidence, did not form part of the *res gestæ.* It is conceded, of course, that the acts and declarations of one conspirator are not evidence against another, unless the conspiracy itself is established; but in this case there were facts and circumstances sufficiently proved from which a conspiracy might well be inferred.

The sixth paragraph of the court's charge was excepted to, but we think it unobjectionable. It is an intelligible and entirely accurate statement of the rule that, when a conspiracy has been proved, what each of the conspirators did or said in furtherance of the joint enterprise is admissible in evidence against his associates. The rule might, certainly, have been stated with greater precision, but the meaning of the instruction, whether read closely or hastily, is, in our opinion, unmistakable.

The thirteenth paragraph of the charge is said to be defective because, in it, the jury were told that a reasonable doubt "is one arising from the candid and impartial investigation of all the evidence in the case, or such doubt of the defendant's guilt as may exist in your minds because of a want of sufficient evidence to convince you of the defendant's guilt." Counsel say the jury should have been directed to take into account circumstances as well as evidence. We think the instruction correct and the criticism without merit. Evidence, as defined by lexicographers and law writers, includes all the means by which, in a judicial trial, it is sought to establish or disprove any material allegation of a civil or criminal pleading. Any circumstance which affords an inference as to whether the

matter alleged is true or false is, therefore, evidence and is commonly understood to be within the meaning of that term. *Lamb v. State, ante,* p. 212; 1 Greenleaf, Evidence (16th ed.), sec. 1; Thayer, Cases on Evidence, p. 2; 1 Jones, Evidence, sec. 3.

In the eighth paragraph of the charge the court told the jury that circumstantial evidence to warrant a conviction must exclude every reasonable hypothesis except the one implying defendant's guilt, and that incriminating circumstances not proved beyond a reasonable doubt were not entitled to any weight or influence. It is not claimed that this statement of the rule is inaccurate, but it is said to be, on account of the language used, beyond the comprehension of the average juror, and that the court erred in refusing to give the same thought in an instruction drawn by counsel for defendant and couched in plainer words. We are inclined to prefer the instruction drawn by counsel to the one given by the court, but there does not seem to be any great difference in their intelligibility. The meaning of each is, it seems to us, within the grasp and reach of ordinary men.

The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. AINSWORTH PRECINCT, BROWN COUNTY, NEBRASKA, V. CHARLES WESTON, AUDITOR OF PUBLIC ACCOUNTS.

FILED SEPTEMBER 17, 1903. No. 13,336.

Municipal Corporation: BONDS: STATUTE. Section 14, chapter 45, Compiled Statutes, authorizes any precinct, township, city of the second class, or village "to issue bonds in aid of works of internal improvements, improving streets in cities of the second class and villages, highways," etc. *Held,* That the phrase, beginning with the word "improving," is a limitation of the preceding language, and limits the authority to issue bonds to such as are issued in aid of the works specifically enumerated in such phrase.

ORIGINAL application for a peremptory writ of mandamus to require the auditor of public accounts to register and certify certain precinct bonds. *Writ denied.*

William M. Ely and *P. D. McAndrew,* for relator.

Frank N. Prout, Attorney General, contra.

SULLIVAN, C. J.

This is an application for a peremptory writ of mandamus, commanding the auditor of public accounts to register and certify certain bonds issued by Ainsworth precinct of Brown county, and payable to the state, as a donation for the use and benefit of a state normal school to be located in said precinct. The only question involved is whether a state normal school is one of the objects in aid of which a precinct may lawfully issue bonds.

The theory of the relator is that a state normal school is a work of internal improvement, and that the issuance of the bonds is authorized by the provision of section 14, chapter 45, Compiled Statutes (Annotated Statutes, 10792), which is as follows:

"Any precinct, township, city of the second class, or village, organized according to law, is hereby authorized to issue bonds in aid of works of internal improvements, improving streets in cities of the second class and villages, highways, railroads, bridges, court houses, jails, city and town halls, and the drainage of swamp and wet lands, within such municipal division, to an extent not exceeding ten per cent. of the assessed value of the taxable property at the last assessment within such precinct, township, city of the second class or village."

Even were we to concede, which we do not, that a state normal school is a work of internal improvement, within the meaning of the term as used in the constitution and statutes of this state, the relator's theory would be untenable. The section quoted is not authority for the issuance of bonds in aid of works of internal improvement

generally, but only in aid of works of internal improvement, *"improving streets in cities of the second class and villages, highways, railroads, bridges, court houses, jails, city and town halls and the drainage of swamp and wet lands."* The italicised phrase is a clear limitation on the preceding language, and limits the works of internal improvement, in aid of which the municipalities specified in the act may issue bonds, to such as go to the improvement of the objects enumerated in the qualifying clause. As a state normal school is not one of the objects thus enumerated, the bonds are unauthorized, and the respondent properly refused to register them.

We do not overlook *Traver v. Merrick County,* 14 Neb. 327, where bonds issued in aid of a water grist mill for public use were held valid. But they were issued by a county and in pursuance of section 1 of the chapter referred to, which authorizes counties and cities to issue bonds in aid of "any railroad, or other work of internal improvement." Neither have we overlooked *Cummings v. Hyatt,* 54 Neb. 35, wherein bonds issued by a township in aid of the construction of an irrigation ditch were upheld. But when the bonds in that case were issued, section 14, *supra,* was not in its present form, but was as follows:

"Any precinct, township, or village (less than a city of the second class), organized according to law, is hereby authorized to issue bonds in aid of works of internal improvement, highways, bridges, railroads, court house, jails, in any part of the county, and the drainage of swamp and wet lands."

The section as it now stands was enacted in 1899, when the word "improving," which introduces the qualifying clause, was used for the first time. The introduction of the word at that time is significant. Besides, in that case, what is now section 48, article 2, chapter 93*a,* Compiled Statutes (Annotated Statutes, 6802), declaring canals constructed for irrigation purposes, works of internal improvement, and making all laws in regard to works of internal improvement applicable thereto, was invoked in

support of the bonds. The case, therefore, based as it is, partly on a differently worded section than that now in force, and partly on an act having no relation to the object for which the bonds in question in this case were voted, is not in point. The writ must be denied.

WRIT DENIED.

WALTER J. GREEN, APPELLEE, V. AUGUSTA DOERWALD ET AL., APPELLANTS.

FILED SEPTEMBER 17, 1903. No. 13,080.

1. **Appraisal.** An appraisment of real estate for the purposes of a judicial sale, can not be successfully assailed on the ground that the appraisers were mistaken in their valuation of the property. *Nelson v. Alling*, 58 Neb. 606.

2. **Foreclosure: APPEAL.** Where on an appeal from an order of confirmation of sale of real estate made in pursuance of a decree in foreclosure proceedings, certain sections of the code providing for the appraisal of real property sold under judicial proceedings are challenged as unconstitutional and it appears that the determination of the question can avail the appellants nothing, the validity of the sections thus challenged will neither be investigated nor determined.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, DISTRICT JUDGE. *Affirmed.*

Louis Berka, for appellants.

Charles H. von Mansfelde, contra.

HOLCOMB, J.

From a final order of confirmation of a sale of real estate, made in pursuance of a decree in foreclosure proceedings, the owners of the equity of redemption appeal. Appellants complain that the court erred in overruling their objections to the order of confirmation on the ground that the property was appraised too low and greatly disproportionate to its real value. To support the objections thus interposed, appellants filed affidavits of a general character

of four different parties, placing the value of the real estate sold at from $5,000 to $5,500, while the appraised value as made by the sheriff and two freeholders called for that purpose was estimated to be $3,000. There is no charge of fraud in making the appraisement, nor does it appear from the record that the difference in valuation is the result of other than an honest mistake of judgment. All that can be said against the appraisement as made by the sheriff and those assisting is that they were mistaken as to the true value of the real estate appraised for sale. This, of itself, is not sufficient to require the vacation of the appraisement made. *Cole v. Willard*, 62 Neb. 839, and authorities cited. The mistake of the appraisers, conceding one to have been made, is not a glaring one; and it may well be doubted whether the appraisement as made by the officers called and sworn for that purpose, and discharging *quasi* judicial functions, does not carry more weight than the very general affidavits filed in support of the objections to the appraisement. The trial court having approved the sale as being fair and equitable, it having authority in the exercise of its equitable powers to set the appraisement aside and direct a new one, if the appraisement appeared manifestly inadequate and disproportionate to the true value of the land notwithstanding it was sold for more than two-thirds of the appraised value, and not having done so, we are not prepared to say its action in confirming the sale was erroneous. *Williams v. Taylor*, 3 Neb. 717.

Our attention is also challenged to the alleged unconstitutionality of the act of 1875 providing "for the more equitable appraisement of real property under judicial sale." Laws, 1875, p. 60. It is argued the amendatory act contains two subjects, one of which only is expressed in the title; and that it violates the provisions of section 11, article 3, of the constitution, to the effect that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." We do not think we are called upon, in this case, to investigate and pass upon the

question thus presented, even though it might be found upon investigation that the act is vulnerable to the objections presented. It is to be noted that the act referred to amended and repealed sections 492 and 493 of the code as then existing. The appraisal complained of was made without the formality of ascertaining and deducting prior liens, the plaintiff in the action having waived this formality as he rightfully may do. *Ballou v. Sherwood*, 58 Neb. 20. The land was appraised at a gross sum and sold for more than two-thirds of its gross appraised value. It can avail appellants nothing whether the act be valid or invalid for the land was appraised and sold according to the provisions of the statute, whether we consider the old law as still being in force or whether we regard it as superseded by the act alleged to be unconstitutional. In neither view of the case have the appellants any legal grounds of complaint, as the appraisement and sale is valid and in conformity with both the old statute and the one superseding it and, for that reason, we excuse ourselves from, in this case, entering into a discussion or determination of the alleged unconstitutionality of the latter act.

The judgment of the district court is

AFFIRMED.

CRANCER & CURTICE COMPANY V. MCKINLEY MUSIC COMPANY.

FILED SEPTEMBER 17, 1903. No. 12,454.

ERROR: TRANSCRIPT. Upon petition in error to this court, the proceedings of the district court can be shown only by a transcript of the records of that court duly certified. Affidavits can not be used to supply omissions in such transcript.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Affirmed.*

Lionel C. Burr and *Charles W. Burr,* for plaintiff in error.

J. A. McGraw and Mockett & Polk, contra.

SEDGWICK, J.

This case is brought here upon petition in error from the district court for Lancaster county. The transcript filed with the petition in error is certified to by the clerk of that court to be a true and correct transcript of the petition and answer, and various other proceedings specified in the certificate, but does not purport to contain any "amended answer."

It is conceded by counsel for both parties in their briefs that the case was appealed from the county court of Lancaster county, but there is nothing in the transcript to show that fact except there is copied in the transcript a paper entitled "Answer in the County Court of Lancaster County, Nebraska." This does not purport to have been certified to in any manner by the county court as the original answer filed in that court, nor as a true copy thereof. The plaintiff in the district court filed a petition alleging a cause of action for certain goods sold to the defendant. The defendant filed an answer admitting the allegations of the petition and alleging a counter-claim for damages. A general demurrer was filed to this answer, which was sustained by the court, to which ruling the defendant excepted; but the record shows that the defendant thereupon took leave to file an amended answer, and subsequently took leave to amend his answer already filed by interlineation. Neither of these amendments appears to have been made, but the action of the defendant in taking such leave would be a waiver of the error, if any, of the district court in sustaining the demurrer to his answer. Afterwards it appears that a motion was made to strike an amended answer from the files for the reason that "the same states a new and different cause of action from that

upon which this case was tried in the county court." This motion was sustained by the court; the defendant excepted, and has brought the case here for review, alleging that the court erred in striking the amended answer from the files. Both parties, in their briefs, assume that the answer was amended by interlineation, but there is nothing in the record which shows what that amendment was.

The answer copied in the record does not purport to be an amended answer, and there is nothing in the record to show that the paper copied in the transcript is in fact the amended answer which was stricken from the files by the order complained of.

An attempt appears to have been made to remedy some of these defects by affidavits, but the proceedings of the district court must be shown by a transcript of the records of that court duly certified; it can not be done by the affidavits of the party interested. The defects referred to, and others, arising from the careless manner of making up the record before us, are pointed out and insisted upon by defendant in error, and, of course, can not under such circumstances be disregarded.

No error appearing, the judgment of the district court is

AFFIRMED.

CHARLES W. HYATT V. CHARLES S. ANDERSON ET AL.

FILED SEPTEMBER 17, 1903. No. 12,927.

Guardian's Sale: PUBLIC POLICY. It is not conduct contrary to public policy or fraudulent for a guardian, before applying for a license to sell real estate belonging to his ward, to procure the obligation of an intending purchaser to bid an adequate price at the sale or, after the confirmation, to advance and account for the amount of the bid, at the instance and on behalf of the purchaser.

ERROR to the district court for Holt county: JAMES J. HARRINGTON, DISTRICT JUDGE. *Affirmed.*

Moses P. Kinkaid, for plaintiff in error.

R. R. Dickson, contra.

AMES, C.

The facts in this case, so far as they do not appear to us to have been established by indubitable evidence, are undisputed, and, so far as they are pertinent to any substantial controversy in the action, are as follows: Charles S. Anderson was the owner of the undivided five-sevenths of a tract of land in Holt county. Of the remaining two-sevenths, one belonged to Anderson's minor daughter, of whom he was guardian, and the other belonged to one Paul Lamereaux, also a minor, under the guardianship of his brother, George Lamereaux. The latter and Anderson were brothers-in-law. Anderson contracted to sell the entire tract to Hyatt, the plaintiff in error, and to procure conveyances to the latter of the interests of the minors for a gross price of which one-seventh was to be paid on account of the share of each minor. It is not contended that the sum thus stipulated to be paid was inadequate to the value of the land, or that Anderson was to, or did thereafter, receive, or attempt so to do, any benefit or advantage from the transaction, except his aliquot share of the purchase price for his five-sevenths of the tract.

Applications were thereafter duly made by the guardians, respectively, to the district court for licenses to sell the estates of their wards, and, licenses having been granted, public sales were advertised, made, reported to to the court and confirmed in all respects as provided by statute, Hyatt appearing in each instance as a purchaser at the price agreed upon and, after the confirmation, receiving guardians' deeds for the titles of the minors in the tract in question. Of the prices so agreed upon and bid at the sale, Anderson paid one to the guardian of Paul, and made due report of and duly accounted for the other as guardian of his daughter. This suit is in substance, though not in form, an action to recover from Hyatt the

purchase price of these two-sevenths. The plaintiff recovered below, and Hyatt prosecutes error.

The plaintiff in error contends that the transaction was against public policy and void, and that Anderson can not recover anything because of it for his own benefit, or in his own name in his individual capacity. The corollary of this proposition, that the minors upon attaining their majority may successfully maintain an action to recover from Hyatt their interest in the land or the value of it, counsel for the plaintiff in error has not urged, nor do we think he could maintain it if he should do so. Neither could he very well contend that his client is entitled to retain the land without payment therefor to any one. We do not discover anything reprehensible in the transaction. It amounts, as it seems to us, to this: Anderson and George Lamereaux, the guardians, before applying for licenses to sell, procured the obligation of an intending purchaser to bid at the sales sums which were adequate to the value of the titles offered. Nothing was done irregularly or under cover, nor anything to deter others from bidding, had any desired so to do. Hyatt was the highest and best bidder and obtained the property to which he became entitled as such. Anderson after making his report of the sale was estopped to deny that he had been paid the purchase price in cash, for the share of his daughter, and pursuant to his previous arrangement with Hyatt, he did pay the price of the share of Paul to the guardian of the latter, who was estopped in like manner. We are at a loss to understand for what reason the sales were open to direct impeachment, but however that may be, they are certainly not open to collateral attack by the purchaser. A very similar case is that of *Stuart v. Allen,* 16 Cal. 473, where the principles involved are more fully discussed and where the same conclusion is reached.

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

HASTINGS and OLDHAM, 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.

MRS. RENA BOGGS, APPELLANT, V. FRED H. MCEWEN ET AL., APPELLEES.

FILED SEPTEMBER 17, 1903. No. 13,089.

Incumbrances: PRIORITIES. One acting in good faith and without negligence, and for a valuable consideration, may safely deal with an apparently and actually unincumbered title, the subject of which is not in adverse possession.

APPEAL from the district court for Dixon county: GUY T. GRAVES, DISTRICT JUDGE. *Reversed with instructions.*

R. M. Dott, A. E. Hitchcock and *F. A. McMaster,* for appellant.

John J. McCarthy, W. D. McCarthy, Robert E. Evans and *O. E. Martin, contra.*

AMES, C.

The facts disclosed by the record upon this appeal are substantially undisputed. So far as their recitation is necessary for the decision of the controversy they are as follows: On and prior to the first day of April, 1900, Fred H. McEwen was, and had been, occupying a dwelling house and lot in the village of Emerson in this state as the tenant of certain persons named Merten who were the owners of them in fact and of record. For some two months prior to the date mentioned, he had been negotiating for the purchase of the property, and also, it would seem, to borrow the money with which to pay the purchase price, from his sister, the appellant Mrs. Rena Boggs, who was at Mt. Vernon, South Dakota, where she resided.

At about the date mentioned, he appears to have become convinced that he would be able to perfect the arrangement, and to have begun to procure labor and material from the other parties to the suit, who are mechanics' lienholders, for the reparation of the building. This conduct was begun and continued within the knowledge, but without the authority, direction or privity of the Mertens. The agreement between him and the Mertens for the sale of the premises was never reduced to writing, and amounted to no more than an oral consent by the latter to sell and convey upon being paid a certain purchase price in cash.

On or about the 8th day of May, following, one George H. Hasse, a banker at Emerson, received through the mail a certificate of deposit issued by a bank at Mt. Vernon, for the sum of $1,080.60, payable to the order of Mr. Boggs at the expiration of about a month thereafter, and indorsed by her with a direction to the effect that the proceeds thereof should not be used or drawn or paid to the Mertens until they should have conveyed the house and lot to McEwen. Upon receipt of the certificate, Hasse notified McEwen and the Mertens of the fact, and the latter executed a deed of the premises bearing the last named date and conveying the premises to McEwen, and delivered it to Hasse to await the maturity of the certificate and the consummation of the transaction by the full payment of the purchase price to them. On the 26th of May, shortly before the certificate fell due, Hasse sent it to Mt. Vernon for collection and within a few days thereafter received, also by mail, payment of it. On the first day of June, the purchase price was paid to the Mertens, or placed to their credit in the Emerson bank, pursuant to their previous instructions, and McEwen executed and delivered to Hasse his note and a mortgage on the house and lot payable to Mrs. Boggs for the amount of money loaned by her, and received the deed for the premises then in the possession of Hasse. The deed and mortgage were then sent through the mails by Hasse to the county seat, Ponca, where they were filed for record in the proper office, as appears by in-

dorsements thereon, on the 5th day of June, and spread at large upon the record on the 8th day of that month. On the last named day both instruments were returned to Hasse and the note and mortgage, together with a letter giving an account of the transaction, sent by him, through the mail, to Mrs. Boggs. During all this time and for some time afterwards, the furnishing of labor and materials and the reparation of the house were in progress, but it is not claimed that Mrs. Boggs had any knowledge or suspicion of any of such matters, or that any of the parties to the transaction were guilty of any deceit or fraud actual or constructive.

This is an action by Mrs. Boggs to foreclose the mortgage which is long since past due and wholly unpaid. McEwen and his wife, Olma, were made parties defendant and made default and are not now complaining of the result of the suit. The other defendants are laborers and material men, who filed cross-petitions claiming mechanics' liens upon the premises. The court found that certain of the liens are prior and superior to the lien of the mortgage and rendered a decree accordingly. The plaintiff appeals. It is not claimed, and there is no evidence in the record that would tend to support a claim, that the house and lot were subject to any mechanic's lien so long as the title and ownership thereof remained in the Mertens. The delivery of the deed and of the mortgage were plainly intended to be and were, simultaneous acts, and they both found their way to the public records at the same instant, and as soon as was reasonably convenient after they became effective by delivery, which was not unnecessarily delayed. Until that time the material men dealt with McEwen with at least constructively full knowledge that he was not the owner of or possessed of any legal estate or interest in the property. On the 5th day of June they were advised by the public records that the title had been recently conveyed to McEwen burdened with the lien of the plaintiff's mortgage. It is evident that the cross-petitioners knew as a matter of fact, at the time they begun

furnishing the material for which they claim liens, that the house and lot belonged to the Mertens who acquired it as heirs at law of one William Merten, who deceased not long previously, and some of them testify that McEwen told them he had bought the property of the heirs and had a clear title to it, and that William Merten, Junior, one of the heirs who was employed by McEwen as a carpenter, told them that the heirs had sold the property to the latter, but it is not claimed that either Merten or McEwen was the agent or representative of Mrs. Boggs in any sense, neither is it pretended that Hasse was such an agent, except for the mere purpose of collecting the certificate of deposit, paying the purchase price and seeing to the execution and delivery of the deed and mortgage and the making of them of record. If he knew of the progress of the building operations, which he probably did, though there is no direct evidence to that effect, it was a fact not relevant to the nature of his employment and not one which it was his duty to make known to his principal. There were no contracts, oral or written, for the furnishing of the labor or materials for which recovery is sought, the former of which seems to have been done by the day or hour, and the latter to have been delivered as ordered from time to time, upon ordinary parcels accounts according to the custom of the retail dealers. By far the larger part, apparently nearly the whole, of each of the claims against McEwen, thus accrued after the deed and mortgage had been made of record, and none of the cross-complainants testifies to having even so much as heard of the existence of either of these instruments until after the beginning of this action. That the cross-petitioners were grossly negligent in the conduct of their business goes without saying, but that the plaintiff was guilty of any fault in that respect, or omitted any precaution which ordinarily prudent persons observe under similar circumstances is not pretended. On the contrary she took unusual care and pains to be assured that the unincumbered title of the Mertens should not pass from them, until it should be charged

with the lien of her mortgage. Under such circumstances, who has the prior or superior right? It seems to us that the question is its own answer. The case was submitted to us, without oral argument, but upon largely voluminous briefs, containing a wealth of citations by both parties, but we do not find referred to among them any authority in point, and we are not aware that there is any such, but we think the case falls within the principle of the decisions of this court in *Henry & Coatsworth Co. v. Fisherdick,* 37 Neb. 207; *Hoagland v. Lowe,* 39 Neb. 397; *Fuller, Smith & Fuller v. Pauley,* 48 Neb. 138; *Bradford v. Anderson,* 60 Neb. 368.

One acting in good faith and without negligence and for a valuable consideration, may safely deal with an apparently and actually unincumbered title, the subject of which is not in adverse possession. This proposition, which accurately describes the attitude of the plaintiff in this transaction, we have never heard disputed. No one contests the validity of the liens, except the plaintiff, and as she is entitled to priority over all of them she is not in a position so to do.

It is recommended that the judgment of the district court be reversed and the cause remanded with instructions to enter a decree awarding the plaintiff a first lien for the amount of her mortgage debt and adjusting the other liens accordingly.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded with instructions to enter a decree awarding the plaintiff a first lien for the amount of her mortgage debt and adjusting the other liens accordingly.

REVERSED.

MARY E. COUNSMAN V. MODERN WOODMEN OF AMERICA ET AL.*

FILED SEPTEMBER 17, 1903. No. 12,964.

Mutual Benefit Association: CHANGE OF BENEFICIARY. A change of beneficiaries made by a member of a mutual benefit insurance association, which does not reach the head office until after the death of the member and then is refused because not in accordance with the by-laws as to a part of the fund, has no effect as to the part of the fund in reference to which it is in proper form, the association having a by-law which declares the old certificate to be in effect until the new one is delivered.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, DISTRICT JUDGE. *Reversed.*

Charles G. McDonald and *James A. C. Kennedy*, for plaintiff in error.

George W. Cooper, contra.

HASTINGS, C.

This case presents but one question for our consideration, that is, whether or not the beneficiary in the insurance certificate of Ulysses G. Counsman was changed by his action on the 28th day of May, 1901, he having died before six o'clock in the morning, on May 29 of that year. On the evening of the 29th his benefit certificate, with the indication of the change, was forwarded to the head camp of the order by W. B. Wardell, clerk of Omaha Camp No. 1,833. Counsman died on the next morning, and his benefit certificate was received at the "head camp" in Rock Island on the 30th, and on the 31st, no notice of his death having yet been received, the certificate was mailed to the clerk at Omaha by the head clerk, with a letter refusing to make the requested change, because it was not in accordance with the by-laws of the association. The certificate had named his son to the extent of $1,500, and his wife to the extent of $500, as beneficiaries and the proposed

* Rehearing allowed. See opinion, p. 713, *post.*

change named his mother instead of his wife and his father as trustee for the boy as to the remainder of the benefit. Such a trustee is forbidden by the rules of the organization and the certificate was, therefore, returned to be corrected, but of course could not be after the death of the assured. The organization paid the $1,500 due the boy to his guardian. The $500 was claimed both by the mother and the wife. The association filed its petition asking leave to pay the $500 into court and be relieved from further liability, and that the court dispose of the fund. This order was granted. The mother, Arabella Counsman, and the wife, Mary E. Counsman, each filed answer and cross-petition claiming the money; the money was paid and the association discharged. The district court found the mother was entitled to the $500. Motion for new trial was filed by the wife, on the ground that the decision was contrary to law and not sustained by sufficient evidence, and also on the ground of newly discovered evidence, and errors of law occurring at the trial. This motion was overruled. Supersedeas bond was given, and the case brought by petition in error to this court by attorneys MacDonald and Kennedy, on leave obtained in this court because of the refusal of their client to prosecute the action and because of their having an interest in the result under an agreement for a contingent fee.

The only point urged is that the evidence was insufficient to show a right on the part of the mother; that the attempt to change the beneficiary was not completed. The benefit certificate was dated May 23, 1898. By a provision of the by-laws in force at that time a member in good standing at any time might change the beneficiary by paying to the camp clerk fifty cents and delivering his certificate with the surrender clause on the back of it filled out to designate the change. This surrender should be executed in the presence of the camp clerk, but if he could not be present, then its execution might be attested or acknowledged by any person authorized to administer oaths and take acknowledgments. The local clerk was to

forward this certificate, with the surrender clause indorsed and one-half of the fee, to the head clerk, who should thereupon issue a new certificate to the beneficiary named in the surrender clause, provided such beneficiary should meet the requirements of the by-laws.

In June, 1899, however, this provision was changed and a new by-law adopted identical with the old one, but with the clause added that no change in the beneficiary shall be of effect until the delivery of the new certificate, and until then the old certificate shall be held in force. Both provided that no change should be of binding force unless made in compliance with this section. It is not claimed that this was done, but it is claimed that the assured in his lifetime having changed the beneficiary, so far as he could with reference to this $500, it should be upheld; that the change with regard to his son, which was made at the same time, but was not in accordance with the by-laws of the organization and was refused, had nothing to do with this $500.

It is claimed on behalf of the defendant in error that this new by-law, adopted in 1899, after the issuance of this certificate, has no relation to it. This, however, can not be the case, for the benefit certificate itself expressly provides for a compliance with the by-laws in existence and with such as should thereafter be adopted.

The real question is whether any one but the association could raise the question that this change had not been acquiesced in by the association. The learned trial court seems to have regarded the matter of beneficiary as wholly within the disposal of the assured. We can not so regard it. It is a matter of agreement between the assured and the association. It was something which the association was to do. Under its by-laws' requirements he was powerless to do it himself. After his death, it would seem that the association and the local camp clerk were powerless to do it for him. Doubtless, if he had procured his benefit certificate to reach the head camp in his lifetime in due form, so that it would have been entitled to the approval

and the issuance of a new certificate, in the absence of express restriction in the by-laws, a new beneficiary would be entitled to receive the fund. Our own court, it is true, has held that beneficiaries have no vested interest in certificates of this kind until the death of the assured, and that the power to change rests with the assured and the association. The change, however, is conditional upon compliance with the laws of the society. *Fisher v. Donovan,* 57 Neb. 361.

It would seem that the death of the assured, Counsman, before the presentation, even, of this requirement for a change of beneficiaries, which was refused when presented because of its noncompliance with the by-laws of the association, effectually prevented his desire in this respect from taking effect, and caused the right to the fund to vest upon his death, *eo instante,* in the beneficiary named in the certificate, which the by-laws provided should be still in force.

It is recommended that the judgment of the trial court be reversed and the cause remanded.

OLDHAM and AMES, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed February 4, 1904. *Judgment of reversal adhered to:*

Proceeding in Error: ATTORNEYS' FEES. Attorneys who have undertaken to establish, for a contingent fee, a client's right to a fund in court, and who, after rendering valuable services, have been defeated in the district court, and who have furnished a supersedeas bond to retain the fund, and are taking steps to have the decision against their client reviewed on error, are entitled, when their client under these circumstances refuses to pay them and instructs them to proceed no further on her behalf, to prosecute error proceedings in her name, on their own behalf, in order to collect their contingent fee out of the fund still in court, if they can establish their client's right to it.

HASTINGS, C.

A rehearing has been allowed in this case chiefly because of the fact that it is now being carried on by the attorneys of Mary E. Counsman. An order of the court appears in the record allowing them to do so. This was taken by us as conclusive at the former hearing, and no attention was paid to the question as to their right to maintain a petition in error, although counsel for defendant in error devoted a considerable part of their brief to that question. It subsequently appearing that the order permitting Mary E. Counsman's attorneys to prosecute the petition in error, notwithstanding her refusal to do so, was entered *ex parte* and was provisional only, a rehearing was allowed as to that question and incidentally to the entire case.

The petition in error was filed by counsel, through some misunderstanding, in their own names. A good deal of the assault upon it is due to that fact. There seems no doubt that to entitle one to prosecute error in his own name he must be a party to the record in the trial court. It seems equally clear that the petition in error must make all the parties who do not join in it defendants. The original petition did not make Mary E. Counsman a party to this action and was, as stated, in the names of the attorneys. They have now filed, by leave, an amended petition in the name of Mary E. Counsman, such as they were by the first order allowed to file. Their right to do this is still challenged on the ground that they perfected no lien by giving notice in the lower court and that they make no claim of fraud upon them in the action of their client. So far as the want of notice is concerned, it has been decided that no particular form of notice is necessary. *Cones v. Brooks,* 60 Neb. 698. The money in question in this action is still, so far as the record discloses, on deposit pursuant to an order of the trial court awaiting the ultimate disposition of this case. Notice to the other party by any means, before it is paid out, ought to be sufficient to answer the re-

quirement of the statute in regard to attorneys' liens. Compiled Statutes, chapter 7, section 8 (Annotated Statutes, 3607).

Counsel for Mary E. Counsman tried her case in the district court, and after defeat secured a supersedeas bond, under which the money is still held. They also procured a settlement of a bill of exceptions. Then they received notice to proceed no further. Their client denied having received anything on account of the action, and refused to pay them anything on the ground that their fee was contingent upon a recovery. In this situation they were allowed to prosecute error in her name, at least to the extent of establishing their own right.

Counsel now concede that if the attorneys have a right in the fund it is permissible for them to proceed in their client's name even after her refusal to go on. The well known doctrines that a party refusing to pay counsel will not be allowed to discontinue an action, and that a court will enforce a lien upon a fund in its possession, seem clearly applicable. *Howard v. Town of Osceola,* 22 Wis. 453; *Black v. Black,* 32 N. J. Eq. 74.

It is true that a petition in error is in form the commencement of a new action, but it is in fact merely a means for the continuance and obtaining a new trial of the old one, and in the present case an appeal would have accomplished the same purpose. There seems no reason why the present proceeding should not, so far as this question is concerned, be regarded as merely a continuation of the original action and one which the attorneys have a right to pursue to the extent of their interest. Of course, if they have a right to proceed in their client's name, she is, for the purpose of such proceeding, a party.

So far as the question of the former decision on the merits is concerned, counsel only complain that it shows a misapprehension, as to the state of the record in respect to the by-laws, showing that benefits would not be made payable to a trustee. The record seems to be silent as to that, except that the new designation of beneficiary on

behalf of the son was refused on that ground before the head camp learned of assured's death.

Whether that position was well or ill taken, seems not material to this case. The right of Mary E. Counsman to the money is held to have accrued before the application to change reached the head camp. By virtue of the assured's death on the 29th, and of the application not reaching the head clerk till the 30th of the month, her right became absolute under the by-law making the old certificate in force until the new one should issue. Whether this application received after the assured's death was rejected for a valid or an invalid reason, seems to be of no importance.

It is urged that if the judgment is reversed, it be only as against the attorneys' lien. The judgment as against Mary E. Counsman is an entirety. The attack upon it is in her name and in right of a claim under a contract made with her. We do not see how the judgment can be held good as against her and bad as against these attorneys claiming through her. The litigation as it now stands is in form a contest between Mary E. Counsman and her late husband's mother, Arabella Counsman, over this $500 which has been deposited subject to the order of the district court. The Woodmen Association was long ago dismissed out of the action. The disposition of this fund is all that is before the court. The disposition made by the district court is found to have been erroneous.

If Mary E. Counsman has in any way lost her right in the fund, after the judgment is reversed, the record does not show it. The only showing is her attorneys' statement that she directed the discontinuance of proceedings in error and denied having received anything. If she has lost her right in the fund, or does not care to further assert it, she, of course, can get nothing by any further action of these attorneys. On their own showing they have not, at the present time, any authority to act in her name except for the protection of their own rights.

If for any reason Mary E. Counsman's right to this fund

has been lost, that can be shown whenever her claim is sought to be asserted. As before suggested, there seems no ground in this record to say, now, that such is the case. Her statement to her attorneys was that she had received nothing, but did not wish to prosecute the case further. This would not of itself bar a recovery on her behalf, after the judgment against her is reversed, if she renews her claim.

It is recommended that the former decision in this case be adhered to.

AMES and OLDHAM, CC., concur.

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

REVERSED.

WILLIAM M. CLARK, APPELLEE, V. COUNTY OF LANCASTER ET AL., APPELLEES, IMPLEADED WITH CHARLES G. SHEELEY, APPELLANT.

FILED SEPTEMBER 17, 1903. No. 13,051.

1. **Appeal.** On an appeal in equity the appellee is not concluded as to any matter directly involved in the questions raised by the appellant.
2. ———. As to matters not necessarily involved in the appeal an appellee who enters no cross-appeal should be held concluded.
3. **County Board:** POWER TO CONTRACT. The limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of previous years and two-thirds of the levy of the current year, gives no authority to the board to take into account the levy of the current calendar year prior to the making of such levy. Until it is made there is no "levy of the current year."
4. ———: ———: PREREQUISITE. The adoption of plans and specifications is a necessary preliminary to advertising for and letting a contract by the year for the building of bridges, and such advertising and letting must be in accordance with the plans and specifications so adopted.

5. **Repairing Bridges.** There is no authority for the letting of annual contracts for repairing of bridges or for the doing of such repairing under an annual contract, where the amount exceeds $100.

6. **Injunction:** EQUITY. A court of equity will not enjoin the further execution of a contract and enjoin the prosecution of any claim for compensation for work and material already furnished in good faith under it, except on condition of the payment of a fair value for the work and material so furnished.

7. ———. Where defendant was proceeding under color of a lawful contract, the institution of an action to enjoin further proceedings under it, and the ordering of a temporary injunction on condition of the furnishing of a bond, which is not given, do not necessarily deprive the subsequent proceedings of defendant under the contract of their good faith and color of lawfulness.

APPEAL from the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Affirmed.*

Lorenzo W. Billingsley, Robert J. Greene, Richard H. Hagelin, Jesse B. Strode and *Edmund C. Strode,* for appellant.

James L. Caldwell, William T. Stevens, Stephen B. Pound, Frank A. Boehmer, Lionel C. Burr and *Elmer E. Spencer, contra.*

HASTINGS, C.

This is an injunction suit brought by the plaintiff, as a taxpayer of Lancaster county, to prevent the defendant, Sheeley, from building certain bridges, and from presenting any claim for pay for them or for materials or labor in them; to procure the canceling of his contract with the county commissioners for their erection, and to prevent his collecting a $3,000 warrant which had been allowed to him on account of them and was unpaid. It was also sought to enjoin the county commissioners from taking any such action, and the treasurer from paying the $3,000 warrant and from transferring from the general to the bridge fund any money of the county. It was also sought to have the county commissioners directed to consider the ordering of bridges in open session and to make a record

of their acts concerning that subject. The county was made a party presumably because of its interest in the contract which it was sought to have canceled.

The original petition was filed April 4 and, after alleging the corporate and official character of the parties, stated that the commissioners had entered into an unlawful contract with Sheeley; that the latter, as "first party, agrees to furnish all materials, and to construct and complete ready for travel such bridge work as said commissioners may order built over streams in said county during the ensuing twelve months. Said bridge work to be built according to the plans and specifications attached hereto and made a part of this contract, the same as if written at length herein, and to be the various lengths as ordered, to be built of such material as ordered, conforming to said above mentioned plans and specifications. And the said first party agrees to have the structure ready for travel within ninety days from date of order by said county commissioners. The first party agrees to promptly inspect and pass upon the work, and, in consideration of the materials and labor to be performed by the first party, the second party agrees to pay the first party the amounts set forth in the attached bids. Said payment to be made on completion of said bridge work as ordered, in warrants drawn on the county treasurer of said Lancaster county. The second party will, however, allow first party such estimate for material delivered as, in said second party's judgment, is proper and customary. The party of the first part shall within sixty days from date file a bond in the sum of $2,000, guaranteeing the faithful execution of this contract, with sureties satisfactory to said commissioners." That Sheeley had not given the bond; that on February 24, he had presented claims to the amount of $8,000 for materials under this contract, which had been allowed and two warrants, one for $5,000 and one for $3,000 issued to him, the larger of which had been paid; that these claims were fraudulently allowed; that no bridges had been ordered and the commissioners knew when allowing them

that no materials had yet been furnished; that there was not to exceed $1,200 in the bridge fund of the county at the time of their allowance; that about February 24, to provide funds to pay these claims, the commissioners directed $4,000 to be transferred to the bridge from the general fund, and dated their order March 12, 1902; and the money was paid on the $5,000 warrant but was not paid for bridge material; that two of the commissioners have issued orders for bridges, when not in session, and without the knowledge or assent of the chairman of the board; that defendant was proceeding to erect bridges, as he claimed, under this contract, to the amount of $22,600, upon such orders, and at prices and an expense to the county greatly more than was necessary or had been before paid.

On April 16 all the defendants except Tilton, the chairman of the board, and Knight, county treasurer, answered by a general denial. On the same day the plaintiff, Clark, filed an amended petition embracing all his former allegations. In addition he alleged the following advertisement for bridge bids:

"Notice is hereby given that sealed bids will be received at the office of the county clerk at Lincoln, Lancaster county, Nebraska, until 12 o'clock noon, Saturday, February 15, 1902, for the building of all bridges that shall be ordered for the ensuing year. All bids shall be accompanied by plans and specifications and a certified check in the sum of $500. The board of county commissioners reserve the right to reject any and all bids. Address all bids to D. A. Frye, county clerk.

"Lincoln, Nebraska, January 22, 1902."

Also, that other parties made bids, but the Sheeley contract resulted; that his bid was fraudulent and misleading and not by the lineal foot, as the law requires, but for a certain sum per lineal foot, and an additional amount for substructure or superstructure; that his bid was not the lowest and best, and that there was no authority to award him the contract; that no plans and specifications were previously adopted, and there was no power to let an

annual contract, and that the alleged one was unlawful and void.

On the 5th day of April notice had been given each of the defendants of the filing of the original petition and of the substance of its allegations, namely, that the contract of February 21 was unlawful and void, and that the allowance of $8,000 to Sheeley was also unlawful; that there was no power to make the contract and that it was the result of an unlawful combination of defendants, and that all proceedings under it would be asked to be enjoined. April 11 was set as the day for hearing. On that day the notice was filed but the hearing seems to have been deferred until April 22 and 23, after the filing of the amended petition. April 26 a temporary injunction was allowed against all defendants except the county and the treasurer. They were to be forbidden to construct or repair any more bridges under the contract, or to file claims for work done, and the commissioners were to be enjoined from allowing any claims and from ordering any more work done under the contract. This was conditioned upon the giving of a $5,000 bond, which was not done.

On May 27 defendants, Borgelt and Welton, county commissioners, again answered, admitting the official character of defendants, the advertising for bids and making of contract with Sheeley, the allowance of $8,000 to him and issuance of warrants for it, and the transfer of $4,000 from the general to the bridge fund. They deny plaintiff's other allegations. They say the contract was let in good faith on the lowest and best bid; that Sheeley had done a large amount of work under it and by orders from the board; that they are willing that an accounting be had between the county and Sheeley, and ask that it be had, and that plaintiff be cited to appear for that purpose.

In the meantime, apparently, a cross-petition had been filed by the county attorney, which does not appear in the transcript. It seems to have asked for an accounting between Sheeley and the county. At all events, on the same 27th day of May defendants, Borgelt and Welton, answered

such a cross-petition by setting up that they and defendant Tilton were the county board; that they represented the county and that the county attorney had filed his cross-petition without authority from them or from any taxpayer. They denied any collusion and fraud; said that all the work done by the contractor had been ordered by the board and was all needed, and was done for the lowest obtainable price. In this answer, too, they ask for an accounting on the basis of the contract and of the $8,000 paid.

Plaintiff replied to their answer by a general denial.

On June 26 the county attorney filed an amended cross-petition, alleging that the county maintained a courthouse and offices for the sessions of the county board; that the board advertised for bids on bridge building for the year 1902, and although the county board had adopted plans and specifications for the bridges to be built during the year, the advertisement called for bids to be "accompanied with plans and specifications"; that defendant Sheeley, thereupon, submitted his bid with plans and specifications; that the latter were in the form of "blue prints" and too voluminous to copy, but are referred to as a part of the cross-petition; that such procedure was unlawful, and no annual contract was authorized except upon the basis of the previously adopted plans and specifications, which each bidder could and must make the basis of his bid; that the county board pretended to adopt the defendant Sheeley's plans and unlawfully and fraudulenty pretended to accept his bid and enter into the contract with him and, without advertising for competition on any plans and specifications adopted by the board, and without reasonable care to secure competition and the letting of the contract to the lowest and best bidder; that the contract was signed by the commissioners each individually and is not binding upon the county.

The county attorney further says that the accepted bid was not the lowest and best one, that it was so declared arbitrarily and without consideration of others, in disre-

gard of the rights both of the other bidders and of the public, and without any opportunity to other bidders to compete upon the plans so attempted to be adopted, and such action was illegal and void; that the contract so made was in pursuance of a conspiracy to prevent competition, and contains unlawful provisions, fraudulently incorporated in it, to allow and pay estimates for materials delivered, and a provision for the contractor's filing a bond within sixty days instead of before entering upon the work; that the contractor, without first filing a bond as required by law, immediately entered upon the work and commenced to build and repair bridges, without any finding of the board that such work was necessary, and without any order locating or directing it, and without lawful authority from the county board. That the $5,000 and the $3,000 warrants were allowed, the first paid and the second outstanding, and both should be made a lien upon all materials and bridges furnished and made by the contractor; that no finding or order had ever been made by the board as to what bridges or repairs were necessary; that no record existed of any action of the county board as to any of the twenty-seven bridges claimed by the contractor to have been ordered under the contract; that any such orders, if given, were by individual members of the county board and of no binding effect on the county; that they were not acts of the board as a corporate body nor done at the court house, nor in any regular session of the board; that the defendant Sheeley had full notice of the invalidity of such pretended action of the members of the county board and of the amount of money on hand in the bridge fund, and that the contract when made was in excess of the funds and void; that the bids were purposely made deceptive, and were not for completed bridges at a given sum per lineal foot, but at such a sum for superstructure, with an addition for substructure, and were read and accepted by the board for completed bridges, and are grossly in excess of the ordinary price of such structures; that any bid for substructures, separately, was unlawful,

and because of this unlawful feature, fraudulently introduced into it, the contract should be annulled.

The county attorney further says that, since the commencement of the action, two of the commissioners attempted to ratify, and have made of record, orders for the twenty-seven bridges claimed by the contractor, and to add three more; but such attempt to legalize and carry out an unlawful private agreement, before made, is contrary to good morals and public policy, and is unlawful and void

He alleged that the record, so attempted to be made, includes orders for repairs on bridges and for materials for that purpose; that no advertisement was made, no bids taken, no contract let, and no plans and specifications adopted for the repair of bridges for 1902; that the repairs attempted to be so provided for are greatly in excess of $100 in costs, and that Sheeley had no authority whatever to enter upon such work. He asked that Sheeley be required to set out in full all the items of his claims against the county for work under his contract, and that as to all parties claiming rights in the material or warrants an accounting to be had, if the court should hold that Sheeley had a right to compensation for his labor and materials employed upon the bridges.

He asked that the Columbia National Bank, which claimed an assignment of the $3,000 warrant, be made a party and required to show cause why it should not surrender it for cancelation, and that as a multiplicity of suits would evidently grow out of the transactions in regard to these bridges, unless the court should adjust the entire matter between the parties, that it do so by its decree. He alleged that the county officers would, unless restrained, make unlawful transfers of funds and pay much more than was lawfully due the contractor, and that the orders for the thirty bridges amount to more than $23,900, a sum greatly in excess of the funds available, which were only $1,200.

He prayed that the $5,000 warrant be declared a lien upon all the material and bridges purchased and built

under the pretended contract; that Sheeley and the Columbia National Bank be enjoined from attempting to collect the $3,000 warrant; that Sheeley be enjoined from removing any of the bridges or materials, and from asserting any claim to them till further order by the court; that the commissioners and county treasurer be restrained from acting under the contract, and the latter be enjoined from paying the $3,000 warrant, and that it be canceled; that Sheeley be enjoined from claiming that his bid at prices set opposite his specifications included only substructures; that the board be restrained from ordering more bridges on the contract, and Sheeley from interfering in any way with the materials and structures furnished the county under it; that the court should instruct the commissioners as to their duties in adopting plans and specifications, advertising for bids, letting contracts and taking bonds for their performance in the matter of county bridges.

On June 23 there had been filed an answer to this cross-petition by the contractor. He admitted the corporate and official character of the parties and the adoption of plans and specifications for bridges for 1902 by the county board, and the advertisement calling for plans and specifications, but alleged that the advertisement was in all respects lawful; admitted that he made a bid accompanied by plans and specifications of his own, but said it was accompanied also by those "which had been previously adopted by the county," and that the bid was in all respects regular and lawful, and denied any lack of authority in the board to accept a bid with plans and specifications; denied the contract was signed by the commissioners individually and said it was executed by them on behalf of the county. He denied the entire cross-bill and alleged that his bid was regular, was the lowest and best, and was regularly accepted on due consideration; said that the $5,000 warrant was paid to him and the other negotiated to the bank as alleged, but that he had then furnished $9,700 worth of material for bridges, and the warrants were in part payment for it; that nearly all of this ma-

terial, and much more, was placed in bridges for the county before the amended cross-petition was filed; that his bid for wooden bridges was at so much per lineal foot of completed bridges, and for steel ones at a certain price for superstructure, and an additional price for substructure, both by lineal foot, and so understood by the county board, and that all the bids for steel bridges were of the same character. He says that in December, 1901, county commissioner Tilton instructed him to order sufficient bridge material for the year 1902, and assured him that it would be purchased at its reasonable value by the county if he did not get the contract; that the $9,700 of materials were procured and delivered, and the $8,000 allowed in pursuance of such order; that no appeal was taken, and after ten days the warrants were delivered to him; that, as he is informed, the object of such ordering of material was to make roads immediately passable and because of urgent necessity; that, after the awarding of the contract to him, written orders, signed sometimes by two and sometimes by all three commissioners, were from time to time given him for erecting and repairing thirty bridges, the orders being numbered from 1 to 30, inclusive. He says that as to each of these an emergency existed; that all of the work was done under the contract and in accordance with the plans and specifications accompanying it, which had been accepted and were in use by the county; that a record was made of each of said orders and the work done in good faith, and only the $8,000, so far, had been paid for it; that numbers 2, 3, 4, 25, 26, and 27 were completed by March 22, numbers 11, 12, 13, 14, 15, 16, 17, 18, 22, 29, and 30 were completed between March 12 and April —, and numbers 6, 7, 8, 9, 10, 19, 20, 21, and 24 were completed between May 1 and June 15, and the others were in course of construction. He says that seventeen of these bridges were accepted by order of record by the county board, and nine more were accepted by the commissioners, but no order concerning their acceptance as yet entered of record.

He also says that during the progress of this work he was ordered to move and paint certain spans of certain bridges, and did so to the reasonable value, all told, of $863, and that under the terms of the contract there is due and owing $15,986.84 after crediting the $8,000. This amount is itemized by stating the compensation due under the contract for each of the twenty-nine bridges, and for this he asks judgment.

A second amended cross-petition was filed by the county attorney changing its allegations in a few formal respects. An exhibit "B," a resolution of the board of county commissioners which purported to have been adopted April 15 by a "majority vote," was attached. It recited that it had been the custom of the county board, in ordering bridge work under the contract, to go to the site with the contractor and give orders on the spot, and have such orders spread on the records during the year at some time after the work was done and before payment, and that some question had arisen as to the propriety of not entering the orders of record before the completion of the work. It was resolved that the orders for these thirty bridges, designating them by numbers and location, be spread upon the record.

Plaintiff replied, denying that the contract covered any repairs; denied that Sheeley's bid was by the lineal foot; denied that any accounting could be had, and also that anything was due, and also that the contract could be reformed or validated in any way; admitted the allegations in regard to the two warrants, but denied the county's right to any accounting therefor, and denied the need of any relief against a multiplicity of suits, or any other relief for the county in this action, and denied the right of the county to set up its cross-petition for an accounting, and denied the jurisdiction of the court to entertain it. Replies by general denial were filed on behalf of the county to the answers to its cross-petition.

On trial of the issues thus made, the court found generally for plaintiff and against defendants, and that the

contract was illegal and void, and upon the cross-petition, for the county against the contractor, and that he could recover nothing upon his contract.

The court found for the contractor as to the value of the work done before the action was begun, and for the county as to all work done after that. It found the value of bridges repaired and constructed before the action was $6,608.74, and that one more, of the value of $2,065.66, was then in such a condition that it was necessary to complete it, and that on each of two repaired after the beginning of the action the work was less than $100 in amount, so that the board was authorized to have it done without bid or contract, and that these two were worth $128. The total recovery allowed the contractor was $8,802.40, less $8,000 previously paid, leaving $802.40. It found that one bridge was begun after the commencement of the action and not completed, and that nothing could be recovered for it. It found that order number 23 was given before the letting of the contract, that the work on it was $194, but that there could be no recovery for it in this action. It found that construction and repair work to the value of $8,529.06 was done after the action was begun, and that for such work there could be no recovery. It canceled the contract on the county's petition, and enjoined the defendants from carrying it out; awarded judgment to the contractor for $802.40, and enjoined him from in any way interfering with the bridges or materials on the ground. All parties excepted to the findings and decree, and motions for new trial were filed by the contractor as against both the plaintiff and the county, and were both overruled. Motions for new trial filed, separately, by commissioners Borgelt and Welton, were also overruled, and from the decree the contractor appeals.

His counsel take the ground that the sole question presented is, whether he shall be paid under his contract according to its terms, on the ground that it was valid, or shall receive, at least, the additional $8,529.06 for the reasonable value of the work, or shall merely have the

$802.40 allowed him by the court. It is claimed that the findings of amounts made by the court are much below the true values as shown by the evidence. It is claimed that as no appeal is taken by plaintiff or by the county they are concluded by the decree. Upon this point we are cited to *Schlawig v. De Peyster,* 83 Ia. 323; *Hamilton v. Whitney, Clark & Co.,* 19 Neb. 303; *Dennis v. Caughlin,* 23 Nev. 188, and *Randolph v. Lampkin,* 90 Ky. 551. The first is a holding under the Iowa practice, which simply makes an appeal a substitute for a proceeding in error. The objection to the decree urged by the successful party had no connection with those of the appellant. This last is also true in the Nebraska case cited. It was an appeal from a finding that a certain judgment was a lien. The appellant disputed the proper indexing of the judgment. The appellee was not allowed to correct the amount which he claimed was too small. The other cases are ones in which appellee's complaint had no direct bearing upon that on which the appeal was taken.

It is not thought that an equity appeal in this state, where the appellant asks a hearing *de novo* as to the validity of the contract in question, and as to the amount due on *quantum meruit* if the contract is found bad, permits him or the court to treat the other party as concluded with reference to these very questions. As the syllabus in *Hamilton v. Whitney, Clark & Co.* puts it, the rights of the plaintiff and of the county are "inextricably involved" with appellant's in the decision of these questions which appellant himself raises. Unless both parties are concluded by a decision on a given point, it seems clear that neither is. Of course there are cases in which only one party is permitted to raise the question, and then if he elects to treat the matter as settled, the other must. But if he chooses to open the question, the other party is no longer bound. A petition in error starts a new action. Nothing is involved in it except the errors assigned. 2 Cyc. 510. An appeal, however, is a further proceeding in the same action and brings up all the parties necessary to

the determination of appellant's rights in the matter. *McHugh v. Smiley,* 17 Neb. 626; *Polk v. Covell,* 43 Neb. 884; *Western Cornice & Mfg. Works v. Leavenworth,* 52 Neb. 418.

The plaintiff and the county are here, as appellees, to discuss these very questions brought here for that purpose by the appellant and, it would seem, are entitled to claim whatever the law gives them upon each of these points which the appellant contests. The question of the amount recoverable upon this contract or upon the accounting, if one is to be had between Sheeley and the county, must be deemed entirely open upon this appeal.

The first real question to be determined is the validity of the contract. It is assailed on the ground that the advertisement is illegal, that it called for bids to be accompanied with plans and specifications and yet was "for the building of all bridges that shall be ordered for the ensuing year"; that there were no funds on hand to warrant any such expenditure as the contract involved; that the bid was not by the lineal foot; that Sheeley's bid was not the lowest and best one; that the agreement to pay estimates and for filing a bond within sixty days are both unlawful; and that there was no lawful consideration of competing bids.

Section 83, chapter 78, Compiled Statutes (Annotated Statutes, 6080), provides, that all contracts for the erection and reparation of bridges, whose expense shall be more than $100, shall be let "to the lowest and best bidder." Provided the county commissioners "may adopt plans and specifications for the building of such bridges and may let a contract or contracts for the building of all bridges that may be required to be constructed during the term of one year from the letting of the contract." There are further provisos that the contracts shall not be let to cost more than the money on hand in the bridge fund, together with the road fund money of the district where the work is to be done.

It is urged that the clear meaning of this statute is that,

where it is meant to let annual contracts, plans and specifications must be adopted in advance and the contract be for bridges in accordance with such plans by the lineal foot; that, if such must be the contract, the advertisement must call for the same thing and that it did not in this instance. It is also claimed that there is no authority whatever for an annual contract for repair work; that in its nature there could not be, and that no mention of repair work occurs in the advertisement. It is also objected that the contract is utterly indefinite as to the amount of work, and that orders were given under it for some $23,000 worth of bridges, while there were only $1,200 on hand. It is admitted that there was only this amount of cash, but it is claimed that $4,000 more were really in the bridge fund because it had been transferred to the general fund by an improper and illegal order in December and was returned in March, and that the "levy of the current year" referred to in the statute was the levy of 1902, which was made in July of that year. Two-thirds of it would be $16,803.07. If this was available before the levy was made, with the other funds at hand, there would be sufficient to warrant the contracting for all the bridges ordered. If, however, the levy of 1902 was not available until it was made, then the contracts were in excess of the board's authority and forbidden by the statute. The question as to whether the term "current year" in this statute means calendar year, which has long been by this court held to be the fiscal year of the county (*State v. Cornell,* 54 Neb. 650), or the year from one annual levy to another, is by no means free from difficulty.

In *Austin Mfg. Co. v. Brown County*, 65 Neb. 60, in an opinion with which the writer concurred at the time, it was held that the provision against contracting any debt against the general fund of the county, in excess of "85 per cent. of the amount levied by tax for the current year," did not interfere with contracting in May on the strength of a levy made on June 29. It was there declared that the levy "for the current year" was the one made in that cal-

endar year; that the levy as well as the collection of a tax might be anticipated.

A more careful consideration of the question, since, has led to the conclusion that the opinion in *Austin Mfg. Co. v. Brown County* goes too far, and much farther than was necessary to a determination of that case. A perusal of the opinion will show that the defense, made some years after the giving of the order for the grading machines, was that it was given in May, when there were no funds on hand. The receipt of the machines and the retaining of them in use after the annual levy would ratify the former contract, if it was susceptible of ratification, or would constitute the basis of a new implied one, if the former was absolutely void. There is no statute prescribing how contracts for such supplies shall be entered into and an implied contract was held valid.

The language used in the statute, as to the general fund, is somewhat stronger than in the one under consideration. The permission as to the general fund is to use "85 per cent. of the tax levied for the current year." It is impossible to see how a tax can be "levied" when it is only estimated and the time for levying it has not arrived. It seems clear that in the case of the general fund it is only a tax levied that may be contracted against.

In the case of the bridge fund, the wording is slightly different. Not "85 per cent. of the tax levied" but "two thirds of the levy of the current year" may be contracted against. This, however, would seem, in absence of any other controlling fact, to alter the construction, to require an existing and not merely an estimated and expected levy. Such a fact is sought in the phrase "money on hand derived from the levy of previous years." It is urged that the levy of 1901 was a levy of the previous year and therefore the two-thirds of the levy of the current year must be that of 1902. It is clear, however, that this is merely assuming that the term "previous year" has reference to the calendar year last elapsed. There seems no more necessity for assuming that previous year means previous cal-

endar year, than that "current year" means current calendar year. It must be conceded that, ordinarily, when we use the term "this year," "the current year" or "the previous year" we mean, in each instance, the calendar year in which the event under discussion took place and the one before it. Did the legislature have this meaning in putting the words into this statute? The argument seems irresistible that it did not. They were fixing the exact limit beyond which the county board should not contract. To put such limit at a wholly uncertain and unknown amount, to be determined by future action of the board, would be to make none. It would leave those who should contract with the county entirely uncertain for nearly six months as to whether their agreement was valid or invalid. To hold that in each use of the word the year referred to, whether "current" or "previous" is the year from one levy to another, the year for which it is really made, seems more reasonable. Granting the contention of defendant, that the transfer of $4,000 from the general to the bridge fund was merely replacing money that belonged in that fund, there was still only about $6,000 available money in that fund. The orders given amount to more than $23,000 unless the levy of 1902, not yet made, could be taken into consideration. We conclude that such action was unauthorized and the taxpayer on this ground entitled to enjoin its execution.

The statute seems to require also that plans and specifications be adopted in advance of the letting of an annual contract and that the contract, as well as the advertisement, should have been based upon such plans. It also seems plain that no authority exists for repairing by annual contract, and that where a repair job amounts to more than $100 it must be done by advertising for bids. The contract therefore was invalid and the action of the county board under it unlawful. Was the payment ordered by the trial court of the reasonable value of the work done before the action was commenced the true measure of Sheeley's rights?

The plaintiff took no appeal from the order admitting the county to interplead and to ask for an accounting. Sheeley's appeal from the amount allowed him can not be said to bring up the question of the county's right to request this accounting in which request he joined. We therefore do not have before us the question of the right of the county authorities to inject these questions into the taxpayer's action for an injunction against the carrying out of this contract and for its annulment. We do not see any necessary connection between the two. The plaintiff sought to enjoin any claim or recovery by Sheeley on account of these bridges, but the joining of the proceedings for a settlement of Sheeley's rights, without a contract, to the action of Clark, which was brought to stop proceedings under it, seems to have been productive of no little confusion at the hearing. The question of the right of such joinder, though raised at the trial, is not before us at the present time and is not decided.

The question remaining is, what amount is Sheeley entitled to recover for these bridges built and repaired with no legal contract? It seems clear that the Nebraska statute indicates a prohibition upon any such method of bridge building. It would certainly make the statutory requirement, that all repair work exceeding $100 in amount shall be done upon competitive bids duly advertised for, of small account, if a county board could simply give orders for such work, as in this case, amounting to more than fifteen thousand dollars, with no advertising and no contract. Sheeley's contract, like the advertisement, is silent as to repairing. The advertisement was for bids upon "the building of all bridges that shall be ordered for the ensuing year," and the contract was "to furnish all materials and to construct and complete ready for travel such bridge work as said commissioners may order built over streams," etc. The work was to be "built" according to plans and specifications accompanying, and of the various lengths and materials as ordered. There is not an intimation that of the $23,900 worth of work contemplated about $15,000 was repairing.

Of course equity enforces no forfeitures, but equity follows the law. If, as we think, there is in the law of the state of Nebraska a distinctly implied prohibition against the making of bridges, without advertising and letting of contracts, and against repairing bridges where the expense is more than $100 without such letting of contracts, and there is in the statute an express prohibition of the doing of either, without money on hand or a levy actually made to pay for it, then, in equity, as at law, there can be no recovery where there has been an intentional violation of the prohibition.

In this case, however, there was an attempt to comply with the law. An advertisement was published, a bid made and a contract entered into. There was a colorable claim, at least, of a right to contract with reference to the levy to be made in the following summer. The trial court did not find that these proceedings were taken in bad faith. It entered no express finding as to that, but in allowing Sheeley the $8,204, which he had earned before the action was begun, it must have found that up to that time the proceedings, while irregular and unauthorized, were in good faith. We are not prepared to say that this finding is wrong and that the circumstances are such as to entitle the county to hold Sheeley's materials, as well as labor, for nothing.

Was the refusal to allow him anything for the nine bridges constructed or repaired after the commencement of this action amounting, as the trial court found, to $8,529.06, right and justified? It is, of course, contended by appellee, Clark, that the general finding in his favor is a finding of fraud and wilful violation of the law which precludes any recovery at all by Sheeley. If this were true the refusal to allow for the bridges constructed and repaired after the bringing of this action must not only be sustained, but the allowance for what was previously done must be reversed.

There are some facts in this record tending quite strongly to show that the advertising and letting of the

contract was not in good faith; that Sheeley practically had an understanding with the commissioners from the preceding year that he was to have the contract; that as his witness, Drake, expressed it, "Lancaster county was Sheeley's territory." The court, however, in allowing him for the first constructed bridges, negatived such a conclusion and we do not care to disturb it. We are unable to see that the bringing of this action changed the conditions. So far as Sheeley's rights and the validity of his contract depended upon his own, and the commissioners, following public statutes, the bringing of this action brought him no fresh notice of them. Their enactment and publication is conclusive of notice to every one. So far as any intent to evade them is concerned, he would know, as well before this action was commenced as afterwards, whether it existed. If, as we think, and the trial court seems to have thought, his right depends upon there being reasonable ground for the construction of the statutes, which his counsel are still contending for, the institution of this action and the failure of plaintiff to comply with the order requiring a bond for the temporary injunction, would be no demonstration of its unreasonableness.

In *Grand Island Gas Co. v. West*, 28 Neb. 852, where a taxpayer had sought to cancel a contract and enjoin its execution, and payment of certain gas bills incurred under it, which the city council had allowed, the decree allowing the injunction was modified so as to permit payment for the gas which had been furnished before the action was commenced. The contract was void because made with a corporation in which members of the city council were stockholders. The case is not authority for the proposition that no recovery could be had for gas furnished after the action was begun. No such question is discussed. So far as appears, none was furnished after the beginning of the action. The holding is that plaintiff was not entitled to an injunction against the payment. Whether it could be recovered for on *quantum meruit* is expressly left undecided. But it is held that a cancelation of the contract

and injunction against its carrying out will be allowed, only, on condition of payment for gas furnished. We are constrained to think, if there had been no temporary injunction and gas had been furnished in good faith up to the hearing, it would have also been required to be paid for.

In the present case the taxpayer chose to litigate his rights in a court of equity. He asked, not only the cancelation of the contract, but an injunction against the allowance of any claim for bridges or for work and material. As preliminary to any such relief it would seem that the court should have required payment for all the labor and material which Sheeley had furnished in good faith before the order was entered, even after the commencement of the action. We think he should have had a decree for the full amount of his labor and materials, or the contract declared void and the parties left to their legal remedies.

It is complained that the amount found by the court is not large enough. There seems to be no equity requiring any greater amount. Mr. Sheeley simply testifies that, at fair prices with a reasonable profit, his work was worth the contract prices amounting to $23,973.35. His witness, Drake, says the work was worth $24,893.64, allowing a twenty per cent. profit on expenditures, and fifteen per cent. to the contractor for office maintenance and expenses, and insurance. Evidently the allowance by the trial court is sufficient to cover Mr. Sheeley's outlay in money and property. For his personal services under a void contract he could make no claim. *Argenti v. City of San Francisco*, 16 Cal. 255. For neither profits nor office and soliciting expenses is the county under obligations to pay one who is violating the law. The evidence as to the steel bridges, No. 1 and No. 19, is that the actual expense of their erection would be, respectively, $1,320.89 and $1,930.78. The first is charged at $2,449.95 and the other at $3,402.76. The finding of the trial court as to completed work which was done after the action, viz., $8,529.06, is thought to be

ample to reimburse the actual expenditure on those bridges.

Bridge No. 5 was not completed and nothing was allowed for it. Mr. Sheeley says the lumber for it was at the side, and worth $195.37, at $25 per thousand feet. That he had put in 184 feet of piling for which he charges 55 cents, making $101.20, and 112 feet of 30 inch tubing, at $12.50, $1,400, making a total for this bridge of $1,696.59. As Mr. Sheeley is enjoined from interfering with any of this material or removing it, he should be paid for it. The main item is the tubing. His witness, Drake, put the price of this at $14, but was allowing a twenty per cent. profit, and fifteen per cent. contractor's expenses. Mr. Sheeley's price is $12.50 per foot, but this price included his profit. Taking Drake's price and deducting the twenty per cent. profit, would make the tubing $1,254.40. The piling at forty cents, the price at which Mr. Sheeley had driven a good deal of piling for Lancaster county, would be $73.60. The lumber at $195.37, Mr. Sheeley's price, would make this bridge worth a total of $1,423.37. This amount should be added, together with the value of the finished work as found by the court, viz., $8,529.06, to the total sum of appellant's recovery.

It is recommended that the amount of appellant Sheeley's recovery from the county be changed from $802.40 to $10,754.83 and that interest be allowed on this amount from the date of the original decree, and that the decree of the trial court in all other things be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the appellant Sheeley's recovery from the county is changed from $802.40 to $10,754.83 and interest on this amount from the date of the original decree, and the decree of the trial court in all other things

AFFIRMED.

CADET TAYLOR ET AL. V. JAMES M. WECKERLY.

FILED SEPTEMBER 17, 1903. No. 12,269.

1. **Banks: INSOLVENCY: BOND.** While section 35, chapter 8, Compiled Statutes, provides for the delivery of the assets of an insolvent bank to the officers, stockholders or owners furnishing such bond, a delivery thereof to one of several parties entitled thereto by virtue of the statute, does not relieve the sureties on such bond from liability thereon, where, by their acts, they assent to such delivery and ratify it.
2. **Review: PARTIES: CAPACITY.** The question of a defect of parties and of the legal capacity of the plaintiff to maintain an action can not be successfully urged for the first time in this court.
3. **Evidence.** Evidence examined, and *held* sufficient to sustain the finding of the trial court.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, DISTRICT JUDGE. *Affirmed.*

Arthur S. Churchill, for plaintiffs in error.

Arthur C. Wakeley, contra.

ALBERT, C.

In June, 1896, the state bank examiner reported the defendant bank insolvent to the state banking board, which thereupon directed the attorney general to institute proceedings for the appointment of a receiver, the examiner retaining possession of the assets of the bank. Afterward, in the same month, H. O. Devries, president, Cadet Taylor, vice-president, Daniel T. Mount, a director, and the Globe Loan & Trust Company, a stockholder, of the bank, furnished a bond in compliance with the proviso in section 35, chapter 8, Compiled Statutes (Annotated Statutes, 3735), for the voluntary liquidation of the liabilities of the bank, within three years from the date of the bond. The bond was approved by the state banking board, which, thereupon, directed the bank examiner in custody of the assets of the bank to turn them over to Cadet Taylor, one of the parties furnishing the bond, which was accordingly done.

On the 30th day of March, 1896, and before the bank had been found insolvent, it issued a certificate of deposit to James M. Weckerly, the plaintiff, for $1,050, payable seven months after date, which was wholly unpaid after the time fixed in the bond for the liquidation of the liabilities of the bank, and at the commencement of this action.

This action was brought on the bond, by the plaintiff, against all the obligors, to recover the amount due on the certificate of deposit. While the action was pending in the district court, the defendant H. O. Devries died, and the action was revived in the name of his administratrix.

The petition, among other things, alleges that, upon the approval of the bond, the state banking board turned over the assets of the bank to the parties furnishing the bond, namely, the defendants, Cadet Taylor, H. O. Devries, David T. Mount and Globe Loan & Trust Company, who thereupon took and assumed, and who have ever since remained in possession and control thereof. The bank made default. The other defendants answered, denying that the assets had been turned over to the said parties furnishing the bond, and alleging that the assets were turned over to Cadet Taylor alone, who thereupon took and has ever since been in possession and control thereof. The reply denies that the assets were turned over to Cadet Taylor alone, but avers that, if they were nominally delivered to Taylor, they were so received by him for and in behalf of himself and the other defendants furnishing the bond, and with the knowledge, approval and ratification of all the defendants; that whatever has been done by said Taylor with respect to the custody, management and disposition of the assets of the bank, has been done for the use and benefit, and with the consent and direction, of the makers of the bond, for the purpose of receiving the benefits of the statute heretofore mentioned. The foregoing condensation of the pleadings shows the only questions of fact litigated in the case. There was a trial to the court, without a jury, and a finding and judgment for the plaintiff. The answering defendants bring error.

The main contention of the defendants is, that the assets were not delivered to H. O. Devries, Cadet Taylor, David T. Mount and the Globe Loan & Trust Co., the parties furnishing the bond, but to Taylor alone, and, consequently, the defendants are not liable on the bond because section 35, *supra,* providing for such bond, requires the state banking board to turn over the assets "to the officers, stockholders, or owners of the said bank furnishing the said bond."

It will be conceded that the section referred to, so far as material, is a part of every offer, implied by the tender of a bond in pursuance of its provisions. That being true, when the parties tendered the bond in question to the state banking board, it amounted to an offer on the part of the obligors to be bound by the terms thereof, provided the state banking board would turn over to the parties furnishing the bond the assets of the bank. Like any other offer, it would not become binding until accepted. It is elementary, that an offer, to become binding, must be accepted as made, unless the party making the offer assent to a qualified acceptance. The evidence in this case is conclusive, that the offer, implied by the tender of the bond in question, was not accepted and acted upon by the state banking board in the precise terms in which it was made, because the formal delivery of the assets was made by the banking board to but one of the parties furnishing the bond. But the evidence is ample to sustain a finding that, while this is true, the other parties to the action assented to such qualified acceptance and to some extent, at least, joined with the party to whom the assets were delivered in the control and management of the assets. That being true, they are in no position now to urge that the delivery to Taylor was unauthorized, nor that it absolves them from liability on the bond.

Another question ably presented by the defendants in the arguments is that the penalty named in the bond is in the nature of a trust fund for the benefit of all the creditors, and that a single creditor of the bank can not maintain an

action on the bond in his own name and for his exclusive benefit. But this question was not raised, either by demurrer for defect of parties, or for want of legal capacity of plaintiff to maintain the action, nor does it appear to have been raised in any way, save in the argument addressed to this court. We think the objection comes too late to be available, whatever its merits had it been presented opportunely.

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

AMES and DUFFIE, CC., concur.

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

AFFIRMED.

SAMUEL JOSIAH POLLARD V. MILLIE J. MCKENNEY ET AL.*

FILED SEPTEMBER 17, 1903. No. 13,040.

1. **Trust.** An express trust in land does not arise and can not be created by parol; *aliter*, resulting and constructive trusts.
2. **Fraud.** Ordinarily, a false promise upon which fraud may be predicated must be of an existing fact or a fact alleged at the time to exist, and can not consist of a mere promise to be performed in the future; but if the intention not to perform the promise be shown to have existed at the time the promise was made, the promise is fraudulent.
3. ———. Where a wife prevails upon her husband, who is fatally ill, to convey certain of his property to her by promising to make a certain disposition thereof among his heirs at law, it will be presumed from her wilful failure to make such disposition that her promise was made without any intention of performing it, and was therefore fraudulent.
4. **Constructive Trust.** Where a person obtains the legal title to real estate belonging to another by means of fraud, actual or constructive, a court of equity will fasten a constructive trust upon the property, and convert the grantee or those claiming under him, by descent, into trustees of the legal title, and enforce the trust for the benefit of the grantor or those claiming under him.

* Rehearing allowed. See opinion, p. 753, *post*.

ERROR to the district court for Nemaha county: JOHN S. STULL, DISTRICT JUDGE. *Reversed.*

H. A. Lambert and *J. S. McCarty,* for plaintiff in error.

William H. Kelligar and *Edgar Ferneau, contra.*

ALBERT, C.

This is a suit in which it is sought to have a trust declared in favor of the plaintiff in certain real estate in Nemaha county. The petition shows that Samuel Pollard and Mary Jane Pollard were husband and wife; that the former died in October, 1881; that the deceased for some time before his death was the owner of the lands in suit, which was the family homestead; that the plaintiff and the defendants Millie J. McKenney and Mary E. Dearborn are the only children of the deceased and his wife, and that the defendant Lela L. McKenney is the daughter of Millie J. McKenney, and the defendant Mary G. Dearborn is the daughter of the defendant Mary E. Dearborn. The following taken from the petition is necessary to an understanding of the case:

"That for a long time prior to his death the said Samuel Pollard was an invalid, and in feeble health, afflicted with progressive epileptic fits and paralysis, and knew that he could not recover therefrom; that while thus afflicted, and recognizing that he could not recover, and while of sound mind and memory, he intended and purposed the following disposition of his property, to wit: That his wife the said Mary Jane Pollard, should have the use, rents and profits of the above described lands for and during her lifetime, subject to the payment of his debts, and that the fee of said land should vest in the plaintiff, and that the plaintiff upon the death of his mother, the said Mary Jane Pollard, should pay to the defendants, his sisters, Mary Eviline Dearborn and Millie Junietta McKenney (then Millie Junietta Pollard), the sum of one thousand dollars ($1,000) each.

"That to carry out such intent and purposes, the said Samuel Pollard expressed his determination of having a will executed and drawn to that effect, but the said Mary Jane Pollard represented to him that such a disposition by will would entail large expense on the estate by way of court fees and in probating and administration, and suggested and advised that he make such disposition by deed, to which the said Samuel Pollard assented, and thereafter caused a deed to be drawn conveying said real estate to the plaintiff herein in fee simple, subject to the life estate of the said Mary Jane Pollard, and the payment by this plaintiff to his said sisters, defendants herein, of the sum of one thousand ($1,000) dollars each, at the time of the death of the said Mary Jane Pollard, charging the said Mary Jane Pollard with the payment of all the debts of the said Samuel Pollard. That the said Mary Jane Pollard delayed the execution of the deed, and during said time the said Samuel Pollard constantly grew worse and more enfeebled and unable to leave his bed, and said disease affected his mind and weakened his will power. That at this time the said Samuel Pollard was indebted to various persons in and about the sum of $500, and was negotiating with William Tynon for a loan on said real estate for said amount, with which to pay said indebtedness. That the creditors of the said Samuel Pollard were insisting on the payment of the various claims, greatly worrying the said Samuel Pollard in his then enfeebled condition, and causing him to be very desirous of making said loan.

"That to prevent the said Samuel Pollard from executing the said deed, the said Mary Jane Pollard represented to him that the execution of said deed would prevent the making of said loan, and requested him to convey the land to her, and that she would make said loan and obtain said money and pay said debts, and for him to rely upon her; that she would carry out his intentions as to the disposition of said lands as hereinbefore set forth, and that she would in all things carry out his desires in regard to said land,

and would hold the same during her life, and would, before death, convey the fee simple title thereof to this plaintiff; that by said representations she prevented the said Samuel Pollard from executing said deed conveying said land to this plaintiff, or by other deed or will conveying it to this plaintiff, and induced him to rely upon her to carry out his intentions in regard to the disposition of said land as above set forth.

"That while the said Samuel Pollard was in a very weak physical and mental condition, the said Mary Jane Pollard had prepared certain deeds conveying said real estate in fee to her, and the said Samuel Pollard, through said representations and statements made to him by the said Mary Jane Pollard, relied upon her to carry out his above set forth desires and intentions as to the disposition of said real estate above described, and did by said deed of conveyance, using this plaintiff as a conduit, convey said real estate to said Mary Jane Pollard.

"That this plaintiff, relying upon the statements and representations of said Mary Jane Pollard, and having confidence in her, and believing that she would carry out the intentions of said Samuel Pollard, consented to act as a conduit for the conveyance of said land from the said Samuel Pollard to the said Mary Jane Pollard. That said deeds were duly executed and recorded. That said land at said time was of the value of $4,000. That the $500 mentioned in said deeds was only a pretended consideration, and was never intended to be paid, and no part thereof was ever paid, and that the only consideration for said deeds was the argreement herein set forth.

"That on June 26, 1901, the said Mary Jane Pollard died; that from the time of the death of the said Samuel Pollard to her death, the said Mary Jane Pollard held a life estate in said land, and during all of said time received the rents and profits of said land, and during all of the said time held the fee in said land in trust for this plaintiff under and by virtue of said agreement with said Samuel Pollard. That during all of this time this plain-

tiff believed and relied upon the said Mary Jane Pollard fulfilling and carrying out said agreement.

"That since the death of said Mary Jane Pollard, the defendant, Millie Junietta McKenney, has presented and offered for probate a pretended will of the said Mary Jane Pollard, and the same is now pending in the county court of Nemaha county, Nebraska, which said will purports to convey said above described real estate to the above mentioned defendants. A copy of the said pretended will is hereto attached, marked 'Exhibit A,' and made a part of this petition. That during the lifetime of the said Mary Jane Pollard she failed and neglected to carry out the intentions of the said Samuel Pollard as to conveying said real estate to this plaintiff, and failed and neglected to carry out said agreement as above set forth, and never aliened or conveyed said real estate, other than the conveyance thereof purported to have been made in said pretended will, and by the said will the said Mary Jane Pollard attempted to violate said trust and to convey said real estate to said defendants, and to deprive this plaintiff of any title thereto or estate therein.

"That at all times since the death of his father, this plaintiff was and now is the equitable owner and entitled to the fee in and to all of said real estate; that said Mary Jane Pollard only had a life estate in and to said land, and held the legal title in trust for this plaintiff, and that whatever title in and to said land that is now held by said defendants, any and all of them, either under said pretended will or as heirs of said Mary Jane Pollard, is held in trust for this plaintiff, who is now the real and equitable owner of said land, and that said Mary Jane Pollard during her life frequently admitted said trust, and this plaintiff had full faith and unbounded confidence in the said Mary Jane Pollard and fully believed she would faithfully execute said trust.

"That said defendants, either or all of them, have no right, title or interest in or to said real estate or any part thereof, other than a charge thereon of $1,000, payable to

each, said Millie Junietta McKinney and Mary Eviline Dearborn, which said sums this plaintiff is now ready, able and willing to pay according to the intentions of the said Samuel Pollard, and is now ready and in all things willing to carry out his part in fulfilling such intentions."

The prayer is, that the plaintiff be declared the equitable owner of the land, that the purposes and intentions of Samuel Pollard in the premises be carried into effect, and for general relief.

The defendants filed general demurrers, which were sustained by the court; the plaintiff elected to stand on his petition and a decree was entered accordingly. The case is here on error.

The argument in this case proceeds on the assumption that the agreement of the wife, Mary Jane Pollard, to carry out the intention of her husband in regard to the land, rested in parol. As this assumption is not inconsistent with the allegations of the petition, we proceed on the theory that such was the character of the agreement. The only question, then, in this case is, whether the trust sought to be enforced falls within the provisions of chapter 32, commonly called the statute of frauds, which, so far as concerns us now, is as follows:

"Section 3. No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same.

"Section 4. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law."

The language of section 3 is so clear and sweeping as to exclude the possibility of creating an express trust by

parol. That section is not only an insuperable obstacle to the creation of a trust of that character by parol, but to thus creating a trust in any manner relating to land. In *Hansen v. Berthelsen,* 19 Neb. 433, it was held that an express trust can not be raised by a parol promise to reconvey to the grantor. To the same effect are the following: *O'Brien v. Gaslin,* 20 Neb. 347; *Dailey v. Kinsler,* 31 Neb. 340, 35 Neb. 835; *Thomas v. Churchill,* 48 Neb. 266; *Cameron v. Nelson,* 57 Neb. 381. The principle applied in those cases applies with equal force to a parol promise to convey to a third party, because it would be an attempt to create an express trust by parol and would contravene the provisions of section 3, *supra.* Such is the holding of the courts of other states, under statutory provisions similar to those quoted. Among the cases adhering to such rule are the following: *Shafter v. Huntington,* 53 Mich. 310; *Randall v. Constans,* 33 Minn. 531; *Fairchild v. Rasdall,* 9 Wis. 379; *Pavey v. American Ins. Co.,* 56 Wis. 221. From what has been said it necessarily follows, we think, that no express trust was raised by the parol promise of the wife to carry out the alleged intention of her husband as to the property in question.

But, by the express provisions of the fourth section, trusts arising by implication, or by operation of law, are excepted from the operation of the statute. Both resulting and constructive trusts obviously fall within the exception. Resulting trusts are such as are presumed or implied from the acts of the parties, as where one man pays the purchase price for land and the deed is taken in the name of another, it is presumed that a trust was intended for the person who paid the money. Such trusts arise, result or are implied from the contract and relations of the parties; the intention of the parties, as manifested in their contracts made in good faith, is the foundation of them. 1 Perry, Trusts (5th ed.), sec. 166. But, the presumption arising from such contract and relations is not conclusive, but may be rebutted by evidence showing a different intention. And where, as in the present

case, the intention of the parties is clearly expressed, there is no room for presumption or implication, consequently there can be no resulting trust.

Closely allied to resulting trusts, and frequently confused with them, are constructive trusts. This class of trusts arises from actual or constructive fraud or imposition, committed by one party on another. 1 Perry, Trusts (5th ed.), sec. 166. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced. Again, if a party obtains the legal title to property by virtue of a confidential relation, under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits; out of such circumstances or relations, a court of equity will raise a trust by construction and fasten it upon the conscience of the offending party and convert him into a trustee of the legal title. *Thompson v. Thompson,* 16 Wis. 94; *McClain v. Johnson,* 43 Vt. 48; *Hollinshead v. Simms,* 51 Cal. 158.

There is little difficulty in applying the doctrine of constructive trusts in cases of actual fraud, but it is not always easy to determine whether a given transaction involves constructive fraud. The general doctrine of the courts is, that a false representation, upon which fraud may be predicated, must be of an existing fact, or a fact alleged to exist at the time, and can not consist of a mere promise to be performed in the future. *Jackson v. Cleveland,* 15 Mich. 94; *President and Trustees of Hartsville University v. Hamilton,* 34 Ind. 506; *Noble v. State,* 39 Ind. 352; *State v. Prather,* 44 Ind. 287; *Adkins v. Adkins,* 48 Ind. 12; *Hayes v. Burkam,* 51 Ind. 130; *Reagan v. Hadley,* 57 Ind. 509; *Welshbillig v. Dienhart,* 65 Ind. 94; *Burt*

v. Bowles, 69 Ind. 1; *Bethell v. Bethell,* 92 Ind. 318; *Gallager v. Brunel,* 6 Cow. (N. Y.) 347; *Johnston v. La Motte,* 6 Rich. Eq. (S. Car.) 347. But, if the intention not to perform the promise be shown to have existed at the time the promise was made, the promise is fraudulent, even in the absence of confidential relations between the parties. *Christy v. Sill,* 95 Pa. St. 387; *Brison v. Brison,* 75 Cal. 525; *Larmon v. Knight,* 140 Ill. 232. In the last case the court hold that the existence of the evil intent at the time the promise was made may be inferred from the failure to comply with the promise, and that the promisor may be presumed to have intended, when he made the promise, to do what he finally did do. In *Newton v. Taylor,* 32 Ohio St. 399, it was held, that where a party participates in bringing about the arrangement, induces the result and takes in confidence what he can not retain without bad faith, he becomes a trustee by virtue of his own wrongful acts, and the trust in such case may be proved by parol. In *Brison v. Brison, supra,* the court held, not only that a promise made with the intention of not performing it is fraudulent, but that the violation by the grantee of a promise to reconvey, is constructively fraudulent and gives rise to a constructive trust, which may be established by parol, if he obtains an absolute deed without consideration, by means of a parol agreement to reconvey to the grantor to whom he stands in the confidential relation, *even where there be no intention at the time not to perform the promise.* In that case, as in this, the parties were husband and wife and considerable stress is laid on the confidential relation of the parties. In holding that the absence of an intention not to perform the promise when it was made is immaterial, the court went farther than was necessary to a decision, because the petition, as construed by the court, shows that the promise was made without any intention of performing it. But, in our opinion, the rule is nevertheless sound. A transaction of that character involves more than a mere breach of contract; there is also involved the

element of confidence reposed by the grantor in one upon whom he had a right to rely, and a betrayal of such confidence.

In the present case the parties, as before stated, were husband and wife. The conveyance was made at the solicitation and instigation of the latter, during the last illness of her husband, when he was both physically and mentally weak, and under circumstances well calculated to strengthen the influence of his wife over his conduct. By virtue of her relationship and consequent influence, and, upon the strength of her promise to carry out his intentions with respect to the property, the wife obtained the legal title. Such agreement she not only failed to perform, but repudiated by making an entirely different disposition of the land.

The rules, so far as we have stated them, announced in *Brison v. Brison, Larmon v. Knight* and *Newton v. Taylor, supra,* meet our entire approval, and, it seems to us, that any one or more of them applied to the facts in this case will necessarily impress a trust upon the property in suit. It follows, therefore, that the demurrer should have been overruled.

What has been said disposes of the question presented by the record, but, as the case goes back for trial, it may be proper to anticipate one of the questions which will confront the trial court. It appears to be assumed by the plaintiff that the relief in this case should be a decree giving effect to the intention of the parties as shown by their agreement at the time of the conveyance, and to the testamentary intentions of the grantor. We are aware of authorities which seem to support that assumption, but we do not think they should control in view of the sections of the statute of frauds, *supra.* Section 3 explicitly provides that no trust over or concerning land, or in any manner relating thereto, may be created by parol. It does not contemplate the existence of a right without a remedy but excludes the idea of the existence of the right unless created in the prescribed manner. To carry out the in-

tention of the parties in this case would be to give effect to a contract which the statute, in express terms, declares shall be ineffective. Besides, it would be giving effect to the mere testamentary intentions of the grantor, whereas such intentions, except in the case of nuncupative wills, to be effective must be expressed in the form of a will, duly executed. Compiled Statutes, chapter 23, section 27 (Annotated Statutes, 4992). Moreover, as we have seen, the trust arises from the actual or constructive fraud of the grantee. The action then is for relief on the ground of fraud, and to compel the grantee, or those claiming under him, to surrender that which in equity and good conscience they are not permitted to retain. It might have been maintained by the grantor in his lifetime upon a showing bringing the case within the rules hereinbefore stated and approved. Had it been brought by him, the relief granted would have been merely to place the parties *in statu quo*. Those claiming under him, it seems to us, are entitled to the same relief and no other or greater. The court may well deprive the defendants of the fruits of a fraudulent transaction, and still give force and effect to the statute of frauds. But if it goes farther and carries out the intentions of the parties as evidenced by their agreement and the testamentary intentions of the grantor orally expressed, the statute of frauds and of wills become dead letters, because to carry out the intention of the parties to a contract is to enforce it, and to carry out testamentary intentions is to give effect to a will. That, in case the contract or will is not in writing, would be to do the very thing the statute says may not be done. If we are right thus far, it follows that the relief in this case should be limited to a cancelation of the conveyances whereby the wife acquired her husband's title to the land.

It is therefore recommended that the decree of the district court be reversed, and the cause remanded for further proceedings according to law.

GLANVILLE and BARNES, 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 for further proceedings according to law.

REVERSED.

The following opinion on rehearing was filed October 20, 1904. *Judgment of reversal adhered to:*

Trust: DECREE. A decree establishing a constructive trust should not be limited to a cancelation of the conveyance whereby the constructive trustee acquired title to the land; the trust should be ascertained and enforced.

SEDGWICK, J.

It appearing on the motion for rehearing that the commissioner in his opinion had announced a rule for the guidance of the lower court which is not indicated in the syllabus, a reargument was had before the commission, one of the present members of the court having been upon the commission and heard the reargument. We are satisfied with the result on the former hearing reversing the decision of the lower court upon the principles stated in the syllabus. The statement, however, in the opinion that "the relief in this case should be limited to a cancelation of the conveyance whereby the wife acquired her husband's title to the land," we think is erroneous. If the allegations of the petition are true, the decedent, Samuel Pollard, intended and proposed to convey the land in question to the plaintiff subject to the life estate of the defendant, Mary Jane Pollard, and also subject to the payment of the debts of the decedent. The allegations of the petition are sufficient to show a constructive trust in favor of the plaintiff, and, if upon the trial these allegations are sustained by the evidence, the trust should be ascertained and enforced.

The cause is therefore remanded for further proceedings in accordance with the opinion as herein modified.

REVERSED.

ODOM HOOKER V. CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK.

FILED SEPTEMBER 17, 1903. No. 12,955.

1. **Insurance:** DEFAULT. The policy sued upon provided for suspension of the insurance during the time any premium note remained overdue and unpaid; a loss occurred while plaintiff was in default of payment of his first premium note; the note named the agent as payee, but was owned by insurer. *Held*, That plaintiff's default, unless waived, suspended his insurance.
2. **Verdict:** EVIDENCE. Plaintiff pleaded a contract for an extension of time in which to pay his matured premium note to a date beyond that of the loss, also, a waiver by receipt of payment after notice of plaintiff's loss under the policy. *Held*, That a verdict against the plaintiff is supported by the evidence.
3. **Error.** Record examined, and *held* to show no error.

ERROR to the district court for Stanton county: GUY T. GRAVES, DISTRICT JUDGE. *Affirmed.*

William W. Young and *G. A. Eberly*, for plaintiff in error.

John A. Ehrhardt, contra.

GLANVILLE, C.

Odom Hooker was plaintiff in the court below, and has brought this cause before us on a petition in error, seeking to reverse the judgment of the district court for Stanton county, rendered against him in his action upon an insurance policy for the value of stock killed by lightning. The parties will be designated herein as plaintiff and defendant, as they stood in the trial court. Before considering the merits of the case, it is necessary to decide one preliminary question.

Plaintiff assigns error for the giving of certain instructions by the court to the jury, and after filing his petition in error with the record and his briefs, he was met by the contention that the record did not show exceptions to the

instructions complained of, whereupon he applied to the district court for an order noting his exceptions. A hearing was had before the trial court, and the court made the following findings and order:

"Upon due consideration, the court doth find that the allegations and statements in plaintiff's motion and application filed herein are true. The court doth further find that the plaintiff having failed to make record of his exceptions, either by marginal notations in writing upon the original instructions of the court or by reducing the same to writing and filing the same in said cause, he is not now entitled to the entry of said order *nunc pro tunc,* and the same is, therefore, denied and refused."

These findings of the court are, in effect, that the plaintiff at the time of the giving of the instructions in question, then and there, duly excepted to each and every one of them, and that by the ruling of the court such exceptions were not allowed to be noted or entered upon the instructions, until after the verdict of the jury had been returned. These findings of the court, made a part of its record in the case, are sufficient to entitle the plaintiff to an examination of the instructions complained of; the instructions being "duly excepted to" at the time the same were given to the jury and the above findings being a sufficient record to show that the exceptions were properly taken.

The policy sued upon was issued by the defendant to the plaintiff, November 17, 1899, insuring him to the aggregate amount of $1,400 against loss of property by fire or lightning, and in consideration for the policy, the plaintiff gave an instalment note to the defendant for $44.80, payable in instalments of eleven and 20-100 dollars annually, without interest, the first instalment being due December 1, 1900, and also gave his note for $11.20, without interest, due March 1, 1900, of which the following is a copy:

"$11.20. STANTON, NEB., Nov. 8, 1899.

"For value received, promise to pay to F. A. Frost, or order, eleven and 20-100 dollars, on or before the first day

of March, 1900, with interest at —— per cent. per annum (being first payment for policy of insurance based upon application made this day to the Continental Insurance Company of New York). This note shall not be valid unless said policy is issued by the company.

"And it is hereby agreed that, in case of nonpayment of this note at maturity, this company shall not be liable for loss during such default, and the policy for which this note is given shall lapse until payment is made to this company at its western department in Chicago, Ill., and in the event of nonsettlement for time expired, as per terms in contract, the whole amount of note may be declared earned, due and payable, and may be collected by law. This note is given to secure payment of a part of the premium for a policy of insurance. In case of loss under said policy this note shall immediately become due and payable, and may be deducted from the amount of said loss. If transferred either before or after maturity, by the company, it is agreed this note shall be subject to all defenses as if owned by the company herein named.

"ODOM HOOKER."

This note was not paid at maturity, and while it remained overdue and unpaid, the loss in question occurred. The policy sued upon contains the following provisions:

"But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned, while any promissory note or obligation, or part thereof given for the premium remains past due and unpaid.

"The company may collect by suit or otherwise, the premium note or notes, and a receipt from the office of the company must be received by the assured before there can be a revival of the policy, which shall in no event carry the insurance beyond the original term."

The note copied above, although on its face made payable to an agent, is a note given for part of the premium for plaintiff's policy, and by the dealings of the parties,

and we think by the pleadings, has been considered and treated as, and in fact at all times it was the property of the defendant, and the plaintiff alleges a contract to extend the time of its payment made with the said Frost, and assented to by defendant, through its agent, and claims payment of the same to the defendant, by payment to the said Frost, and, we think, the note is one a default in payment of which would under its terms and the terms of the policy suspend the insurance during the time it remained overdue and unpaid.

Plaintiff's attorney took pains to bring out with emphasis upon cross-examination, evidence that Frost held this note for collection at the time a contract for extension is claimed to have been made, and at the time the note was paid, and his letter to the defendant under date of July 20, 1900, acknowledged by plaintiff, and introduced in evidence, is in part as follows:

"I also acknowledge receipt of a letter from your company bearing date June 23d, inclosing for me $11.20 which I had paid upon the first instalment note given under said policy to your agent, F. A. Frost, at Stanton, Nebraska, who held the same for collection and who collected the same from me with a full knowledge of the destruction of said property by lightning and surrendered said note to me at the time of payment. Early of the same week that my property was destroyed by lightning, your agent, Mr. Frost, came to my home in Stanton county for the purpose of collecting this note. I did not have the money at that time to pay the note, and told him that I would haul some hogs to town on Saturday of that week, or the following Monday, for the purpose of paying said note, and he stated to me at the time that it would be all right, and that you would wait upon me until that time. On the following Monday, June 11, I did as I agreed with Mr. Frost, hauled my hogs to town and paid the note in question after having told him of the destruction of said property by lightning."

It seems that the agent Frost, in company with one

Evans, a special agent of the defendant, called on plaintiff at his farm early in June, and urged payment of this note then three months past due, that the note was not paid, but plaintiff promised to pay it soon; that Sunday morning, June 10, three of plaintiff's horses were found dead, killed by lightning; that he called on the agent Frost Monday evening, and paid the face of this note to him and received the note. There is some conflict in the evidence, as to what took place at the interview on the farm. Plaintiff on direct examination stated:

"He (Evans) said he came there for the purpose of seeing me about the insurance note to the Continental Insurance Company. I told him I didn't have the money right then to pay it, but if he would extend the time till Saturday or Monday, and Mr. Evans or whatever his name is, I can't remember, he said all right, and I went and sold some hogs, I went to Mr. Frost and told him I'd sold and I'd pay him the money and he said that would be all right."

On cross-examination, he declined to swear that the agent did not tell him his policy would be in abeyance and that he had no insurance until his note was paid, and when asked, "Now they said they'd wait till Monday?" he answered, "Wait till Saturday; I told him I'd come and pay it." Both agents say he promised to pay the note Saturday, but deny saying it was all right, or giving any extension of time. Again plaintiff and one witness insist that plaintiff informed the agent Frost of his loss before he paid his note. This is denied by Frost. These are practically all the disputes between the parties as to the facts involved.

Plaintiff contends that his note, overdue at the time of the loss, was given to Frost, and that the defendant company had no interest therein, and that under the holdings of the court in *Union Life Ins. Co. v. Parker,* 66 Neb. 395, and *Pythian Life Ass'n v. Preston,* 47 Neb. 374, 379, his policy was not suspended because of the nonpayment of this note. In the case before us, no contract allowing this

note or the payment represented thereby, to become the property of, or retained by, the agent was pleaded or proved, and the note at all times has been recognized as the property of the defendant. The plaintiff at first swore that he had given the note to the company, though afterwards changed his statement in that regard, and said he had given it to Mr. Frost. It was explained by the agent why his name was inserted in the note. Mr. Frost did not write and issue such policies as plaintiff's, and the application therefor was taken by a traveling agent, Johnson, and he, Frost, took this note in this form, it seems, to show his connection with the matter. In the *Parker* case above referred to, the agent had a right to all of the first payment, and took a note therefor, payable to himself, and sold it, the proceeds belonging to him. The insurer recognized the title of the indorsee, and bought the note after the loss occurred.

In the *Preston* case cited, the contract with the agent who took the note which was unpaid at the time of the loss provided: "The compensation allowed said party of the second part (the agent) for his services rendered under the terms of this contract shall be 100 per cent. of the membership fee or advance premium adopted by the party of the first part and collected by the party of the second part." It was held:

"That the association had surrendered the right to any further control or direction of the collection of the fees and advance premiums"; and

"That if he (the agent) extended credit it was not for the company but for himself."

Those cases are easily distinguished from the one before us, and their reasoning does not apply to the facts herein. This case, so far as this element of it is concerned, is governed, we think, by *Phenix Ins. Co. v. Bachelder,* 32 Neb. 490, s. c., 39 Neb. 95, and *Home Fire Ins. Co. v. Garbacz,* 48 Neb. 827, and the jury having found against the plaintiff on the disputed questions of fact, judgment on the verdict will be sustained, unless error is found in the instruction or rulings at the trial.

Plaintiff makes special complaint of instructions No. 2 and No. 6, because No. 2 instructs:

"That the burden is upon the plaintiff, and it is for him to prove every material allegation contained in said petition by a preponderance of the evidence."

And No. 6 requires the jury, in order to justify a verdict for plaintiff, to believe "that the horses killed were covered by the policy."

He insists that these taken together may have misled the jury to his prejudice, because his petition alleges that the horses killed were owned by him at the time the policy was issued, and the proof shows that they were bought afterwards; and that while such allegation of ownership was immaterial, yet the jury may not so have understood. There is no merit in this contention. The instruction is correct as given, for the court by its first instruction stated the issues by recital of the material allegations and did not include the allegation of such ownership; and furthermore, if plaintiff wanted a more explicit statement of the issues, he should have asked an appropriate instruction for that purpose, which he failed to do.

Again, the court, by several other instructions, narrowed the inquiry to the real issue between the parties and directed a verdict for the plaintiff upon a finding in his favor as to those issues; that is if the jury found the time of payment of the note involved had been extended to the day when it was paid, or that the forfeiture had been waived by receipt of payment with knowledge of the loss.

Plaintiff contends that the court erred in refusing instructions No. 1 and No. 4, asked by the plaintiff. Instruction No. 4 so asked is somewhat lengthy, and we will not copy the same, but hold that it would have been error for the court to give it for two reasons; first, by this instruction the jury would have been allowed to find for the plaintiff in a greater sum than the insurance upon the property lost. The policy is severable as to the amount of insurance on separate classes of property, and is for $200 on horses, mules and colts, and this instruction would

authorize a verdict for the total value of property lost, which proof shows to be $240.

Again, it is to the effect that if the defendant did not at once, upon notice of the loss, and nonpayment of the $11.20 note, cancel the policy and notify the plaintiff of its forfeiture, and offer to return the instalment note in its possession, this would be a waiver of the forfeiture or suspension clause of the policy, and render the defendant liable. That is not the law, as the policy, by the nonpayment of a premium note, was suspended and not forfeited as a whole, and could be reinstated by payment of premium, notwithstanding a dispute had arisen between insurer and insured as to liability for the loss involved herein.

Instruction No. 1 asked by the plaintiff would have been erroneous, for the first objection above stated to instruction No. 4, that is, that it would have allowed a recovery in excess of the amount of the insurance. It is also objectionable because it appears to require a verdict for the plaintiff if the time of payment of the note in question had been extended until "June 9, or 11, and that plaintiff, then and there, at the time of the extension agreed to pay the same on one of said dates." This would have been wrong; an extension of payment to June 9 would not make defendant liable for a loss occurring on June 10.

There are some assignments of error based upon rulings of the court on admission and rejection of evidence. Without reviewing the record at length on these assignments, we will say we have examined it carefully and find no error in these regards.

Plaintiff's cause was fairly submitted to the jury, the evidence sustains the verdict, the verdict and judgment are not contrary to law, and we find no error in the record.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and ALBERT, CC., concur.

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

AFFIRMED.

JOHN M. KREADER V. CITY OF FREMONT.

FILED SEPTEMBER 17, 1903. No. 13,091.

Municipal Corporation: LIABILITY: FEES. Fees of officers and witnesses for services rendered in a prosecution for the violation of an ordinance of a city, either in police court or in district court upon appeal, can not be collected from such city, unless their payment by the city is required by statute or by ordinance authorized by statute.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, DISTRICT JUDGE. *Affirmed.*

Courtright & Sidner and *G. G. Martin,* for plaintiff in error.

E. F. Gray and *C. E. Abbott, contra.*

GLANVILLE, C.

The defendant in error is the sheriff of Dodge county, and, as such, served papers in a case pending in the district court for that county, wherein a certain defendant was being prosecuted for the violation of an ordinance of the defendant city, the case being there upon appeal from police court. He also took assignments of certain fees claimed by the clerk of the district court, sundry witnesses who had appeared for the prosecution in the police court and in said district court, and the fees of the police judge of defendant city, all these fees being claimed in connection with the same prosecution. He filed his claim with the city council, and, upon its disallowance, appealed to the district court where issues were joined, and trial proceeded through the introduction of evidence on behalf of the plaintiff in error; whereupon the court instructed a verdict for the defendant in error, and the case is before us upon such assignments requiring us to pass upon the correctness of such instruction.

The only question necessary for us to pass upon is the one touching the liability of the defendant city for the payment of these fees, or any of them.

It is the law of this state that such prosecutions are criminal actions, and must be carried on in the name of the state; any fines collected as a result of such prosecutions go to the school fund, and the city, for the violation of whose ordinances the state is prosecuting, is not a party to the action.

No statutory provisions have been called to our attention, and, in fact, none exist in this state, fixing a liability for such fees as are herein sued for upon the municipality whose ordinance forms the basis of the prosecution.

It is a well known proposition of law, too thoroughly established to require argument or citation of authorities, that, unless provision is made by statute for the compensation of members of society and public officers who are required to perform duties in assisting the state to maintain order and prosecute violators of its laws, they may not demand compensation for such services; that as members of society this duty may be placed upon them without compensation, and as public officers, if the duty is required and no compensation fixed by law therefor with provision made for its payment, the fees or salaries allowed such officers in other respects are supposed to be their compensation for such services rendered.

Such being the law, and there being no statutory liability fixed upon the defendant city, it follows that the judgment of the district court is right and should be affirmed.

We therefore recommend that the judgment of the district court be affirmed.

BARNES and ALBERT, CC., concur.

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

AFFIRMED.

CHARLES TIERNAN, APPELLANT, V. MILLER & LEITH ET AL., APPELLEES.

FILED SEPTEMBER 17, 1903. No. 13,058.

1. **Homestead Entry:** JURISDICTION. The courts of this state have no jurisdiction to try and determine the validity of homestead entries duly allowed by the officers of the land department of the general government.

2. ———: INJUNCTION: LESSEE. A party entering public lands as a homestead is entitled to the possession thereof and can not be enjoined from exercising his right of possession by one who without right held a prior possession. A lease of the land by the homesteader gives the lessee a like right of possession.

APPEAL from the district court for Box Butte county: JAMES J. HARRINGTON, DISTRICT JUDGE. *Affirmed.*

R. C. Noleman, for appellant.

William Mitchell, contra.

DUFFIE, C.

This action was brought by the appellant, praying an injunction against the appellees enjoining them from asserting any exclusive control over numerous tracts of land claimed by the appellant to be government land, and from fencing the same or from driving the stock of plaintiff from said land. As we understand the record, twenty-nine homestead entries were made upon the lands in question, and duplicate receipts were issued to the parties by the receiver of the United States land office at Alliance. Miller & Leith claim to have leased the lands embraced in most of these homestead entries, and are about to fence in the same and take exclusive possession thereof. It is alleged that these entries are fraudulent, that Miller & Leith furnished the money to pay the land office fees, and also paid the entrymen certain sums for making said entries, which it is charged were made for the benefit of Miller & Leith; that the entries are a fraud upon the gov-

ernment and were made for the sole purpose of giving Miller & Leith a claim of right to the lands under which they are about to take exclusive possession thereof and to exclude the appellant therefrom, he having occupied a large portion of the lands with his herd of cattle for many years prior to the commencement of this action. The defendants filed a demurrer to the petition which was overruled—judge Harrington sitting in the case. Thereupon defendants filed a motion to dissolve the temporary injunction issued in the case, and, upon a hearing, the motion to dissolve was overruled and the temporary injunction continued. The hearing on this motion was before judge Harrington. At the next regular term of court, at which judge Westover presided, the plaintiff and appellant obtained leave to file a supplemental petition and thereupon a demurrer was interposed to the petition and supplemental petition which was sustained by the court, and the plaintiff refusing to amend or further plead, the injunction was dissolved and the plaintiff's petition dismissed. From this order the plaintiff has appealed to this court. The sufficiency of the petition being questioned both by demurrer and on motion to dissolve the temporary injunction issued thereon, and held sufficient by judge Harrington, it is now insisted that its sufficiency must be accepted as the law of the case and that judge Westover on the final trial was bound by these rulings.

In *Marvin v. Weider*, 31 Neb. 774, it was held that where the sufficiency of the petition was put in question by a demurrer interposed thereto, and the demurrer overruled and leave given to the defendant to answer, which he did, that it was error for another judge of the same district to sustain an objection to the introduction of any evidence on the ground that the petition failed to state a cause of action.

In *Kleckner v. Turk*, 45 Neb. 176, a demurrer was interposed to a petition and overruled, whereupon the defendant filed answer. The trial was had before another judge of the same district and after the reception of the evidence

the judge instructed the jury to return a verdict for the defendant for the reason that the pleadings, evidence and law would not sustain a different verdict. It was held that no error was committed, the reason given being that another element entered into the consideration of the case, namely, the evidence.

In *Perry v. Baker,* 61 Neb. 841, it was held that a judgment for defendant upon sufficient pleadings and evidence will not be reversed because another judge of the same court had, before the trial, sustained a general demurrer to the answer, the answer having been amended by leave of court after ruling on the demurrer, and this is the rule although no evidence is offered on the trial sustaining the allegation brought into the answer by such amendment. In the body of the opinion it is said:

"If a judge makes an erroneous ruling and afterwards in the trial of the case, with more exhaustive investigation of the question, finds his first ruling is wrong, he should not be bound by it. The principle of *res adjudicata* does not apply. The first ruling does not become the law of the case so as to bind the court in the further proceedings therein. The court remains the same whether the *personnel* changes or not. So far as a different rule was announced in *Marvin v. Weider, supra;* that case ought to be overruled."

We conclude therefore from an examination of these authorities that where there are two or more judges of a district and one of them has passed upon the sufficiency of the petition or answer, his ruling does not become the law of the case and bind another who may be called upon to try the case on its merits, and especially is this the case where, as here, the pleadings have been changed and other elements have entered into the case. This brings us to a consideration of the case on its merits. The facts set forth in the plaintiff's petition and largely supported by his affidavits offered in resistance of the motion to dissolve the injunction, present a case which, if offered to the proper tribunal, would undoubtedly justify it in holding

that the homestead entries made upon the land in controversy were fraudulent in character and demand their cancelation. The trouble is, however, that no court, either state or federal, has jurisdiction at this time to investigate this question or pronounce judgment thereon. As said in *Reaves v. Oliver,* 3 Okla. 62, 41 Pac. 353:

"The title is yet in the United States and the questions affecting the rights of the several parties to acquire title is for the officers of the land department to deal with. The courts will not interfere with or attempt to determine any question involved before the land department while the title is yet in the United States. The courts will only deal with the question of possession, and in order to do this will look into the record sufficiently to advise itself as to the true status of the parties in that department. Whenever the facts are undisputed the courts will apply the law to the status of the parties, as justice may require."

In this case it is shown that the land in controversy has been entered under the homestead act and the land officers, in allowing the homestead entry, are required to pass upon the qualifications of the entrymen, and the courts will not inquire into or pass upon any question of fact properly belonging to the department while such matters are pending therein. The congress of the United States has placed the disposal of the public lands with the secretary of the interior under rules and regulations to be established by his department. Until the title has passed from the government the courts will not interfere in the administration of the law by the land department.

In *Marquez v. Frisbie,* 101 U. S. 473, it is said:

"We have repeatedly held that the courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus, and we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the executive departments, to take jurisdic-

tion of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, which would render its patents a nullity when issued. After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds it may be enforced, but not before."

So long as the homestead entries made by the parties mentioned in appellant's petition remain uncanceled by the land department of the United States, these parties have a right to the possession of the lands embraced within their homestead entry, and they may lease such lands, or such portion of them as they desire, to third parties. The plaintiff not having a prior right acquired under some law of the United States, can not interfere with that possession or dispute the right of the homestead claimant, except by proceedings in the land department, until title has passed from the United States, when the land and the right thereto may become the subject of inquiry in the courts. If the homestead entries in question are fraudulent, the land department has not only ample but exclusive jurisdiction to deal with that question. If the officers of the land department have acted fraudulently in passing upon adverse claims of title to the land, or if they have mistaken the law and given it to one party where the law properly construed would award it to another, then, the courts may right the fraud or correct the unlawful holding. As said in *Marquez v. Frisbie, supra:*

"The rule which governs the courts in the effort to correct any error in such decision has been so repeatedly stated here as to leave no room for doubt or misconstruction. That principle is, 'that the decision of the officers of the land department, made within the scope of their authority, on questions of this kind, is in general, conclusive everywhere, except when considered by way of appeal within that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when

the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief.' "

These principles were fully discussed in *Smiley v. Sampson,* 1 Neb. 56, and *Morton v. Green,* 2 Neb. 441. There is a class of cases of which the courts take jurisdiction to protect and preserve the possessory rights of parties who have entered upon government land and who can connect themselves with the land by some color of title or possessory claim or right under some statute of the United States with a view of entering it as a homestead or preemption claim. Where two parties claim such right of possession, the courts will interfere to protect the party whose right was first acquired, and while the question of priority between the parties is being determined by the land department of the general government. Could the plaintiff in this action show that he was in possession of this land under any claim of homestead or preemption, or any other right growing out of our public land laws, the court would protect his possession until the land department of the general government examined the case and determined that such possession was subordinate to that of the party seeking to oust him. But the facts in this case are the reverse of what is necessary to give the court jurisdiction. Plaintiff, without claim of right to the land, is seeking to enjoin those who claim under a homestead entry made at the proper land office of the United States from taking possession, and is asking the court to usurp the exclusive jurisdiction of the land department by declaring fraudulent and void homestead entries allowed by that department. This, the court has not power to do. The judgment of the district court was right and we recommend that it be affirmed.

POUND and KIRKPATRICK, CC., concur.

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

AFFIRMED.

CHARLES WANECEK V. MARY KRATKY.

FILED SEPTEMBER 17, 1903. No. 13,137.

1. **Marriage Contract.** Where upon an agreement of marriage the parties expressly agree that the ceremony shall be celebrated in accordance with the rules and customs of a particular religion and church, such rules and customs become a part of the contract and binding upon the parties.

2. **Action for Breach.** Where one of the parties to a marriage contract fails to perform his agreement at the time fixed for the ceremony, no reasonable excuse existing for such failure, the other party may rescind the contract and maintain an action for damages.

ERROR to the district court for Douglas county: LEE S. ESTELLE, DISTRICT JUDGE. *Affirmed.*

John D. Ware, for plaintiff in error.

Henry C. Murphy and *Charles L. Hover, contra.*

DUFFIE, C.

About November 1, 1900, the parties entered into an agreement of marriage and on the following day they called on Father Bednar, a Catholic priest in charge of a church at South Omaha, to procure the publication of the banns in accordance with the regulations of that church. The date of the marriage was fixed for November 27, 1900, at eight o'clock A. M. On three successive Sundays after this visit to the priest, public announcement of their proposed marriage was made in accordance with the laws and customs of the church. Following this announcement and up to about the date fixed for their marriage plaintiff in error continued to call upon the defendant in error, and, under the expectation that the marriage would take place

as arranged, she secured bridesmaids, called home distant members of her family, invited friends, and made all preparations for the ceremony. It was arranged that plaintiff in error should call for his bride at the residence of her parents, but he failed to do so; and it was afterwards ascertained that he went to his work in the usual manner at one of the packing-houses in South Omaha, and, when called on by an attorney for defendant in error, gave as an excuse that Father Bednar had stated to the mother of defendant in error that he was not a good Catholic, and was not strong enough in the faith; that he was willing to be married by any other priest or at the court house or by any one authorized to perform the ceremony, but declined to have the ceremony performed by Father Bednar. Thereupon, defendant in error elected to terminate the marriage contract and brought this action for damages. The jury returned a verdict in her favor for something over five hundred dollars, upon which the court entered judgment, and defendant has taken error to this court.

The principal error urged is that it is not shown that the plaintiff in error refused to marry defendant in error and that his neglect to call for her and accompany her to the church, as agreed, does not of itself constitute a breach of the marriage contract on his part, especially in view of the fact that he informed her attorney that he was willing to consummate the marriage before any other priest or officer authorized to perform the ceremony. The rule is well established that attached to every contract of marriage is an implied condition that any subsequent change in mental or physical condition of either party, so as to render it impossible to accomplish the object of the marriage relation, releases the parties from the agreement. In such case, no action will lie for breach of the contract. On the other hand, it is beyond controversy that where the parties expressly agree that their marriage shall be celebrated under and in accordance with the rules and customs of a particular religion and church, such rules and customs become a part of the contract and binding upon

the parties. In the case at bar, the parties entered into such express agreement, even specifying the church and the priest. The day and hour of consummation was mutually agreed on by the parties with the sanction and consent of the priest who was to perform the ceremony. This precaution was taken to avoid naming a day prohibited by the rules of the church. The violation of this part of their agreement, without just cause, amounted to a breach of the contract on the part of the plaintiff in error, and defendant in error, as she well might do, elected at the time to consider the contract ended and to sue for damages.

In *Kelly v. Renfro,* 9 Ala. 325, at the trial it appeared that an engagement of marriage existed between the plaintiff and defendant, that a day had been fixed for the marriage, preparations made and the guests invited. On the morning of the day agreed upon, the defendant wrote a note to plaintiff's father saying that he thought the engagement ought to be postponed, at least for the present. This note was not answered. The defendant offered to show that shortly after the day set he had proposed a performance of the contract, also that before this action was brought he had repeatedly proposed to consummate the marriage. This evidence the court ruled out. The defendant requested the court to charge the jury that if he, on the day set, proposed either a postponement or a rescission of the contract, the plaintiff's assent might be inferred from her silence at the time of this proposal, as well as from declarations made by her. This charge the court refused to give. The court said:

"It is scarcely necessary to add, that the charge requested was properly refused. No virtuous female could be expected to respond directly to the note which the defendant communicated to the plaintiff's father, and no other inference ought to be drawn from her silence, than that the engagement was terminated, not merely postponed, by this act of the defendant, independent of any assent on her part."

To the same effect is *Jones v. Layman,* 123 Ind. 569.

In *Holloway v. Griffith,* 32 Ia. 409, it is said:

"An offer on the part of the defendant to fulfil the marriage contract after a refusal, or a continuance of the offer in open court upon the trial, on condition that plaintiff would dismiss the suit, should not be regarded by the jury either as a defense or in mitigation of damages."

As in other cases, the rule is that after a defendant has once broken his promise, his offer to renew is no defense on an action for its breach. The circumstances were most humiliating to the defendant in error. She had sent for her relatives, invited her friends, and was prepared to accompany the bridegroom to the church. Without excuse or explanation, he failed to meet his appointment and left her to bear the shame and humiliation of his conduct. Under such circumstances, we think that defendant in error was justified in rescinding the contract and in replying to his proposition, "After the trick you played me I will not have you in church or out of church." The criticisms upon the instructions of the court are, we think, without merit. There was a clear breach of contract on the part of the plaintiff in error. The defendant in error promptly rescinded the contract and brought this action for its breach. His proffer to consummate the agreement after breach and after rescission on the part of defendant ought not to be considered. We recommend an affirmance of the judgment.

POUND and KIRKPATRICK, CC., concur.

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

AFFIRMED.

VALENTINE ULRICH v. A. J. MCCONAUGHEY.

FILED SEPTEMBER 17, 1903. No. 9,994.

1. **Partnership:** TRANSFER. Where one partner of a firm conveys or assigns partnership property, and such assignment is concurred in by the other member of the firm, the assignee will have a right

to the property assigned superior to one whose claim is based upon a subsequent assignment from one member of the partnership.

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

ERROR to the district court for Hamilton county: EDWARD BATES, DISTRICT JUDGE. Rehearing of case reported in 63 Neb. 10. *Former judgment vacated. Judgment of district court affirmed.*

William H. Thompson, for plaintiff in error.

Eugene J. Hainer and *Jerome H. Smith, contra.*

KIRKPATRICK, C.

This is a replevin action tried in the district court for Hamilton county. An opinion was filed in the case on November 20, 1901. *Ulrich v. McConaughey,* 63 Neb. 10.

The questions involved in the controversy are stated at length in the former opinion, and, therefore, need not be restated herein. We have made a careful examination of the entire record, and are of the opinion that the conclusion reached at the former hearing in this court is correct, as announced in paragraphs numbered 1, 2, 3, 4, 5 and 7 of the syllabus. So much of the opinion, therefore, as relates to these paragraphs of the syllabus just mentioned we adhere to, further discussion thereof being unnecessary at this time.

In the former opinion, and in the sixth paragraph of the syllabus thereof, it is said:

"A partner can not apply partnership property to the payment of his individual liability without the consent of his copartner."

The record, as we view it, makes a reexamination of the proposition here announced necessary, for the purpose of determining its applicability to the evidence in the case. Instruction No. 6 given by the court was in the language following:

"If you find from the evidence that H. S. Brown and

S. S. Brown were partners respecting the land mentioned in the evidence, and the crops to be grown thereon, then, and in that event, any contract made in the line of said partnership, by either of them, would be binding on both, and the first transfer made in good faith, and for a valuable consideration, by either of them, respecting the leases in controversy, would be binding on all parties concerned, and the party taking such first assignment would acquire the first and best title thereto."

The correctness of this instruction as an abstract proposition, was not passed upon in the former opinion, but it was held that the judgment of the district court should be reversed, because of the inapplicability of that instruction to the evidence. In brief of counsel for plaintiff in error, respecting this instruction, it is said:

"It is wrong in this: First, the instruction assumes the jury would be warranted in finding from the evidence that said Browns were equal partners in the ownership of the land; second, in this, that the first disposition made of the leases by one of them for a valuable consideration would be binding, leaving out the important provision, 'if in the line of the partnership business.'"

We are of opinion that the instruction is not vulnerable in respect of either of the objections urged. Regarding the first objection, it may be said that counsel for plaintiff in error seems to be under a misapprehension. It is clear to us that, taken in connection with the other instructions given, the instruction very fairly and clearly submits for consideration of the jury the real question involved.

Our examination of the evidence has led us to the belief that it establishes beyond question the partnership of the two Browns in the ownership, not only of the land, but of the crops to be grown thereon. From the evidence of the partners themselves it is shown without substantial dispute that Mrs. Brown had advanced to be used in the partnership business from her separate estate between $500 and $600 some time before the controversy herein

arose. While it is undisputed that S. S. Brown gave his individual note to his wife for the money borrowed, it is, we think, equally clear that the money was used in the prosecution of the partnership business, the greater portion of it being used in the payment of the amount due to plaintiff in error or his assignor upon the contract relating to the land used by the Browns in their business.

The fact that S. S. Brown gave his individual note would not, we think, change the character of the debt from a partnership to an individual debt. But whether it was a partnership debt or not would depend upon the contract of partnership between the two Browns. S. S. Brown testified that he was to furnish the capital for the business of the copartnership. His money was to be returned to him with good interest, and the profits in the business, thereafter remaining, were to be divided. If to borrow the money in question from Mrs. S. S. Brown did not create a partnership debt, it would be because of an agreement on the part of S. S. Brown that he was in fact to advance the partnership capital, but in no view of the evidence in the case is it necessary to determine whether this was or was not a partnership debt. We do not determine it.

Very shortly after the execution of the lease in controversy, and about May 1, 1891, S. S. Brown assigned the duplicates of his leases to his wife, in payment of the money due her. These assignments were forwarded to H. S. Brown in Illinois for his execution, and they seem to have been by him executed at once, but not actually returned to Mrs. Brown until August 1. It seems that the partnership business resulted in a loss from its inception, and it is undisputed that practically all of the capital used therein, amounting to something like $15,000, had been advanced by S. S. Brown, the member of the firm who lived in Nebraska. While it is not disclosed that the affairs of the partnership business had been settled, or that any adjustment whatever had been made, yet it is disclosed that H. S. Brown, who had some time previously

returned to Illinois, had nothing but a nominal interest in the affairs of the copartnership.

Plaintiff in error claimed title to the corn in controversy by virtue of an arrangement with H. S. Brown, the partner residing in Illinois, by the terms of which H. S. Brown agreed to, and did in fact, surrender to plaintiff in error the bond for a deed covering the land, the same being the only title held by the partnership to the land. While this bond for a deed was made in the name of H. S. Brown individually, the evidence amply justified a finding that it was partnership property, and that this was well known to plaintiff in error. The rule is that if property is bought by a partner in a firm, acting for the firm, the property belongs to the partnership as soon as the sale is complete, because the purchaser is the firm; and the fact that title to real estate is taken in the name of one member does not deprive it of the character of partnership property. *Catron v. Shepherd,* 8 Neb. 308; *Barber v. Crowell,* 55 Neb. 571; *Bowen v. Billings, Boise & Co.,* 13 Neb. 439.

It further appears that this agreement was verbal, but that at a later date it was to be reduced to writing. It was so reduced to writing on September 23, 1891. On that date H. S. Brown gave to plaintiff in error an order on the several tenants living on the land to turn over the rent share of the corn to plaintiff in error. The leases had been made in the name of S. S. Brown. There seems to be no room for question under the evidence that H. S. Brown executed this written agreement, and gave the order upon the tenants some time after he had executed the assignment of the leases to Mrs. Brown, and had forwarded them, either to her, or to her husband to be delivered to her.

In the view we take of the evidence, it is not necessary to determine the day upon which the contract between H. S. Brown and plaintiff in error was entered into, or when it became effective; or whether H. S. Brown had authority to execute this kind of a contract, surrendering

title to the partnership land without the knowledege or consent of his partner; because from any view that may be taken, the right of Mrs. Brown to the corn is prior in point of time to that of plaintiff in error. We are of opinion that the instruction was not prejudicial to plaintiff in error; it seems to have been applicable to the theory upon which the parties tried the cause.

It is contended that the instruction is erroneous because it states that the first transfer made by either partner would be effective, if for a valuable consideration, without limiting the power to make such assignment with the proviso, "if in the line of partnership business." The instruction does not fall when subjected to the test suggested. It must be read as a whole. It is therein said that "any contract made in the line of said partnership by either of them would be binding on both." This must, and would naturally, be read in connection with all that follows. It is apparent that it contains the essential element alleged to be absent therefrom.

Complaint is made with reference to other instructions, but defects therein, if any, are not specifically pointed out, and from an examination of the charge as a whole, we feel warranted in saying that the case was fairly and intelligibly submitted. The cause seems to have been tried upon the theory that either partner had the right to make a conveyance in the line of partnership business without the concurrence of the other. The right of plaintiff in error rested entirely upon the agreement and conveyance claimed to have been made by H. S. Brown, who resided in Illinois, and who, as we have seen, did not have possession of the property, and had, at the most, only a nominal interest therein. Taking the record as a whole, and the charge of the court, we feel that the cause was properly submitted. It is therefore recommended that the opinion heretofore rendered in this case be modified in accordance with the views herein expressed, and that the judgment of the district court be affirmed.

HASTINGS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment heretofore rendered in this case is vacated and the judgment of the district court

AFFIRMED.

GEORGE MITCHELL ET AL. V. COUNTY OF CLAY.*

FILED SEPTEMBER 17, 1903. No. 12,664.

1. County Commissioners: POWERS. Prior decisions as to the powers of county commissioners in passing upon claims against the county and in making settlements with county officers examined and discussed.

2. ———: JUDICIAL FUNCTIONS. When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is *quasi* judicial.

3. ———: ———: CLAIMS. County commissioners act *quasi* judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed.

4. ———: MINISTERIAL ACTS. But they have no judicial power or discretion as to interpretation of the law. Whenever the course to be pursued or the amount to be allowed is fixed by law, they must follow the law, and their acts in so doing or endeavoring so to do are ministerial only.

5. ———: ACCOUNTS OF COUNTY OFFICERS. The action of county commissioners in adjusting the accounts of county officers under sections 43 and 44, article 1, chapter 18, Compiled Statutes, is ministerial only.

6. ———: ———. A settlement with a county officer which, in substance, is an adjustment of his accounts, does not become *quasi* judicial, so as not to be reviewable otherwise than by appeal, merely because claims were filed for sums claimed to be due such officer and allowed for the purpose of enabling warrants to be drawn therefor.

7. ———: MINISTERIAL ACTS. If, in such case, the compensation to be allowed the officer is fixed by law, the allowance of the claim is formal only.

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* Rehearing allowed. See opinion, p. 795, *post*.

8. **Quasi Judicial Act.** On the other hand, if the amount to be allowed is in the discretion of the commissioners, or if, in fixing such amount, the law requires them to decide questions of fact, their action is *quasi* judicial.

ERROR to the district court for Clay county: GEORGE W. STUBBS, DISTRICT JUDGE. *Reversed.*

George H. Hastings and *William Clark,* for plaintiffs in error.

Ambrose E. Epperson and *Thomas H. Matters, contra.*

POUND, C.

This action was brought by the county of Clay against Mitchell, formerly the clerk of said county, and the sureties on his bond, to recover moneys received by Mitchell as such officer in excess of the compensation allowed him by law. The answer, among other things, alleged that Mitchell had performed certain extra services for the county for which no fees were provided and had made out and presented claims for such services to the county board, which said board in due course allowed and ordered paid; that no appeal had ever been taken from said judgments and orders and they remained in full force, unappealed from, unreversed and unmodified; that warrants had been issued to him for said amounts by order of said board, and that this suit was brought to recover back the sums allowed and paid him as aforesaid. Trial was had to the court which found for the plaintiff. The items in controversy are of two kinds. On the one hand, there are allowances for services as clerk of the county board in accordance with section 14, chapter 28, Compiled Statutes (Annotated Statutes, 9040). On the other hand, there are items for services in canvassing election returns, for which the statute provides a specified compensation.

An examination of the reported decisions of this court will disclose that three different views have been taken as to the effect of such settlements with county officers.

In the earlier cases, it was held that the board had no discretion to allow any sums in excess of the compensation fixed by law, and that its action in allowing claims where the amount was determined by statute was ministerial only and not binding in collateral proceedings. Subsequently a line of cases sprang up in which it came to be held that whenever a claim was filed under section 37, article 1, chapter 18, Compiled Statutes (Annotated Statutes, 4455), the action of the county board in passing on such a claim was judicial, and was binding in collateral proceedings in the absence of fraud, concealment or misrepresentation. More recently a few cases have gone still further, and have indicated that any settlement with the county officer purporting to be full and final is binding both upon the officer and county unless appealed from. Under such circumstances, it seems expedient to review the decisions at length in order to ascertain whether and how far they may be reconciled and to deduce from them, if possible, a consistent doctrine upon this subject in harmony with the statutes.

The earliest case in the reports dealing with this matter is *Brown v. Otoe County,* 6 Neb. 111. The question in that case was whether an action could be brought against the county for printing and publishing a delinquent tax list, or the claimant must be left to appeal from the action of the county board. The court held that the action of the commissioners on a claim of that character was judicial and that their determination was conclusive unless reversed upon error or appeal.

In *State v. Board of County Commissioners of Buffalo County,* 6 Neb. 454, another phase of the same question arose with reference to a claim for money due on a contract for building a portion of a bridge lying in two counties. It was held that the action of the board on such claim was judicial and conclusive unless appealed from, and hence that the board could not afterwards vacate its own adjudication. The question whether a board of county commissioners could vacate an order allowing a claim

arose again in *Kemerer v. State,* 7 Neb. 130. In this case the county clerk presented a claim for preparing the tax list, a service for which the fees were definitely fixed by law. The court held that the allowance of the claim in such a case was not a judicial act "because the board has no judgment or discretion to exercise in the matter." Discussing this point it said:

"Fees of the county clerk for preparing the tax list and duplicate are definitely fixed by law, and the board can not make them any greater or any less, and therefore the duty of the board is merely ministerial, and that is, to issue a warrant to the clerk for the amount so fixed by law for preparing the tax list and duplicate."

Richardson County v. Hull, 24 Neb. 536, was a suit against the county to recover a sum claimed to have been paid as taxes upon a tract not subject to assessment. It was held that this cause of action must be prosecuted by presenting a claim to the county commissioners in the first instance, and that the action of the commissioners on such a claim was judicial and conclusive unless appealed from. In this case, in order to ascertain whether or not the lands were subject to assessment, it was necessary to find, as a question of fact, whether one Wilbur, whose widow and heirs at law held title to the land, was a union soldier in the service of the United States during the civil war and lost his life in such war, and to find that said land was the only property possessed by them in the state and did not exceed $2,000 in value during the years it was assessed. Hence it is apparent that questions of fact were involved which it was necessary for the commissioners to decide upon evidence. *State v. Roderick,* 25 Neb. 629, was a similar case to *Kemerer v. State, supra.* A writ of mandamus was applied for to compel the county treasurer to pay to relator, the city treasurer, moneys in his hands alleged to belong to the municipality. The county treasurer claimed to retain the sums in dispute as commissions and as fees for certain services for which fees were fixed by statute. The statute also fixed precisely the amount of

commissions which he might charge. The court said that the fact that the amount was reported to the county board and allowed by them would make no difference since, as the compensation was fixed by law, the county board had no jurisdiction or authority to increase it.

"Where the fees are fixed by statute," said REESE, C. J., "the county board act ministerially, and not judicially, in allowing and paying such fees, and the allowance of any amount, in excess of that fixed by law, is simply void."

This case was followed in *County of Logan v. Doan,* 34 Neb. 104, in which the court said:

"Nor has the county board the power to allow a public officer a compensation in excess of that allowed by statute, nor where none is authorized."

Ragoss v. Cuming County, 36 Neb. 375, was an action by a county against a former county clerk to recover fees collected by him while in office. The items in dispute were for making the tax list in two separate years, for making assessors' books for the same two years, for extra services for one of the years, and for searching the records in a case against the county. The defense was that certain assistants or deputies had been appointed by order of the county board and that the sums in question had been paid to such assistants. The action of the board involved was its allowance of money paid out of excess fees to deputies and assistants upon claims filed by the clerk. How many assistants the clerk required was left to the judgment and discretion of the board by the statute applicable to that county at the time; and hence its action was clearly one requiring the exercise of discretion within the rule announced in *Kemerer v. State.* Accordingly the court held that the allowance of the claims was not open to collateral attack in the absence of fraud.

Thus far, it will be seen, the authorities are entirely consistent. The principle clearly to be deduced from them is that county commissioners act *quasi* judicially in passing upon claims against the county whenever such action involves the determination of questions of fact upon evi-

dence or the exercise of discretion in ascertaining or fixing the amount to be allowed. But whenever the course to be pursued or the amount to be allowed is fixed by law, they have no discretion and must follow the law, and their acts in so doing or endeavoring so to do are ministerial only. The first hint of a departure from these principles is to be found in *State v. Churchill*, 37 Neb. 702. This was an application for mandamus to compel the county board to issue a warrant for a sum of money alleged to be due the relator for services as bailiff in the district court. The statute then in force provided that bailiffs should receive two dollars a day for their services. The county board deducted a considerable amount of delinquent taxes from the warrant issued to the relator, under the authority of section 49, chapter 18, Compiled Statutes (Annotated Statutes, 4467). It was contended that the statute of limitations had run against these taxes and hence the amount thereof could not be deducted. It will be noted that the amount payable to the bailiff was absolutely fixed by law and that the law imperatively required the board to deduct all delinquent taxes without leaving them any discretion in the matter. The court held, however, that the county board in examining and allowing the claim acted judicially and that its order was conclusive unless reversed, and hence that the deduction of taxes improperly was at most an error. It is evident from reading the opinion that there was no intention of departing from the principles of the prior cases. Moreover, the ruling may be justified and was undoubtedly right upon another ground. Section 646 of the code provides that mandamus shall not issue in any case where there is a plain and adequate remedy in the ordinary course of the law. Hence, so long as the relator had a remedy by appeal from the action of the county board, the writ of mandamus was not available to him. The statute absolutely requires claims to be filed before warrants issue, and an appeal may be taken in all cases without reference to whether the action of the board was ministerial or judicial. It is true it might be said

that under our constitution the courts have judicial powers only, and hence a merely ministerial proceeding could hardly be maintained, as such, in the district court. But review of ministerial acts which preclude a citizen from obtaining money due him from the public is judicial in its nature, and it can not make any difference whether such review takes the form of an appeal or of proceedings in error. These observations apply also to *Pennock v. Douglas County,* 39 Neb. 293. This was an action against the county to recover money paid by the purchaser of real estate at a tax sale, on the ground that the taxes and assessments were illegal and void. As the claim was contractual in its nature, it clearly came within the purview of section 37, article 1, chapter 18, Compiled Statutes (Annotated Statutes, 4455), and hence was maintainable only in the manner prescribed by the statute. The question whether the action of the board in such a case was judicial or ministerial was not necessarily involved, and the holding of the court that the district court could not try an action of that character unless a claim was first filed with the county commissioners and an appeal taken from their order, in effect, decides a point of practice only. This view is sustained by a recent decision of this court in *Custer County v. Chicago, B. & Q. R. Co.,* 62 Neb. 657, in which it is held that the provisions of section 145, article 1, chapter 77, Compiled Statutes, are intended to enable the county board to inquire into the merits of claims filed under the preceding sections and pay such of them as it may deem just without litigation, and that the action of the county board under that section is not judicial, although claims are filed and the ordinary process of allowance or disallowance gone through with according to section 37, article 1, chapter 18, Compiled Statutes.

The first real departure, therefore, from the ruling established by the prior decisions is to be found in *Sioux County v. Jameson,* 43 Neb. 265. In that case the county board employed an assistant and presented claims to the county commissioners for the remuneration of such assist-

ant, which were allowed and paid by warrants on the general fund. Afterwards the county sued to recover back the money so paid. The right to employ assistants and pay them out of the fees of the office was fixed by section 14*a*, chapter 28, Compiled Statutes (Annotated Statutes, 9045). That section applied only to counties having over 25,000 inhabitants, and hence not to Sioux county at the time this cause arose. It seems clear, therefore, that in this case the county clerk was allowed to receive the whole $1,500 provided for by the statute, and also $98 paid to the clerk or assistant for performing duties which the clerk ought to have performed, and that the action of the board in allowing this extra compensation, according to the rule laid down in *Kemerer v. State* and *State v. Roderick*, was of no force. Nevertheless the court said:

"The petition raises the question, could the county commissioners allow a claim for the service of a clerk or an assistant to the county clerk and order the amount of the claim paid from the general fund of the county? This was for them to determine at the time the claims were presented for their examination and allowance or disallowance, and from their decision the legislature has provided for an appeal. 'It has been definitely settled by repeated decisions of this court that the county board, in the examination and allowance or rejection of claims against the county, acts judicially, and its judgments or orders in such cases are conclusive unless reversed in the manner provided by law.'"

The court did not intend, if we may judge from the opinion, to depart from the principles theretofore announced. It either overlooked the line of cases holding that allowance for compensation in excess of the amount expressly fixed by statute was of no force or else it assumed that the county commissioners had a *quasi* judicial power to construe the statutes. No suggestion to the latter effect is to be found in the opinion, and we may take it that the cause was argued and presented to the court as one involving judicial action on the part of the

commissioners, without calling attention to such cases as *Kemerer v. State* and *State v. Roderick*. No conscious departure from the latter case is to be found in the reports until the case of *Heald v. Polk County*, 46 Neb. 28, which is the basis of a new line of decisions taking quite a different view. In this case, a county clerk after making a report of all fees received, and retaining the amount fixed by law, filed a claim for some $200 for making out the tax list of the county. This claim was allowed and a warrant delivered to the clerk. Afterwards suit was brought to recover the money. The court held that where the law prescribes the duties of a public officer and fixes his compensation, he must perform all the duties required of him for the compensation fixed. It held also that the clerk was not entitled to any extra compensation for making out the tax lists in a county having less than 25,000 inhabitants, under the statutes in force at that time. It conceded that the board acted ministerially in examining the clerk's report and adjusting the accounts between him and the county. But it held that the examination and adjustment of the reports on the one hand and the allowance of the claim on the other were independent transactions, and that in allowing the claim the board exercised judicial functions, so that its decision was conclusive as against collateral attack. In support of this holding it cited *Brown v. Otoe County, supra; State v. Buffalo County*, 6 Neb. 454; *Dixon County v. Barnes*, 13 Neb. 294; *Ragoss v. Cuming County, supra; State v. Churchill, supra*, and *Sioux County v. Jameson, supra*. The first four cases do not sustain any such holding, but are each in entire accord with the rule laid down in *Kemerer v. State* and *State v. Roderick*. *State v. Churchill* has been considered already. *Sioux County v. Jameson* is the only case cited affording any ground for the decision, and in that case, as we have seen, the deviation from the original rule was unintended and unconscious.

Heald v. Polk County has been followed in *Ragoss v.*

Cuming County, 46 Neb. 36, a case in all respects the same; *State v. Vincent,* 46 Neb. 408; *Cuming County v. Thiele,* 48 Neb. 888, and *Trites v. Hitchcock County,* 53 Neb. 79. In several other cases the court has cited *Heald v. Polk County arguendo,* or has purported to follow it in cases to which it was not applicable, which were in entire accord with the prior decisions. For instance, in *Hazelet v. Holt County,* 51 Neb. 716, the court held that "a county board, in its examination of reports of the county clerk, of fees received by him, and in the adjustment of the account between him and the county, acts ministerially; and if, through fraud or mistake, he is allowed to retain fees which he should not, such adjustment is no defense or bar to an action by the county to recover such fees." This ruling is manifestly required by sections 43 and 44, article 1, chapter 18, Compiled Statutes (Annotated Statutes, 4461, 4462). The court said, *obiter,* however, that if the sums improperly allowed in the adjustment had been presented by way of claims and allowed as such, the allowance would have been conclusive. In *Taylor v. Davey,* 55 Neb. 153, there was a suit to enjoin payment of a claim allowed by the board to an expert for examining the books of a county treasurer. The court held properly that the action of the board was judicial. It cited, however, *Heald v. Polk County* and *Sioux County v. Jameson.*

The opinion in *Heald v. Polk County* does not make it very clear upon what principle the court separated the action of the commissioners into two parts governed by distinct rules, namely, the adjustment of the account, on the one hand, and the allowance of the claims presented in connection therewith on the other. This point was dealt with in *Trites v. Hitchcock County, supra,* in which the court held substantially that when the commissioners act under section 37, article 1, chapter 18, Compiled Statutes (Annotated Statutes, 4455), they act judicially, while when they act under section 43 their action is ministerial only.

It will be remembered that *Heald v. Polk County* and other cases following that decision maintain carefully the distinction between the allowance of claims and the mere adjustment of an officer's accounts and settlement thereof. A third line of cases has sprung up, however, in which this distinction is lost sight of and the action of the board in making a final settlement with an officer is treated as judicial and conclusive, unless reversed upon error or appeal, in all cases. The first case of this character is *Gage County v. Hill,* 52 Neb. 444. In that case the county sued a former clerk for fees retained by him in excess of his legal compensation. He pleaded that during the term of his office he had made "full and complete settlements with the county board of said county while such board was in session, and had fully, completely, accurately and faithfully accounted to the said board for the several sums for which the action was brought; that the amounts ascertained on said settlements to be due from said Hill had been paid by said Hill to the person and officers entitled to receive the same, and that he had, at the termination of his term of office, fully accounted for all sums found by said board to be in his hands, and by said board he had, at the expiration of his said term of office, been discharged for all moneys, fees and warrants received by him during the term of his office." This answer was demurred to and the district court overruled the demurrer. In affirming this judgment the court said that the case was in all respects similar to *Sioux County v. Jameson, supra; Heald v. Polk County, supra,* and *Ragoss v. Cuming County,* 46 Neb. 36. But, if the opinion accurately states the answer, it will be seen that such is not the case. The decision goes much further than any prior holding of the court, since Hill did not plead that claims had been presented and allowed, but simply that his accounts had been examined and adjusted by the board. In *County of Douglas v. Bennett,* 61 Neb. 660, the court expressly put itself upon the ground which is clearly required to sustain *Gage County v. Hill.* In this case the court say:

"Where a full and complete settlement of a county officer with the county commissioners, who are authorized to make the same, has been made, such settlement is final and conclusive, unless there is fraud, mistake or imposition in making the same."

The question was as to the sufficiency of the answer in an action by the county against a former sheriff. The answer, as stated in the opinion, did not allege that any claims had been filed and allowed under said section 37, but merely set up a full accounting, adjustment and settlement. This was held sufficient. It will be seen that while the court in *Gage County v. Hill* and *County of Douglas v. Bennett* did not expressly overrule any of the prior cases, these cases constitute a third line of decision, entirely inconsistent with either of the prior courses of adjudication, and, if adhered to, substantially alter the usual interpretations of sections 43 and 44, article 1, chapter 18, Compiled Statutes (Annotated Statutes, 4461, 4462).

Since the decision in *Heald v. Polk County,* the court has adhered in several cases to the original line of authorities. As recently as *Perkins County v. Keith County,* 58 Neb. 323, the court cites *Kemerer v. State* with approval. In this case, a county had been divided and, in the process of division, a balance was due from one county to the other, which was definitely settled and agreed upon. Of course, it became necessary, before a warrant could be issued, to go through the form of making a claim and allowing it. The court held, however, that there was nothing in such a case upon which the county board of the debtor county could "exercise judgment or discretion," and hence that an original action might be brought in the district court. The court said on page 327:

"No case, we are sure, has gone to the length of holding that a single demand, the amount and validity of which has become unalterably fixed, must be presented to the county board to be audited and allowed."

Nevertheless, the court had been holding for a long

time that if the amount and validity of a claim were fixed absolutely by statute, upon presentation of a claim for a greater amount, the county board had a discretion to allow such greater amount and its action in so doing was judicial. In *Bush v. Johnson County,* 48 Neb. 1, the county brought an action against a former treasurer, and the question involved was whether a settlement between him and the county board was a judicial determination. The court held it was not. Its language in this connection is instructive because *Gage County v. Hill* and *County of Douglas v. Bennett* can not be reconciled therewith. It said:

"These periodical settlements assigned by our statutes to be made with county treasurers do not have the elements in them of a judicial determination of the subjects involved. It would not be contended that if the county commissioners state, as a matter of record, as the result of one of these so-called settlements, that the treasurer was short in his accounts in a stated sum and consequently indebted to the county in such sum, that this would constitute an adjudication of the whole matter, and, unless appealed from, it would be final and binding on the parties, and not open to attack. No more can the result obtained by the examination be said to be binding and conclusive upon the county in regard to the amounts reported on hand by the treasurer being the exact, true amounts, or their payment by the treasurer preclude the institution and successful prosecution of an action for any further sums which he has failed to report or to pay over. It can have no further or greater conclusiveness than any settlement made between private persons."

In *Stenberg v. State,* 48 Neb. 299, 306, the court said:

"A county board has exclusive original jurisdiction to examine and pass upon claims or demands against the county properly cognizable for audit and allowance, and the jurisdiction of the district court, as to such, is appellate merely." In this case there was an application for a writ of mandamus to compel the county commis-

sioners to issue a warrant for payment of a judgment recovered against the county. The question was raised whether this judgment was invalid by reason of not having been presented to the county commissioners in the first instance, so that the district court which rendered the judgment acquired no jurisdiction of the claim. What the court said in the quotation above noted was not necessary to the determination of the case, but is noteworthy on account of the use of the words "properly cognizable."

The foregoing review of the authorities would seem sufficient to demonstrate that this entire subject is in need of revision. The doctrine of *Gage County v. Hill* and *County of Douglas v. Bennett* can not be reconciled with the plain import of said section 44, which contemplates that an adjustment or a settlement of accounts with a county officer shall be simply a basis for the recovery at law of any balance which may be found due. Moreover, those cases are absolutely irreconcilable with the line of decisions beginning with *Heald v. Polk County* in which a distinction is made between the allowance of claims under section 37 and the adjustment of accounts under section 43. This distinction is not without plausibility; but if it is to be maintained it must follow that in every case in which a claim contractual or *quasi* contractual is asserted against a county, whether or not the statute absolutely fixes the course which the commissioners shall follow or the amount which they may allow, they have a discretion, arising from the mere fact that a claim is filed, to take such action or make such allowance as they please. The opinion of the court in *Kemerer v. State* is a complete answer to any such contention, and we heartily concur in the expression of surprise in the opinion of SULLIVAN, J., in *Perkins County v. Keith County, supra,* that any case should be found contending for such a proposition. *Kemerer v. State* having been approved and relied upon in *Perkins County v. Keith County,* the situation is that three different doctrines upon this subject are to be found in the reports, all of

them sanctioned by recent cases, and one of them, at least, in conflict with the statutes.

Under such circumstances we think the question may fairly be treated as *res nova,* and, looking at it in that way, we have no doubt that the doctrine of the older cases should be preferred and ought to be finally adhered to.

When the law commits to an officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is *quasi* judicial. *State v. Hastings,* 37 Neb. 96, 117. This we think is the true criterion. It is not the form of the action taken by the commissioners, but the nature and character of the action itself, by which we are to judge whether it is ministerial or *quasi* judicial. County commissioners act *quasi* judicially in passing upon claims against the county whenever their action is not merely a formal prerequisite to the issuance of a warrant but involves the determination of questions of fact upon evidence, as in *Richardson County v. Hull,* 24 Neb. 536, or the exercise of discretion in ascertaining or fixing the amount to be allowed, as in *Ragoss v. Cuming County,* 36 Neb. 375. But they have no judicial power or discretion as to interpretation of the law. If this power is to be conceded to county commissioners, it follows that their action in such matters can not be controlled by a writ of mandamus, and that, however absurd or erroneous the construction which they put upon the statutes, the sole remedy is by petition in error in the district court. Whenever the course to be pursued or the amount to be allowed is fixed by law, they must follow the law, and their acts in so doing or endeavoring so to do are ministerial only no matter what form such acts may take. So far as *Heald v. Polk County* held that the action of county commissioners in adjusting the accounts of county officers under sections 43 and 44, article 1, chapter 18, Compiled Statutes (Annotated Statutes, 4461, 4462), is ministerial only, that decision is not only in accord with the prior cases but is absolutely required by the terms of the statute. This

holding was expressly approved and repeated in *Bush v. Johnson County,* 48 Neb. 1, and *Hazelet v. Holt County,* 51 Neb. 716. The two subsequent cases of *Gage County v. Hill* and *County of Douglas v. Bennett,* if, as appears on their face, they are in conflict therewith, should be disapproved. But what can it matter that such a settlement or adjustment may involve the formality of a claim against the county, in order to permit a warrant to issue for the sum which may be found due the officer in the course thereof? If the allowance of a claim in such a case requires no facts to be ascertained upon evidence and involves no discretion whatever, how can the case differ from *Perkins County v. Keith County,* or fail to be governed by the very apt remark of SULLIVAN, J., in that case at page 327:

"When the amount of the defendant's liability was settled by contract, there remained nothing in regard to the matter upon which its commissioners could exercise discretion. There was nothing to examine and adjust or audit and allow. It would be a work of supererogation for the commissioners to examine and allow a claim which, under the authority of the statute, they had already fully examined and legally allowed."

In other words, the only substantial function of a claim in such cases is to serve as the formal basis for the issuance of a warrant. Hence it would seem clear that a settlement with a county officer which, in substance, is an adjustment of his accounts, does not become *quasi* judicial, so as not to be reviewable otherwise than by appeal, because claims were filed for sums claimed to be due such officer and allowed for the purpose of enabling warrants to be drawn therefor. If, in such case, the compensation to be allowed the officer is fixed by law, the allowance of the claim is formal only. On the other hand, if the amount to be allowed is in the discretion of the board, or if, in fixing such amount, the law requires the commissioners to decide questions of fact, their action is *quasi* judicial.

If the foregoing are the correct principles by which this cause is to be determined, it follows that so far as the claims for services as clerk of the county board are concerned, the judgment of the district court is erroneous, while with respect to the claims for canvassing election returns it is correct. Section 14, chapter 28, Compiled Statutes (Annotated Statutes, 9040), provides that the county clerk shall be allowed, for performing the duties of clerk of the county commissioners and attending to the business of the county, such salary per annum, to be paid upon account quarterly, as the county commissioners may allow, not exceeding $400 per year. The amount of compensation, not exceeding $400, is left to the county board. A claim for services of this character is in the nature of a *quantum meruit*. In order to fix the proper amount, the board must determine, as a matter of fact, what services were rendered and what they were worth. On the other hand, the statute fixes absolutely and arbitrarily the amount which shall be allowed for canvassing election returns. Section 24, chapter 28, Compiled Statutes (Annotated Statutes, 9065.) In this matter, therefore, the board have no discretion and their action is purely ministerial. The judgment of the district court, so far as it permits recovery notwithstanding the allowance of claims for canvassing election returns, is correct; but it can not be sustained so far as it allows recovery of the moneys allowed to the clerk upon his claims for services as clerk to the county board.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

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.

REVERSED.

The following opinion on rehearing was filed February

17, 1904. *Former judgment vacated. Judgment of district court affirmed:*

1. **County Clerk: SALARY: FEES.** The salary allowed a county clerk for services as clerk of the county board must be accounted for as fees of his office.

2. ———: ———: ———. The county board acts judicially in fixing the amount of the salary of the clerk when acting as clerk of the board, but when such fees have been allowed, as such, and paid to the clerk, if the total amount of his fees for the year, including the fees so allowed, is more than the limit of his annual salary as fixed by statute, he is liable to the county for the excess.

SEDGWICK, J.

Upon reargument of this case, we find that the conclusion reached by the commissioner upon the first hearing, *ante,* p. 779, is wrong. We have no doubt that the correct rule, by which to determine whether the action of the county board, in any given case, is ministerial or judicial, is announced in the opinion referred to. We are entirely satisfied with the reasoning of the commissioner, from which he derives his conclusion upon that point. We are equally well satisfied that, in the determination of this case, material facts disclosed by the record have been overlooked.

There is no doubt that the county board, in fixing the amount to be allowed to the county clerk as compensation for his services as clerk of the board, acts judicially, but when the board has so acted, and the compensation has been so fixed, it is paid to the clerk as fees of his office; and as such must be accounted for as other fees. *State v. Silver,* 9 Neb. 85, *State v. Russell,* 51 Neb. 774; *Hayes County v. Christner,* 61 Neb. 272; *Holcombe v. Dawson County,* 1 Neb. (Unof.) 743. In this case, the fees received by the clerk, including the fee of $400 for each year allowed by the county board for his fees as clerk of the board, exceed the amount that he was entitled by law to retain, as found by the trial court.

It is suggested that, since the county board acted judicially in fixing these fees of the clerk, it must be held

that the board allowed him the amount which he has retained, as compensation for his services as clerk of the board. The record contradicts any such theory. At the end of each quarter during the years 1898 and 1899, the board fixed the amount of compensation of the clerk at $100 for the preceding quarter, and he received the $100 then accordingly. The clerk neglected to enter these fees upon his book until after his term of office had expired, when, in the year 1900, he appears to have made the entry, but the action of the board was plain and specific in allowing him $100 for each quarter for his services.

The judgment of the district court is therefore right; the former judgment of this court is vacated, and the judgment of the district court

AFFIRMED.

MICHAEL CIZEK v. ANNA CIZEK.*

FILED SEPTEMBER 17, 1904. No. 12,968.

1. Decree: COLLATERAL ATTACK. Where the court had jurisdiction of the parties and of the subject matter, and such subject matter was brought before it by the pleadings, its decree is not open to collateral attack, although the jurisdiction may have been exercised and the subject matter dealt with erroneously or irregularly.
2. ———: ———: FINDINGS. In case the pleadings are sufficient to bring the subject matter before the court, the decree may not be attacked collaterally merely for want of findings; such defect goes no further than to render the decree irregular or erroneous.
3. Homestead: POWERS OF COURT TO QUIET TITLE. The district court has the power to quiet the title to a homestead in one of the spouses without the concurrence of the other.
4. Divorce: HOMESTEAD: POSSESSION. After decree of divorce, the husband has no right of possession in the separate property of the wife, occupied as a homestead while the marriage relation subsisted.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, DISTRICT JUDGE. *Affirmed.*

* Rehearing allowed. See opinion, p. 800, *post.*

Adolphus R. Talbot and *Thomas S. Allen,* for plaintiff in error.

James E. Philpott, contra.

POUND, C.

Michael Cizek, hereinafter styled the defendant, brought suit for divorce against Anna Cizek, hereinafter referred to as the plaintiff. The latter filed a cross-petition, praying that she be granted a divorce; alleging certain facts evidently intended as a claim that the property in controversy in the present cause had been purchased with her money and was, in justice and equity, her separate property, held in trust for her by her husband; and seeking to have the title thereto quieted in her and an award of alimony. Defendant failed to comply with an order for temporary alimony, and upon hearing plaintiff was granted a divorce. The decree further provided that, "by consent of parties being made thereto in open court," the defendant should convey the property in controversy to plaintiff, subject to a lien of $250 awarded defendant, to be evidenced by a mortgage which plaintiff was directed to execute; the decree to stand in lieu of such conveyance and mortgage in default of compliance. No appeal was taken, and the decree remains in full force. The present proceeding was brought by the plaintiff to obtain possession of the property. A verdict in her favor was directed in the district court, and error is prosecuted in this court.

It is contended on behalf of the defendant that the consent of his counsel was wholly without his knowledge or authority and that the decree, so far as it relates to the property in controversy, is void and open to collateral attack. There can be no doubt that if the court attempted to award alimony out of particular property or to charge the award upon particular property, instead of leaving it to operate as a general lien, its action was irregular

and erroneous, and subject to correction upon review. *Swansen v. Swansen,* 12 Neb. 210; *Brotherton v. Brotherton,* 14 Neb. 186; *Nygren v. Nygren,* 42 Neb. 408. But where the court had jurisdiction of the parties and of the subject matter, and such subject matter was brought before it by the pleadings, its decree is not open to collateral attack, although the jurisdiction may have been exercised and the subject matter dealt with erroneously or irregularly. *Hilton v. Bachman,* 24 Neb. 490; *Hough v. Stover,* 46 Neb. 588. All parties were before the court by their pleadings. The plaintiff alleged that the property in question was, in equity, her separate estate and was held in trust for her by her husband. If so, the court had power to enforce the trust. *Bartlett v. Bartlett,* 15 Neb. 593. Whether any such presumption as that which exists where a husband purchases property and places the title in his wife's name arises where the property is purchased with the wife's money and the conveyance runs to the husband, we need not consider. In any event the presumption may be overcome by clear and convincing evidence of a trust. *Doane v. Dunham,* 64 Neb. 135. And we must assume that such evidence was before the court. *Hilton v. Bachman, supra.* The mere fact that the decree contains no express finding upon the issue as to a trust, raised in the cross-petition, is not material. In case the pleadings are sufficient to bring the subject matter before the court, the decree may not be attacked collaterally merely for want of findings. Such defect goes no further than to render the decree irregular or erroneous. *State v. Duncan,* 37 Neb. 631.

Counsel contend, further, that the property in question was the homestead of the parties, and hence, as neither could convey without the concurrence of the other, the court could not by its decree transfer the title from the one to the other without the other's consent. But it is well settled that a conveyance of the homestead from the one spouse to the other does not require execution and acknowledgment by both. *Furrow v. Athey,* 21 Neb. 671,

There is, in substance, no conveyance or incumbrance of the homestead in such a case. The reversion only is affected. The homestead interests of all parties are exactly what they were before. As the reversion is a valuable estate, and it is just and right that it should pass to the heirs or devisees of the spouse from whose estate in truth and fact the homestead was selected, there is every reason why a court of equity should interfere and should enforce the trust in such cases. When the court had determined the title in the plaintiff, defendant's rights in the property were those of homestead only, depending upon the relation of husband and wife between the parties. After decree of divorce, he had no right of possession in the wife's separate property, merely because such property was occupied as a homestead while the marriage relation subsisted. *Klamp v. Klamp,* 58 Neb. 748.

It is therefore recommended that the judgment be affirmed.

DUFFIE, C., concurs.

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 March 17, 1904. *Former judgment vacated. Judgment of district court reversed:*

1. **Record**: PRESUMPTIONS. Presumptions indulged to sustain a record against a collateral attack can only be made to supply the record in matters regarding which it is silent, and can not be permitted to contradict the record in matters in which it speaks for itself.
2. **Alimony**: JURISDICTION. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.
3. ———: ———. Provisions of chapter 25, Compiled Statutes, relative to alimony, its allowance and the mode of its enforcement, *held* exclusive,

4. ———: ———. In a suit arising under the provisions of chapter 25, Compiled Statutes, the district court has not jurisdiction to award real estate of the husband to the wife in fee as alimony, and a decree in so far as it attempts so to do is void and subject to collateral attack.

5. Jurisdiction. Jurisdiction of the subject matter is conferred by the law, and can not be conferred by consent of the parties.

KIRKPATRICK, C.

At a former term an opinion in this case was handed down, affirming the judgment of the lower court. *Ante*, p. 797. The case has been resubmitted to this department, and argument by counsel for both parties has been had upon the merits. The principles of law as announced in the syllabus of the prior opinion are conceded to be sound; but counsel for plaintiff in error (hereinafter defendant) contend that the judgment of affirmance is based upon a misapprehension of the record, and that the judgment should have been one of reversal. We will herein restate the facts, as shown by the record upon which this cause was tried, as briefly as consistent with a clear expression of our views of the law applicable to the case made.

On April 30, 1902, defendant in error (hereinafter plaintiff) filed her complaint against defendant in justice court of Lancaster county, for the unlawful and forcible detention of lots 1 and 2, in block 109, city of Lincoln, and asking restitution with costs. There was judgment for plaintiff, and the cause was removed to the district court where, after trial to a jury, the district court directed a verdict for plaintiff. Judgment entered upon this verdict is sought to be reversed by the present proceeding in error to this court.

It appears that plaintiff and defendant prior to March 26, 1902, were husband and wife. On that day, in an action then pending in the district court for Lancaster county, wherein defendant was plaintiff and plaintiff was defendant, the court granted an absolute divorce to plaintiff, and in the decree rendered is contained the following recital:

"The court finds that the defendant (plaintiff herein)

is entitled to a divorce as prayed for, and by consent of parties being made thereto in open court, in lieu of all other orders for alimony entered herein, the plaintiff shall, within ten days from this date, give to the defendant his deed for lots 1 and 2 in block 109, Lincoln, Lancaster county, Nebraska, and in default thereof this decree to operate as such deed, and that within thirty days the plaintiff shall deliver possession of said property to the defendant; and that within ten days from this date, the defendant shall execute and deliver to the plaintiff her note and mortgage for the sum of $250 upon said property, due in six months from date and bearing six per cent. interest from date of same, and in default thereof, this deed to operate as a lien upon said property for said amount."

This decree is the basis of plaintiff's claim to the property in controversy, and upon it the lower court in the case at bar directed a verdict for plaintiff. All of the contentions by counsel for defendant urged at the former hearing have been abandoned except the one that the decree in the divorce suit, in so far as it awards specific real estate to plaintiff as alimony, is void, and can not be the basis of any right.

It will be convenient at this point to state the theory upon which the conclusion leading to an affirmance of the judgment at the former hearing was reached. In the fourth paragraph of the petition of defendant (then plaintiff) in the divorce suit, he alleged: "That plaintiff is possessed of the following described property, to wit: Lots one (1) and two (2) block 109, Lincoln, Nebraska. That lot one contains a three room house, and lot two contains a small stable. That all of said property is clear of all incumbrances and is worth about $800." The petition also alleged that "it is the wish and desire of this plaintiff that the court allow defendant reasonable alimony."

In her answer and cross-petition plaintiff (then defendant) alleged:

"That she admits all the fourth paragraph of plaintiff's petition, and further says, that the consideration money

for the payment of said lots one and two was money received by her from her father's estate in Bohemia, Europe; and that the said house on said lot 1 was built, except one room or part thereof, with her said funds obtained as aforesaid, all of which said moneys were loaned by this defendant to said plaintiff, at plaintiff's request; no part of which has ever been returned by the plaintiff to this defendant."

The cross-petition contained a prayer that the defendant be decreed to pay reasonable alimony, and that the title in said lots one and two be quieted in plaintiff.

Under this state of the pleadings in the divorce suit, upon the doctrine announced in *Hilton v. Bachman,* 24 Neb. 490, and *State v. Duncan,* 37 Neb. 631, it was, in the former opinion, held that: "In case the pleadings are sufficient to bring the subject matter before the court, the decree may not be attacked collaterally merely for want of findings. Such defect goes no further than to render the decree irregular or erroneous"; and, assuming that the property was brought within the jurisdiction of the court by the allegations in the cross-petition, it was thought that in order to sustain the decree, the presumption should be indulged that sufficient evidence was heard by the trial court to sustain a resulting trust in the property in favor of the plaintiff, warranting the award of the property to her, the failure to make and incorporate in the decree specific finding of this fact not being jurisdictional.

The principle is sound, but its application to the facts in this record is now questioned, counsel for defendant contending, first, that the issue of plaintiff's equitable claim to the property was not tendered by her answer and cross-petition; and, second, that the decree itself contains a recital rebutting the presumption indulged to sustain it.

Whether the court by the pleadings was given jurisdiction to make a decree affecting the title to this property may, we think, well be doubted. The only object of the proceeding instituted by the husband was to obtain a divorce from his wife. The wife sought by answer and cross-petition to obtain a divorce from her husband with

alimony. Ordinarily, an action to quiet title, or to collect a debt, would not be joined with a suit, the object of which was to obtain a divorce, a purely statutory proceeding in this state. This being the nature of the proceeding then before the court, it ought to appear from the pleadings that the court had jurisdiction of this property—jurisdiction to make a decree affecting title thereto. The question, we think, would be whether the pleadings, aided by any presumptions which it may be permissible to indulge, tendered the issue of a resulting trust in plaintiff's favor, so that the court would have jurisdiction by the decree to change the title. Plaintiff alleged in her cross-petition that the money with which the property was purchased was loaned by her to her husband at his request, no part of which he had repaid. Under a state of facts like this it was held that "the payment of the money at the request of the husband was a loan by the wife to him. It created the relation of debtor and creditor, and not that of trustee and *cestui que trust.*" *Torrey v. Cameron*, 73 Tex. 583-587. In 2 Story, Equity Jurisprudence (13th ed.), sec. 1195, it is said that "a trust is never presumed or implied as intended by the parties unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions." Such a trust is a presumption, subject to rebuttal by evidence showing that the transaction was of a different character. And, if this be true, then it would seem beyond question that a pleading alleging facts as potential to rebut any claim of a resulting trust as any which could have been shown in evidence can not be said to bring such an issue into the case, for, upon the plainest principles, one who loans money upon the request of the borrower has not an equitable claim upon the property purchased with the money borrowed. It does not seem to us that under the state of the pleadings in the divorce suit this property was brought before the court in such a way as empowered it to make any decree affecting the title thereto upon any presumed theory that a trust therein was established.

But the decree in the divorce suit, as already quoted herein, shows, we think, without question, that the property was awarded to plaintiff as alimony, and this precludes any presumption that the property was awarded to her because it was shown to be her own. Alimony is payable out of the husband's estate, and not out of the wife's. It can never be assumed that the court gave as alimony to the wife property shown on the trial to be hers. In 1 Black, Judgments (2d ed.), sec. 277, it is said:

"The general rule, as stated, is that every presumption will be indulged in favor of the records of superior courts. An important corollary to this rule is that there can be no presumption against the record. For if the record imports absolute verity, its recitals must be equally as conclusive when they make against the jurisdiction as when for it."

Upon this rule we think it follows that the judgment of the district court in the case at bar can not be affirmed by invoking the presumption that a trust was proved.

Thus we are brought to a consideration of the one remaining contention, and that now relied on, that the decree, in so far as it awards specific real estate of the husband to the wife as alimony, is void and subject to collateral attack. Is it competent for a district court in this state, sitting as a court of equity to hear cases arising under the provisions of chapter 25, Compiled Statutes (Annotated Statutes, 5324), to devest the husband of his legal title to realty, and vest the title in the wife as alimony? In several cases, this court has reversed judgments where the lower court gave to the wife a lien upon specific real estate of the husband. *Nygren v. Nygren,* 42 Neb. 408; *Brotherton v. Brotherton,* 14 Neb. 186. But this is a collateral attack, and defendant can not prevail unless it is made to appear upon reason and authority that the award of real estate as alimony is not merely erroneous, subjecting the judgment to reversal on appeal, but is in excess of the court's jurisdiction under the statute.

Section 22 of chapter 25 (Annotated Statutes, 5345)

provides that in case of a divorce, "the court may further decree to her (the wife) such part of the personal estate of the husband and such alimony out of his estate as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." There is a provision (section 23) reserving to the wife, under certain circumstances, her dower estate; section 24 reserving under certain circumstances a portion of the wife's personal estate to the husband, and section 26 provides that when alimony is allowed, the court may require security for its payment; may order his real estate sold as upon execution if he fails to pay alimony, and may appoint a receiver to collect the profits of his estate both real and personal, in case of his default, and it is specifically declared that the judgment for alimony stands upon an equal footing with all money judgments, being a lien upon the judgment debtor's real estate in the same manner as any other judgment that may be obtained against him.

Are the provisions of chapter 25 exclusive in their grant of power to the district courts with reference both to the causes for which divorce may be granted, and to the allowance of alimony? Consideration of this question has led us to answer in the affirmative. Matters pertaining to divorce, separation, and alimony were originally of ecclesiastical cognizance. But in this country they have always been regulated by statute, and we think the courts have always looked to the statute as the source of their power. In *Barker v. Dayton,* 28 Wis. 367, 379, it is stated: "It is an undoubted general principle of the law of divorce in this country, that the courts, either of law or equity, possess no powers except such as are conferred by statute; and that, to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings or practice in it, or to the mode of enforcing the judgment or decree, authority therefor must be found in the statute, and can not be looked for elsewhere, or otherwise asserted or ex-

ercised." We think this principle was recognized by this court in the cases of *Nygren v. Nygren* and *Brotherton v. Brotherton, supra,* reversing the judgments because the district court gave a remedy in excess of that authorized by the statute, the provisions of which for the enforcement of the wife's claims being regarded as sufficient and exclusive.

After an exhaustive review of all the authorities upon this question, and a careful examination into the reason and history of jurisprudence both in this country and in England with reference thereto, Bishop, in the first volume of his work on Marriage, Divorce and Separation, section 1400, states the rule as herein announced. In *Earle v. Earle,* 27 Neb. 277, a wife sought separate maintenance without praying divorce. It was sought to defeat her suit on the ground that the proceeding was not recognized by our statute. She was permitted to prevail because to deny her suit would have been to recognize a wrong without a remedy. Without pretending to question the soundness of that decision, it is manifest that it is inapplicable here, because in cases like that at bar the remedy provided by the statute has been declared by this court to be ample and sufficient.

We proceed, therefore, in the examination of the question presented upon the assumption that the court's power to do what it did under the pleadings in this case must find justification in the statute or it can not be sustained. Empowered by the statute to award alimony, can the court, in the exercise of this power, give the real estate of the husband to the wife? Or, stated otherwise, is the power to give the husband's real estate to the wife by decree in a divorce suit implied in the power which the statute expressly confers to give alimony? The language used by the supreme court of Wisconsin (*Bacon v. Bacon,* 43 Wis. 197, 203) in discussing a statute like our own is pertinent to this question. "Section 24," it is there said, "so far as it has relation to the subject, is restricted in terms to personal property. It authorizes the court to adjudge to

the wife part of the personal estate of the husband and alimony out of his estate. The part of the personal estate here intended is presumably confined to specific chattels, other than money; alimony being intended to cover all provision for money. Alimony is not an estate; not a portion of the husband's estate to be assigned to the wife as her own. It is an allowance out of the husband's estate for the nourishment of the wife, resting in discretion, variable and revocable. *Campbell v. Campbell*, 37 Wis. 206. As the authorities in that case sufficiently show, alimony is a technical word, theoretically restricted to personalty and practically to money. It is payable out of the husband's estate, real as well as personal; but the word never covers the estate itself. So section 24 makes it payable out of the husband's estate; clearly excluding any transfer of his estate to the wife, except the part of his personalty previously and expressly authorized."

In *Calame v. Calame*, 25 N. J. Eq. 548, the statute under consideration provided as follows: "When a divorce shall be decreed, it shall and may be lawful for the court of chancery to take (make) such order touching the alimony and maintenance of the wife, and also touching the care and maintenance of the children, or any of them, by the said husband, as from the circumstances of the parties and the nature of the case, shall be fit, reasonable, and just." And with reference to this statute it was said:

"Now, the terms alimony and maintenance are emphatically technical words, having for ages borne a fixed and established meaning, and they never have been held to comprise, within their legitimate signification, an allowance of a portion of the husband's estate in fee. It is not pretended that there is any expression in this law which tends to show that these words have been used in a different sense from that which, as terms of art, they carry with them; and such being the case, it seems to me that, upon general principles, they must be held to embody simply their technical signification."

While the point was not necessary to a decision of the

case before it, the court in *Maguire v. Maguire,* 7 Dana (Ky.), 181, in the last paragraph of the syllabus, said with reference to the signification of the word alimony: "A decree for alimony must secure to the wife an annuity, or other personal right to maintenance; an absolute right to property can not be decreed in a case for alimony."

And so in the case of *Russell v. Russell,* 4 G. Greene (Ia.), 26, 29, under a statute permitting the court "to make such order in relation to the children and property of the parties and the maintenance of the wife as shall be right and proper," it was said: "Alimony is an allowance for maintenance of the wife. It is not to be understood as involving a distribution of the estate by force of law." And in the same case with reference to an attempted transfer of this kind, it was stated: "The rights of realty are held in too much regard to be disturbed by a procedure so summary. The estate of inheritance would thereby be diverted from its legitimate direction."

So much, then, does an examination of the cases reveal as to the technical signification of the word "alimony," denominated in the books as a word of art, standing for a definite idea, which, in the absence of language indicative of a use opposed to its settled meaning, excludes the husband's real estate.

Words in a statute are to be given their usual meaning (*State v. Byrum,* 60 Neb. 384), and this same principle requires that technical words shall be given their technical meaning unless another intention is manifest from the statute. The meaning of this word being fairly settled, it must be presumed that such meaning was in contemplation of the legislature and expresses the true meaning of the statute (*Kendall v. Garneau,* 55 Neb. 403), unless there is to be found in the statute warrant for holding that it was used in a broader sense. Can this be said of our statute on divorce and alimony? The court is empowered to decree to the wife "such part of the personal estate of the husband, and such alimony out of his estate." Thus the power to give in kind seems to be restricted to personal

property, and alimony is made payable *out of his estate.* This variation in language can not be said to be accidental or meaningless. It is similar to the phraseology of like statutes in other states. In *Bacon v. Bacon, supra,* the words "alimony out of his estate," are held to exclude a transfer of the husband's estate to the wife. Alimony is defined by Blackstone as that allowance which is made to a woman for her support "out of the husband's estate." 1 Blackstone's Commentaries, 441. Furthermore, all the subsequent provisions for the enforcement of the decree for alimony seem unmistakably to contemplate that the alimony granted is an allowance out of the husband's estate, and not a part of his estate. In the *Calame* case, 25 N. J. Eq., *supra,* the chancellor said at page 551:

"I will, in conclusion, point to the fact, that the modes appointed by the act to enforce the payment of the alimony, such as requiring security from the husband, and authorizing the sequestration of his personal estate, and the rents and profits of his real estate, appear to stand in opposition to the idea that a part of the land itself can be set apart for the wife."

This language may with equal pertinency be applied to our statute.

In view of the foregoing, we think it can not be successfully said that the court in awarding to the wife specific real estate of the husband as alimony did not exceed the power conferred by the statute. This being true, it must be held, unless one other contention yet to be considered makes another holding necessary, that the decree in the divorce suit, so far as it attempts to give the specific property in controversy to the wife in fee as alimony, is void, and subject to this collateral attack. 1 Freeman, Judgments (4th ed.), section 120*c*.

But it is said that the decree assailed herein recites that the parties thereto consented in open court to the judgment awarding the property as alimony. It is not open to question in this state that jurisdiction can not be conferred by consent. *Burkland v. Johnson,* 50 Neb. 858; *Anderson*

v. Story, 53 Neb. 259; *Armstrong v. Mayer*, 60 Neb. 423. It is only with reference to the jurisdiction over the person that the court will look to the attitude of the party. That which in this decree is attacked for nullity goes to the power of the court to transfer the title to real estate in the manner and under the circumstances attempted. It is manifestly a question of jurisdiction over the subject matter, and being such, it can not well be said that the consent of the parties as recited can affect the determination of the question. It would not be contended that had the court granted a divorce upon a ground not mentioned in the statute, the decree, otherwise void, would be held valid because the parties are shown to have consented thereto. The law conferring the jurisdiction, whether the court had or had not power to set over this real estate to the wife as alimony, must be tested by the law. So tested, we find that the court was without jurisdiction, and that the decree, so far as it attempts to vest title to the property in controversy in plaintiff, is void, and that the judgment of the district court in the case at bar should have been for defendant. It is therefore recommended that the prior judgment of affirmance herein be vacated, the judgment of the district court reversed and the cause remanded for further proceedings.

DUFFIE and LETTON, CC., concur.

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

REVERSED.

CHARLES BEST, APPELLEE, V. HELEN GRALAPP ET AL., APPELLANTS.*

FILED SEPTEMBER 17, 1903. No. 13,016.

1. **Specific Performance.** An agreement to devise land, upon sufficient consideration, may be enforced specifically in a proper case.

* Rehearing allowed. See opinion, p. 815, *post*.

2. **Agreement to Will Property.** It is sufficient if the agreement is that the promisee shall receive the property, or that it shall be left him at the decease of the promisor. There need not be an express promise to make a will.

3. **Equity:** TRUST. Equity will impress a trust upon the property in such cases, which will follow it into the hands of personal representatives or devisees of the promisor.

4. **Agreement Enforceable.** An agreement to leave property by will is not ambulatory or revocable after performance on the part of the promisee.

5. **Part Performance:** STATUTE OF FRAUDS. Part performance of such a character that the court can not restore the promisee to the situation in which he was when the agreement was made or compensate him in damages, is sufficient to take the case out of the statute of frauds.

APPEAL from the district court for Johnson county: CHARLES B. LETTON, DISTRICT JUDGE. *Affirmed.*

M. B. C. True and *James E. Philpott,* for appellants.

Lewis C. Chapman and *John B. Douglas, contra.*

POUND, C.

This is a suit to quiet title. The plaintiff, who is in possession of the premises in controversy, alleges that on the 22d day of May, 1899, and for many years prior thereto, his father, now deceased, was the owner and in possession of the property; that his father was an old man at that time; that all his children were of full age and living out of the state, and that his wife was divorced; that under these circumstances his father, being without suitable care, attention and protection, agreed with the plaintiff, who was then in business in the state of Kansas, that if the plaintiff would abandon his business there and return with his family to the property in controversy, take charge thereof and of the plaintiff and provide him with suitable home and attention until his death, the plaintiff should receive at his death the land in question, and other property not material to this controversy. He further alleges that in

pursuance of and part performance of said agreement, and in reliance thereon, he closed out his business in Kansas, sold his property in that state except such as he could use at his father's home in Nebraska, and removed to the property, upon which he and his family have resided ever since; that he performed in all respects everything on his part to be done and performed under said agreement; and that he assumed and paid all the funeral expenses and expenses of the last illness of his father and all other claims that might be charged as debts against his father's estate, including certain expenses of removing a cloud upon his father's title to the property. He also alleges that his father died on the 14th day of March, 1901, and that five of the children and heirs at law of his father have since that time conveyed and quitclaimed to him all title or interest which they might have in the property. Three children and the heirs of a fourth, deceased, who have not executed such conveyances are made defendants, and the petition prays that the title to the property may be quieted in the plaintiff as against them. The trial court found generally for the plaintiff and against the defendants and rendered a decree as prayed for.

We think the findings and decree are right and should be affirmed. An agreement to devise land, upon sufficient consideration, may be enforced specifically in a proper case. *Howe v. Watson,* 179 Mass. 30, 60 N. E. 415; *Bird v. Jacobus,* 113 Ia. 194, 84 N. W. 1062; *Whiton v. Whiton,* 179 Ill. 32, 53 N. E. 722. It is sufficient if the agreement is that the promisee shall receive the property, or that it shall be left him at the decease of the promisor. There need not be an express promise, in so many words, to make a will. *Kofka v. Rosicky,* 41 Neb. 328. Equity will impress a trust upon the property in such cases, which will follow it into the hands of personal representatives or devisees of the promisor. *Price v. Price,* 111 Ky. 771; *Howe v. Watson, supra; Duvale v. Duvale,* 54 N. J. Eq. 581, 56 N. J. Eq. 375; *Bruce v. Moon,* 57 S. Car. 60, 35 S. E. 415; *Fogle v. St. Michael P. E. Church,* 48 S. Car. 86, 26

S. E. 99; *Smith v. Pierce,* 65 Vt. 200, 25 Atl. 1092; *Burdine v. Burdine,* 98 Va. 515, 36 S. E. 992.

On behalf of appellants the principal contention seems to be that the agreement in question, being testamentary in character, was ambulatory and revocable during the life of the testator. But after performance on the part of the plaintiff or substantially everything to be done on his part, this can not be true. To hold the agreement revocable under such circumstances would be to permit a fraud which a court of equity could not sanction. This very question was decided in *Bruce v. Moon, supra.* It is also insisted that the agreement was within the statute of frauds. While there is some conflict of authority on this point, the authorities recognized and followed in this state hold that part performance, of such a character that the court can not restore the promisee to the situation in which he was when the agreement was made or compensate him in damages, is sufficient to take the case out of the statute of frauds. *Kofka v. Rosicky,* 41 Neb. 328; *Rhodes v. Rhodes,* 3 Sandf. Ch. (N. Y.) 279; *Shahan v. Swan,* 48 Ohio St. 25, 26 N. E. 222; *Sutton v. Hayden,* 62 Mo. 101. This doctrine has the support of many recent decisions. *Winne v. Winne,* 166 N. Y. 263, 59 N. E. 832; *Svanburg v. Fosseen,* 75 Minn. 350, 78 N. W. 4; *Owens v. McNally,* 113 Cal. 144, 45 Pac. 710; *Carmichael v. Carmichael,* 72 Mich. 76, 40 N. W. 173. Where a man of middle age and the head of a family closes out his business, disposes of his property, presumably at a sacrifice, as is inevitable in such cases, and removes to another state for the purpose of taking charge of the property and person of an aged parent, the entire course of his life is so far changed that it would be impossible to compensate him adequately in damages or to restore him, after a lapse of some years, to his original position. To permit the statute of frauds to be asserted in such a case is to work a fraud upon the promisee. In the brief on behalf of appellants, some claim is made with respect to the statute of homesteads. We do not think that statute involved in any way. It

appears that all the children of the deceased had come of age and left the state long prior to the agreement in question. His wife was long since divorced and, except as against the claims of creditors with respect to debts incurred during the continuance of the marriage relation, no homestead rights attached to the land. Several of the questions involved in this case were before the court in *Teske v. Dittberner,* 65 Neb. 167. But as a rehearing is pending, chiefly, however, upon question as to the effect of the homestead statute upon the circumstances of that case, we have preferred to treat the questions at issue independently.

It is recommended that the decree be affirmed.

DUFFIE and KIRKPATRICK, 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 May 18, 1904. *Judgment of affirmance adhered to:*

1. **Quieting Title:** DECREE: EVIDENCE. Evidence examined, and found sufficient to sustain the decree entered in the trial court quieting title to the real estate in controversy in the plaintiff, appellee in this court.
2. **Probate Court:** JURISDICTION. A probate court is without jurisdiction to try and determine title to real estate.
3. **Will:** PROBATE: COLLATERAL ATTACK. A suit in the district court to enforce the specific performance of a parol agreement to devise real property and to quiet title in the plaintiff, as against those claiming under a will duly allowed and admitted to probate in the county court is not a collateral attack on the judgment admitting such will to probate.
4. **Affirmed.** The former opinion and the judgment of affirmance in accordance therewith, adhered to.

HOLCOMB, C. J.

This cause is submitted on rehearing. The former opinion, formulated by Mr. Commissioner POUND, fully states

the case. *Ante,* p. 811. The suit in its nature is for the purpose of obtaining a decree for a specific performance of an agreement, resting in parol, to devise real estate and to quiet title in the plaintiff as against others claiming through a will duly allowed and admitted to probate. As we read the record, we think it is conclusively established that the deceased, Charles Best, Sr., who was at the time near eighty years of age and in need of the care and protection of others younger and more able to work, and who was living alone, having been divorced from his wife, and whose children had departed from the parental roof, caused to be written a letter to his son, the plaintiff in this action, proposing that he should move from his then residence in Kansas to the farm and home of the deceased, and care for him during the remainder of his life, and that in return for such services the son should have his property, or what was left of it, at his death. It appears that the deceased was at the time living alone on the land in controversy, comprising an eighty acre tract and worth approximately the sum of $3,000; that at his instance and request, a neighbor wrote to the plaintiff proposing that if he would remove from his then home to the home of the deceased and care for the latter till his death, he would give him all the property he had left. The letter itself is not in evidence and its exact terms are not known. In response to the letter, the son visited his father and made arrangements resulting in his disposing of his property, which consisted of personalty only, and giving up the business in which he was engaged in Kansas, and with his family removing to the home of the deceased where he took charge of the place, cared for and supplied his father with needed sustenance, looked after him until his death, and paid expenses incidental to his last illness, death and burial, which occurred some twenty months after he had moved on the home place. There is an abundance of evidence that the deceased many times said that he had made the arrangement contemplated in the proposition first imparted to his son by the

letter mentioned; that he was well satisfied with the agreement and was receiving, under the arrangment thus made, the proper care and attention from his son and family that his age and circumstances seemed to require, and it is not to be doubted that the plaintiff in good faith performed to the fullest extent all the obligations resting upon him, and which he was in duty bound to do under the agreement theretofore entered into.

It is argued that the plaintiff was not let into the full possession of the premises and that therefore there was not such performance of the parol agreement as to relieve it from the operation of the statute of frauds. Of course, he moved into the house in which the father had been residing as his home and homestead, and in which he continued to reside until his death. It is obvious, however, that the son became the head of the household and conducted the affairs of the farm, while the old gentleman retained one room of the building in which the son and his family also resided. He ate at the family table supplied by the plaintiff, and became in fact a member of his family. The most that can be said in favor of the defendants' contention is that they occupied the premises jointly. It is manifest that it was in pursuance of the agreement and in carrying it into execution that the son removed onto the father's premises, lived there in the dwelling house erected thereon, and was in possession thereof with a view of caring and providing for the father as contemplated by the terms of the agreement. Such possession, we are satisfied, is on equitable principles all that is required in order to give the plaintiff the benefit of the fact of possession of the premises involved in the controversy as a part performance of the parol agreement to leave the son the real estate on the death of the father. So far as the son was concerned under the agreement, he was let into the entire and undisputed possession of the real property, as was therein contemplated in order to effectuate its purposes. The oral agreement accompanied by the possession and the performance of its terms were, under the

circumstances, sufficient to take it without the statute of frauds.

There is also a contention to the effect that equity ought not to interpose and grant relief to the plaintiff because he may be fully and adequately compensated in money for the services performed under the alleged agreement. We were disposed to believe, when the rehearing was granted, that possibly the performance on the part of the plaintiff of his part of the agreement was not of such character as to preclude his being compensated in a pecuniary way for the services rendered and that therefore his prayer for a decree that the title to the real estate should be adjudged to be in him ought not to have been granted. Further consideration leads us to the conclusion that the decree and our former judgment in this respect were right and should be adhered to. It is very doubtful if any pecuniary standard could be set up by which the plaintiff could be adequately compensated for the services performed in carrying out the agreement. In *Teske v. Dittberner*, 70 Neb. ——, the writer expressed some doubt as to the equitable right of the plaintiff in that action to a decree of specific performance because the nature of the services performed were such that adequate pecuniary compensation could have been awarded. The majority of the court, however, thought that a decree directing specific performance was proper, and it was so ordered. The reasons for giving to the plaintiff just what he contracted for in the case at bar appeal as strongly, or more so, to the conscience of the chancellor than in the case cited. The agreement in the instant case was a reasonable one on its face. The estate of the deceased was limited in value, and in the main consisted of the eighty acres of real estate in controversy. The longevity of the deceased was then unknown, and the expenses of caring for him and the consideration required of the plaintiff in the performance of his part of the contract were uncertain. His home life and business affairs in Kansas, where he was then living, were brought to an abrupt con-

clusion, and, as is said in the former opinion, presumably at a pecuniary sacrifice. He and his family took up their abode with the deceased and undertook to care for him and incur the expense incident thereto and to obtain a living for themselves under the new environments, for an indefinite duration of time. They were required to sever their old associations and business relations and adjust themselves to the new conditions surrounding them. It is difficult, indeed, if not impossible, under the circumstances, to lay down a rule by which the plaintiff could be awarded pecuniary compensation for what he had done in the performance of the agreement. There are many elements which enter into consideration of the matter, the value of which it is impossible to measure in dollars and cents. It is to be borne in mind that the plaintiff comes into a court of equity seeking relief, not for a part performance of the conditions of an agreement on his part to be performed, but only after he had discharged every duty resting upon him thereunder and fully performed all that he had undertaken to do. The agreement and its performance on his part are clearly and unequivocally established by the evidence and it would seem inequitable to deny him the relief prayed for. The evidence, we think, supports the decree entered in the trial court. On the authority of the cases cited in the former opinion, more particularly *Howe v. Watson,* 179 Mass. 30, 60 N. E. 415, the right of the plaintiff to a decree awarding him the land in controversy seems to be clear and the conclusion heretofore reached is therefore right and should be adhered to.

It is further contended that this action is not maintainable because of the proceedings had in the probate court regarding the allowance and probate of the will under which appellants claim. It is said this suit is a collateral attack on the order of the probate court allowing the will and admitting it to probate and therefore the action ought not to be maintained. The objection is not regarded as tenable. The probate court was without jurisdiction to try and determine title to real estate. The will

which had been admitted to probate devising the property to the heirs of the testator could have no greater weight than would other instruments executed by the testator by which title was attempted to be conveyed to the prejudice of the rights of the plaintiff. The will undertook to devise the real estate in controversy to the heirs at law of the testator. Whether they claimed as heirs at law or as devisees would not affect their legal status nor prevent a court of equity from quieting title in the person found to be the beneficial owner. Equity in such cases impresses a trust upon the property which will follow it into the hands of the personal representatives or devisees of the person obligated to convey the legal title. *Teske v. Dittberner, supra.* The subject matter of the controversy was in respect of title to real estate, and the right of plaintiff to a decree for the specific performance of the parol agreement to devise, and quieting title in the plaintiff as against all others claiming the property either as heirs at law or as devisees under the probated will. In either instance the jurisdiction of the district court was not curtailed by the proceedings had in the probate court touching the allowance of the will and its admission to probate. The probated will was the evidence of title under which appellants claimed, and the alleged agreement was the basis of the relief sought by the plaintiff, notwithstanding the conveyance of the legal title by the promisor by means of such will. The suit to quiet title in the plaintiff was in no sense a collateral attack upon the judgment admitting the will to probate. The legal effect of the decree was to avoid the attempted devolution of title by will, and to adjudicate in plaintiff's favor superior right and equity in the land in controversy. The opinion heretofore announced, and the judgment of affirmance in accordance therewith, correctly determines, we think, the rights of the litigants, and the same is therefore adhered to.

AFFIRMED.

DUPONT M. NEWBRO ET AL., APPELLEES, V. ANDREW L. UNDELAND, APPELLANT.

FILED SEPTEMBER 17, 1903. No. 13,084.

1. **Trade-Mark: INJUNCTION: DECEIT.** If the manufacturer of a compound or preparation according to a secret formula is himself guilty of false or misleading representations in any material respect in connection therewith, or if his trade-mark, label, or advertisements contain distinct false assertions which operate to deceive the public as to its nature, composition or origin, he has no standing in a court of equity, and a suit to enjoin misuse of his trade-mark, trade-name or label is not maintainable.

2. **False Representation.** But mere statements of opinion as to its curative properties or as to the cause of a disease, concerning which there is a conflict of expert opinion, are not false representations, within the meaning of the rule, even though somewhat sweeping or even extravagant.

APPEAL from the district court for Douglas county: GUY R. C. READ, DISTRICT JUDGE. *Affirmed.*

Weaver & Giller, for appellant.

Howard H. Baldrige and *William A. De Bord, contra.*

POUND, C.

This is a suit to enjoin the defendant, who is engaged in the business of selling barbers' supplies at wholesale, from adulterating a compound or preparation manufactured and sold by plaintiffs under the name of "Newbro's herpicide," or "herpicide"; from using the label, trade-mark or bottles of the plaintiffs in the manufacture or sale of the adulterated compound; and from using the trade-mark of the plaintiffs in compounding mixtures or preparations to be put on the market by the defendant. The facts are stated clearly and concisely in the special findings of the trial court. The court found that the Newbro Drug Company, being the owner of the trade-name "Newbro's herpicide" and of the trade-name "herpicide," as applied to a liquid application for the hair, and also of a secret formula

used in compounding such preparation, sold and transferred said formula to the plaintiffs and also sold and transferred to them the trade-name "Newbro's herpicide" and the trade-name "herpicide," which names had been in use by plaintiffs and their assignor for more than two years prior to the bringing of suit; that the plaintiffs are the sole and exclusive owners of said trade-names "Newbro's herpicide" and "herpicide" and are entitled to the sole and exclusive use of said trade-names as applied to a liquid application for the hair; that said names are well known in business, have been extensively advertised and large quantities of said preparation sold thereunder, and that said names are of considerable pecuniary value to the plaintiffs; that the defendant is engaged in the business of selling barbers' supplies, and for some months prior to the commencement of this suit, through his clerks and employees, has made, prepared and compounded a preparation similar in appearance to said Newbro's herpicide and sold the same in original bottles of the plaintiffs, which had contained the original compound manufactured by the plaintiffs, with original printed "herpicide" labels thereon, and also with labels thereon containing the word "herpicide" which were intended to deceive the trade and the public in general; that the defendant, having compounded and prepared a preparation resembling plaintiffs' herpicide in appearance, but which was not genuine herpicide, had for some months prior to the bringing of suit sold and placed upon the market for sale, under the label and trade-name of the plaintiffs, said spurious compound and preparation, for the purpose of deceiving the public and leading them to believe that they were purchasing the preparation of the plaintiffs which the plaintiffs had prepared and sold under the name of "Newbro's herpicide" and "herpicide." The court further found that the representations made by the plaintiffs on their labels and advertisements were not false or fraudulent, and, in particular, that the statements upon such labels and advertisements that dandruff was caused by microbes or para-

sites and that said preparation would cure baldness, and the address thereon, "Newbro Drug Co., 68 West Broadway, N. Y.," were not false or fraudulent and were not intended to deceive. Decree was thereupon entered for the plaintiffs, substantially as prayed, from which the present appeal is taken.

The principal contention of the appellant is that the plaintiffs are entitled to no relief by reason of certain statements upon their printed labels and in their advertisements, which appellant claims are false and misleading and have the effect of deceiving the public. The principle governing such cases is well stated in the recent case of *Worden v. California Fig Syrup Co.*, 187 U. S. 516, in which the authorities are collated and discussed. In that case, Mr. Justice Shiras puts the rule thus:

"When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in his advertisements and business, be himself guilty of any false or misleading representation, and if he makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; and where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct material assertion which is false, no property can be claimed on it, or in other words, the right to the exclusive use of it can not be maintained."

The statements upon plaintiffs' label to which appellant particularly calls attention are that plaintiffs' preparation is "the only remedy known that positively stops the hair falling out," that it is "a new scientific discovery," and that it "cures dandruff, baldness and all diseases of the scalp by destroying the microbes or parasites to which all diseases of the scalp are due." The defendant challenges, also, the address upon the label, "Newbro Drug Co., 68 West Broadway, N. Y." It will be observed that

the only statements of fact in this label are the address and possibly the claims that plaintiffs' preparation destroys microbes and parasites to which diseases of the scalp are due and that such diseases are caused by microbes or parasites. As to the address, it appears that the plaintiffs had an office in New York at the place named, but that their factory and principal place of business was at Butte, Montana. The label does not purport to say where the preparation is manufactured, or that its ingredients come from any particular place, or that any special virtue results from manufacture or preparation in one place rather than another. The address is obviously intended merely to notify the public where the manufacturers and proprietors may be reached, and the choice of a great business center for an office for this purpose is natural and in no way calculated to deceive. There is a considerable amount of expert evidence in the record with reference to the causes of dandruff and baldness. The most that can be said with reference to this evidence is that it shows a conflict of opinion among experts upon the subject. It appears that some eminent authorities hold that dandruff is the result of a germ or parasite and that statements to this effect are to be found in reputable, if not authoritative, textbooks. So long as the question is an open one, we fail to perceive wherein there is any fraud in the plaintiffs' advertising that they cure diseases of the scalp by killing the germ or parasite by which such diseases are produced. It appears in evidence beyond contradiction that some of the principal ingredients of plaintiffs' preparation are germicides and have the effect of killing microbes and parasites, such as, according to the plaintiffs' claim, cause the diseases in question. Those who believe that such diseases are caused by parasites will not be deceived by the plaintiffs' statements. Those who do not so believe, seeing that plaintiffs claim only to kill the germs or microbes and do not pretend to cure the diseases in any other manner, are certainly in no danger of deception. In view of the expert evidence, there appears no reason to think that

plaintiffs' claims in this respect are dishonest or fraudulent. The statements that the preparation is a "new scientific discovery," that it cures "all diseases of the scalp" and that it is the only known remedy "that positively stops the hair falling out," are clearly mere statements of opinion. They are possibly somewhat sweeping or even extravagant. But they do not transcend the ordinary limits of what is usually considered fair advertising; and in a time when not merely superlatives, but the utmost resources of vocabulary are scarcely able to meet the demands of every day advertisements, are clearly innocuous. In *Samuel Bros. & Co. v. Hostetter Co.,* 118 Fed. 257, the court say:

"It is argued that no one preparation can possibly be a remedy for the numerous and divers ills for which the label declares this preparation to be adapted, and that the evidence for the appellant shows that a preparation containing so large a percentage of alcohol is contra-indicated for many of those ailments. The court will not attempt a minute investigation of this field of inquiry. It is one upon which the experts differ. * * * The argument that it is a quack medicine, and that it is injurious to the human system, and is contra-indicated for some of the ailments which it purports to cure, comes with ill grace from those who imitate it as closely as they may without possessing a complete knowledge of its formula, and by unfair trade sell the simulated article as and for the genuine."

The evidence shows that the defendant has been engaged in adulterating the plaintiffs' preparation, in using bottles which had formerly contained such preparation, with their original labels, for the purpose of selling a preparation of his own, and in selling the adulterated preparation and a different compound, which he himself prepared, to persons who applied to him for the plaintiffs' herpicide. We think the decree of the district court is right and should be affirmed.

It is therefore recommended that the decree be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

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Acknowledgments. See MORTGAGES, 2.

Action. See ATTACHMENT, 1. BANKS AND BANKING, 2. CORPORATIONS, 1, 7. INFANTS.

1. A sovereign state can not be sued in its own courts without its consent. This state has in a measure waived its prerogative; it has given its consent to be sued, but only in the cases mentioned in section 1106 of the code. The present action does not fall within the provisions of that section. *State v. Mortensen*..... 376
2. A contract with the board of public lands and buildings for the leasing of convict labor is in substance a contract with the state; and an action against the members of the board to compel specific performance of such a contract is in substance an action against the state. *State v. Mortensen* 376

Adverse Possession. See EASEMENTS.

1. A privity must be shown between adverse claimants before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription. *Zweibel v. Myers*..... 294
2. One claiming title to lands by adverse possession may, before the statute has finally run in his favor, purchase a tax deed to the premises without acknowledging the superior title of the record owner. But if he purchases a tax certificate and accepts payment of the same from the record owner through the county treasurer, such act is a recognition of the superior title. *Zweibel v. Myers*..... 294

Alimony.

1. Provisions of chapter 25, Compiled Statutes, relative to alimony, its allowance and the mode of its enforcement, *held* exclusive. *Cizek v. Cizek*..... 800
2. In a suit arising under the provisions of chapter 25, Compiled Statutes, the district court has not jurisdiction to award real estate of the husband to the wife in fee as alimony, and a decree in so far as it attempts so to do is void and subject to collateral attack. *Cizek v. Cizek*..... 800

Appeal and Error. See ATTORNEY AND CLIENT, 3, 4. BANKS AND BANKING, 3. BONDS. CARRIERS, 2. CRIMINAL LAW. ELECTIONS, 4. EMINENT DOMAIN. ESTOPPEL, 3, 4. EVIDENCE. INSTRUCTIONS. JUSTICE OF THE PEACE, 1. NEW TRIAL. PLEADING AND PRACTICE. TRIAL.

Final Order.

1. A judgment of the district court on appeal from an inferior tribunal, which is a complete adjudication so far as the district court is concerned, so as to leave nothing further to be done in that court, is a final order within the purview of section 582 of the code, although the cause is remanded for further proceedings below. *Ribble v. Furmin*..... 38
2. An order setting aside a judgment or decree, fixing the time for filing pleadings and setting the cause down for a new trial, under section 602 of the code, is not a final order from which appeal or error will lie before trial and a final judgment. *Rose v. Dempster Mill Mfg. Co*..... 27

Findings.

3. The usual presumptions in favor of a finding of the trial court do not obtain on appeal in an equity case. *Michigan Trust Co. v. City of Red Cloud*..... 585
4. On a general finding for the defendant in a trial to the court, where the evidence is not preserved and there is no special finding inconsistent with such general finding, if the answer sets forth a defense, the judgment of the trial court must, in the absence of error in making up the pleadings, be upheld. *Snyder v. Johnson*..... 266

Instructions.

5. Where no request is made for a more explicit instruction, an objection can not be entertained because the one given is vague and indefinite. *Riley v. Missouri P. R. Co*..... 82

Issues.

6. On appeal to the district court, the parties are restricted to substantially the same issues as those upon which the cause was submitted below. *Mallory v. Estate of Fitzgerald*, 312
7. On an appeal in equity the appellee is not concluded as to any matter directly involved in the questions raised by the appellant. As to matters not necessarily involved in the appeal an appellee who enters no cross-appeal should be held concluded. *Clark v. County of Lancaster*..... 717

Pleading and Practice.

8. This court need not consider upon appeal questions which were not presented to or adjudicated by the trial court. *Batty v. City of Hastings*..... 511
9. An appellant should present in his briefs all the grounds upon which he seeks a reversal or modification of the decree

Appeal and Error—*continued.*

appealed from; he will not be permitted to seek a modification as to matters not challenged in his briefs, when defeated in an attempt to secure reversal of the entire decree. *Batty v. City of Hastings*..... 511

10. An assignment of error, based on the alleged misconduct of the jury, will not be considered, where such misconduct is ascertainable only from affidavits not included in the bill of exceptions. *Pledger v. Chicago, B. & Q. R. Co*..... 456

11. A judgment will not be reversed on account of a technical error in the admission of evidence, when the party complaining is not prejudiced thereby. *Draper v. Tucker*..... 434

12. Where an objection to a question is overruled—the answer not being given—and the question is afterwards put in another form and is answered without objection, error can not be predicated thereon. *Draper v. Tucker*..... 434

13. Error in sustaining an objection to a question is without prejudice, if the same question is afterwards asked and answered. *Edwards v. State*..... 386

14. The reception of evidence tendered by the defendant, after a decision against him on a demurrer to plaintiff's evidence, is not error. *Riley v. Missouri P. R. Co*..... 82

15. Rulings of the trial court on the admission of evidence, *held*, not prejudicial. *Riley v. Missouri P. R. Co*..... 82

16. Exceptions to the exclusion of testimony are unavailing, unless there be tender made of the proof which it was sought to elicit. *Riley v. Missouri P. R. Co*..... 82

17. An objection to an order of confirmation not presented to the trial court entering the order can not be considered by this court on appeal. *Walker v. Fitzgerald*..... 52

Procedure.

18. Section 242, chapter 23, Compiled Statutes, 1901, is repealed, in effect, by sections 1 and 2, chapter 47, laws of 1881, entitled "An act providing for an appeal from the decisions of the county court in certain matters." *Drexel v. Reed*.... 468

19. Under section 5 of the last mentioned act, it is the duty of the county judge to transmit to the district court a transcript of his proceedings, within ten days after an appeal from an order in probate is perfected. *Drexel v. Reed* 468

20. Under said section the county judge has a right to prepayment of fees, but this right may be waived, and will be, if he has established a regular mode of collecting his fees, which is complied with in the given case. *Drexel v. Reed*.. 468

Appeal and Error—*concluded.*

21. Taking a second appeal in a case does not, of itself, constitute an abandonment of the first one. *Drexel v. Reed*.... 468

22. Where a party has, within due time, done all that is legally required to perfect an appeal, and no waiver of transmission of record by county judge is shown, the district court does not lose jurisdiction of the appeal, by reason of its being filed six days late. *Drexel v. Reed*..... 468

Supersedeas.

23. The giving of a supersedeas bond for the purpose of an appeal, under section 677 of the code, will not prevent the district court from ruling upon a motion for a new trial, theretofore filed, in order to enable the party giving such bond to prosecute error, should he so elect. *Armstrong v. Mayer* 187

24. In an appeal from a decree of the district court foreclosing a real estate mortgage, an undertaking which does not provide for the payment of "the value of the use and occupation of the property" is not effective as a supersedeas. *Collins v. Brown*, 64 Neb. 173. *Walker v. Fitzgerald*..... 52

Transcript.

25. Upon petition in error to this court, the proceedings of the district court can be shown only by a transcript of the records of that court duly certified. Affidavits can not be used to supply omissions in such transcript. *Crancer & Curtice Co. v. McKinley Music Co*..... 700

Appearance.

Ordinarily, if a defendant intends to rely on a want of jurisdiction of the court over his person, he must appear, if at all, for the sole purpose of objecting to the jurisdiction; if he appears for any other purpose, his appearance is general. *Linton v. Heye*..... 450

Assault and Battery. See CRIMINAL LAW, 39, 40.

1. A preponderance of the evidence is sufficient to prove an issue in civil actions for assault and battery. *Clasen v. Pruhs* 278

2. A parent, or one standing in the relation of parent, is not liable either civilly or criminally for moderately and reasonably correcting a child. *Clasen v. Pruhs*..... 278

3. It is a question of fact to be determined by the jury whether or not the punishment inflicted was, under all the circumstances and surroundings, reasonable or excessive. *Clasen v. Pruhs*..... 278

Attachment.

1. Error was prosecuted from only one of several orders sustaining successive attachments. Pending a review in this court, the property attached was sold to the first attaching creditor under an order of sale issued on the judgment of such party, rendered in the attachment suit, and the proceeds applied on that judgment, the other judgments remaining wholly unsatisfied. *Held*, (1) That an action for restitution would not lie against the first in favor of the subsequent attaching creditors, but that an action for money had and received could be maintained to which the defendant might interpose a counterclaim or set-off; (2) that the statute of limitations did not begin to run until the first attachment was dissolved. *First Nat. Bank v. Avery Planter Co*..... 329
2. The seizure of the goods of a third party by the sheriff under an order of attachment is tortious, and attaching creditors who join with the sheriff in resisting an action brought by such third party to recover the goods become trespassers *ab initio*, and jointly and severally liable for a money judgment rendered therein in favor of such third party. *First Nat. Bank v. Avery Planter Co*..... 329
3. When such judgment is satisfied by one of the parties, contribution will be enforced, where it appears that the parties acted in good faith and without any intention of committing a trespass. The basis of contribution in such cases is the ratio the claims of the several attaching creditors bear to each other. *First Nat. Bank v. Avery Planter Co*..... 329

Attorney and Client.

1. Where a judgment to which an attorney's lien has attached has been compromised between plaintiff and defendant in fraud of the attorney's rights, such settlement and compromise may be set aside at the suit of the attorney defrauded. *Jones v. Duff Grain Co*..... 91
2. The proper method of procedure in such case is for the attorney to file an intervening petition and have the amount and extent of his lien judicially determined before any other steps are taken for its enforcement. *Jones v. Duff Grain Co.*, 91
3. *Held*, Not error for the trial court to overrule a motion for an execution to enforce the collection of an attorney's lien before the nature and extent of such lien had been judicially determined. *Jones v. Duff Grain Co*..... 91
4. Attorneys who have undertaken to establish, for a contingent fee, a client's right to a fund in court, and who are taking steps to have the decision against their client reviewed on error, are entitled, when their client instructs

Attorney and Client—*concluded.*

them to proceed no further on her behalf, to prosecute error proceedings in her name, on their own behalf, in order to collect their contingent fee out of the fund still in court, if they can establish their client's right to it. *Counsman v. Modern Woodmen of America*..... 713

Bankruptcy.

1. If a secured creditor of a bankrupt, whose security is insufficient, discloses his security in proving his claim before the referee, he may retain his security and share in the dividends as to the overplus. *Kohout v. Chaloupka*..... 677
2. The petition of a trustee in bankruptcy, asking to be substituted as party plaintiff in a creditor's bill filed by a creditor of the bankrupt who has filed his claim before the referee in bankruptcy, which does not allege that such creditor has waived his security, is insufficient to entitle the trustee to intervene and be subrogated to the rights of such creditor. *Kohout v. Chaloupka*..... 677
3. Petition examined, and *held* not to state facts sufficient to entitle the petitioner to intervene and prosecute the suit. *Kohout v. Chaloupka*..... 677

Banks and Banking.

Insolvency.

1. While section 35, chapter 8, Compiled Statutes, provides for the delivery of the assets of an insolvent bank to the officers, stockholders or owners furnishing such bond, a delivery thereof to one of several parties entitled thereto by virtue of the statute does not relieve the sureties on such bond from liability thereon, where, by their acts, they assent to such delivery and ratify it. *Taylor v. Weckerly*..... 739
2. Where, pending an application for the appointment of a receiver for a bank, under the provisions of chapter 8, Compiled Statutes, a bond is given to procure the return of the assets of such bank under the provisions of section 35 of said chapter, and such proceedings are dismissed and the assets returned, any creditor who is a beneficiary of such bond may maintain an action at law thereon, after the condition is broken to his damage. *Rawson v. Taylor*..... 473
3. The plaintiff can maintain such an action, and the charge, "It appearing that there are other unpaid creditors of the Globe Savings Bank not parties hereto and not represented herein, and the law being that this plaintiff can not maintain this suit if that be true, you are therefore instructed to find for the defendants," given by the court to the jury, is erroneous, and the plaintiff is entitled to a new trial. *Rawson v. Taylor*..... 473

Banks and Banking—*concluded.*

Powers.

4. A banking corporation not being authorized or empowered to pledge its credit as a matter of accommodation by executing undertakings in judicial proceedings, a person dealing with such corporation is not warranted in indulging in the presumption that the cashier of the bank is authorized to obligate the corporation as surety on a replevin undertaking in an action between third parties, merely because, under some possible circumstances, the corporation would be empowered to execute such undertaking in the furtherance of its own interests and in the accomplishment of the objects, the power to perform which was granted by its charter of incorporation. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*..... 220

5. The signing of such an undertaking as surety thereon by the cashier, acting for the corporation, in an action between third parties in which the bank to all outward appearances has no interest, is not an act within the apparent scope of the authority of the cashier in the performance of his duties as such officer. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*..... 220

6. The execution by the cashier of a banking corporation, on behalf of his principal, of a replevin undertaking as surety, in an action between third parties, although it may not be illegal under any and all circumstances, is so much out of and beyond the general scope of the business of such corporation and the authority of the cashier, as to require those dealing with the corporation and accepting and acquiescing in such undertaking as sufficient under the law, to see to it that the bank was empowered and the cashier authorized to execute such an undertaking. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*..... 220

7. A savings bank organized under the laws of this state may acquire title to shares of stock of another corporation, where such stock is taken in compromise or discharge of the indebtedness of an insolvent debtor, and where no circumstances casting suspicion on the transaction are shown but it fairly appears that the directors of the bank acted in good faith and in the belief that the acceptance of the stock was for the best interest of the bank. *Hill v. Shilling*, 152

8. After acquiring the stock the savings bank becomes subject to any liability thereon the same as other stockholders. *Hill v. Shilling*..... 152

Baseball. See SUNDAY.

Beneficial Associations. See CONSTITUTIONAL LAW, 4. INSURANCE.

Section 112, chapter 43, Compiled Statutes, applies to fraternal beneficial associations organized under the laws of other states, as well as to those organized under the laws of this state. *Knights of the Maccabees of the World v. Nitsch*.... 372

Bills and Notes. See EVIDENCE, 6, 11. GUARANTY.

1. In order to be negotiable, an instrument must bear on its face entire certainty as to the amount to be paid at maturity; conditions rendering the amount then payable uncertain destroy negotiability. *Roblee v. Union Stock Yards Nat. Bank*..... 180
2. Incorporation of a collateral agreement in a promissory note, which requires payment to be made of uncertain sums at uncertain times before maturity, and thus renders it impossible to say how much, if anything, will be due at maturity, renders the note non-negotiable. *Roblee v. Union Stock Yards Nat. Bank*..... 180
3. A note otherwise negotiable is not rendered non-negotiable merely by a provision for or reference to collateral security. *Roblee v. Union Stock Yards Nat. Bank*..... 180
4. But, when executed together and as part of one transaction, a note and mortgage securing it are to be construed together and as one instrument. Hence, provisions as to the terms and manner of payment contained in the mortgage may be such as to make the note non-negotiable as to all persons chargeable with notice thereof. *Roblee v. Union Stock Yards Nat. Bank*..... 180
5. Although the note does not refer to the mortgage, indorsees who take with notice of its provisions are bound thereby. *Roblee v. Union Stock Yards Nat. Bank*..... 180

Bonds. See APPEAL AND ERROR, 23, 24. BANKS AND BANKING. JUSTICE OF THE PEACE. PLEADING AND PRACTICE, 13.

The principal and sureties upon an undertaking in an appeal, prosecuted, under a void statute, to a court to which in fact no lawful appeal lies, are liable on the instrument, if the court without objection entertains the appeal, and upon a retrial of the issues renders a judgment adverse to the appellant. *McVey v. Peddie*..... 525

Brands and Marks. See CONSTITUTIONAL LAW, 10, 11. OFFICERS.

Breach of Marriage Promise. See MARRIAGE, 1, 2.

Briefs. See APPEAL AND ERROR, 9.

Building and Loan Associations. See CONTRACTS, 3.

Carriers. See NEGLIGENCE.

1. A railroad company, as a common carrier, may make reasonable rules and regulations for the reception, carriage and

Carriers—*concluded.*

delivery of freights, including the classification and suitable preparation of articles for shipment; and such rules and regulations shippers are to conform to. *Chicago, R. I. & P. R. Co. v. Colby*..... 572

2. The reasonableness of such rules, regulations and classification is a question of law for the court; and it is reversible error to submit that question to the jury. *Chicago, R. I. & P. R. Co. v. Colby*..... 572

3. A party who boards a railway train with the intention of "beating" his way or "stealing a ride," and, to that end, secretes himself on such train, does not stand in the relation of passenger to the common carrier, and the latter owes him no active duty as such passenger. *Pledger v. Chicago, B. & Q. R. Co*..... 456

4. While the common carrier owes such person no active duty as a passenger, yet, if it uses unnecessary force to remove him, or expel him at a dangerous place, or while the train is moving at a dangerous rate of speed, and he thereby sustains injury, the carrier is liable in damages. *Pledger v. Chicago, B. & Q. R. Co*..... 456

Chattel Mortgages. See CUSTODIA LEGIS. FRAUDULENT CONVEYANCES, 1. PARTNERSHIP, 2. PLEADING AND PRACTICE, 12. SPECIFIC PERFORMANCE, 2, 3.

1. It is no objection to an agreement to execute a mortgage on crops that the crops were not in being when it was made. *Sporer v. McDermott*..... 533

2. The discretion conferred upon the mortgagee by a clause in a chattel mortgage, authorizing him to take possession of the mortgaged property whenever he may deem himself unsafe or insecure, is not to be exercised arbitrarily; such belief must rest on reasonable grounds. *Meyer v. Michaels*, 138

3. The facts that would warrant such belief must be such as did not exist, or of which the mortgagee was ignorant, at the time of taking the mortgage. *Meyer v. Michaels*..... 138

4. Evidence *held* to support finding, that the drug company was in actual possession under its mortgage, when the attachments were levied. *Taylor v. Harle-Haas Drug Co*.... 546

5. The term creditors as used in section 14, chapter 32, Compiled Statutes, making an unrecorded chattel mortgage void as to such creditors where the mortgagor retains possession of the property, applies only to such as have legally fastened a lien or charge upon the property for the satisfaction of their debts. *Folsom v. Peru Plow & Implement Co*..... 316

6. A mortgagor of chattels, who retained possession thereof, died, and the mortgage was not filed for record until after

Chattel Mortgages—*concluded.*

the appointment of an administrator on his estate and the mortgaged property had passed into his hands; thereafter the mortgagee brought an action against the administrator for possession. *Held*, That the administrator could invoke said section only in behalf of creditors whose claims had been proved and allowed against the estate before the filing of the mortgage for record, and before the property had passed to the possession of the mortgagee. *Folsom v. Peru Plow & Implement Co*..... 316

Collateral Attack. See ALIMONY. JUDGMENTS. RECEIVERS, 2.

Colleges and Universities. See CORPORATIONS, 2, 3.

Commissioners. See COUNTIES.

Confession. See CRIMINAL LAW, 13-16.

Conspiracy. See CRIMINAL LAW, 5-9, 17. TRIAL, 6.

Constitutional Law. See JURISDICTION, 8. LIMITATION OF ACTIONS. STATUTES.

Bill of Rights.

1. The validity of the so-called deficiency judgment law of 1897 can be upheld only by construing it, in connection with section 2, chapter 88 of the Compiled Statutes, in such manner as to bring it into harmony with the supreme law of the land as interpreted by the supreme court of the United States. So construed, it does not impair or affect any remedy upon any contract entered into before its enactment. *Burrows v. Vanderbergh*..... 43

2. The act of 1897, above mentioned, does not take away or impair the right of the holder of a mortgage executed before its enactment, to apply for and obtain, in an action for the foreclosure of the instrument, a personal judgment for a residue of the mortgage debt remaining after the application of the proceeds of the foreclosure sale. *Burrows v. Vanderbergh* 43

3. An act of a state legislature which is designed, and if enforced would be effectual, to deprive the obligees of existing contracts of an important and efficient remedy for the enforcement of the same, is an act impairing the obligations of such contracts and is in contravention of section 10, article 1 of the constitution of the United States. *Burrows v. Vanderbergh* 43

4. The provision in section 112, chapter 43, Compiled Statutes, that before any amendment to or alteration in the constitution or by-laws of a beneficial association shall take effect or be in force a copy of the amendment or alteration, duly certified, must be filed with the auditor of public accounts,

Constitutional Law—*continued.*

is not unconstitutional, as impairing the obligation of contracts, when applied to a benefit certificate issued prior to the statute and expressly subject to all future changes in or amendments to the by-laws of the association. *Knights of the Maccabees of the World v. Nitsch*..... 372

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

Ordinances.

6. When a municipal corporation is expressly authorized by legislation to enact a certain ordinance in execution of the police power, such ordinance stands on the same basis as a statute, and its reasonableness or unreasonableness is not a matter for the courts except as such question would bear on the constitutionality of a statute of the same nature. *In re Anderson*..... 686

7. A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid because it may affect incidentally the exercise of some right guaranteed by the constitution. *In re Anderson*..... 686

8. An ordinance making it unlawful to circulate or distribute printed or written dodgers, handbills or circulars upon the public streets, alleys, sidewalks or public grounds of the municipality, does not contravene section 5, article 1 of the state constitution. *In re Anderson*..... 686

9. Where an ordinance imposes a tax on the business of an express company transacted for the government of the United States, it is in violation of the provisions of the constitution of the United States and therefore void. *Western Union Telegraph Co. v. Village of Wakefield*..... 272

Statutes.

10. Chapter 50, laws of 1899, entitled "An act creating a state registry of brands and marks, a state brand and mark committee, providing for brands and marks upon live stock, and repealing chapter fifty-one (51) of the Compiled Statutes of 1897," is in conflict with the constitution and wholly void. *State v. Porter*..... 203

11. It was not the intention of the legislature by section 2 of chapter 50, aforesaid, to create a new office to be filled by the

Constitutional Law—*concluded.*

secretary of state; but the provision in said section, authorizing the governor to appoint three persons to act as members of a brand and mark committee, was an abortive attempt to add to the number of executive state offices created by the constitution. *State v. Porter*..... 203

12. Chapter 70, laws 1897, is valid to the extent that the subject of legislation is expressed in the title. *Union P. R. Co. v. Sprague*..... 48

13. Chapter 69, laws 1901, was constitutionally adopted and is valid. *Union P. R. Co. v. Sprague*..... 48

14. The constitution regards substance rather than form; it requires that the subject of legislation shall be clearly expressed in the title of a bill, but beyond this it does not go; the form of expression is at all times a matter of legislative choice. *Union P. R. Co. v. Sprague*..... 48

15. The title of a bill for an amendatory act is not materially changed by omitting a clause providing for a repeal, in general terms, of all repugnant or inconsistent statutes and substituting therefor a clause providing specifically for the repeal of the amended law. *Union P. R. Co. v. Sprague*.... 48

16. An intention to repeal all laws inconsistent with a proposed measure of legislation is necessarily implied and need not be expressed in the title of a legislative bill. *Union P. R. Co. v. Sprague*..... 48

17. Any provision in a legislative bill which is not clearly expressed in the title can not be enacted into law. *Union P. R. Co. v. Sprague*..... 48

18. The title of chapter 70, laws 1897, was too restrictive to cover a provision enlarging the authority of school boards with respect to the levy of taxes for general revenue. *Union P. R. Co. v. Sprague*..... 48

19. A statute in conflict with the constitution yields only to the extent of the repugnancy. *Union P. R. Co. v. Sprague*..... 48

Contracts. See ACTION. COUNTIES, 12, 16. STATUTE OF FRAUDS.

1. If a contract admits of more than one construction, one of which will render it inefficacious or nullify it, that construction should be adopted which will carry it into effect. *Horton v. Rohlff*..... 95

2. It will not be presumed that the parties to a contract intended to provide for the doing of an illegal act, or one which would render their agreement void. *Horton v. Rohlff*, 95

3. Contracts made in this state, by residents of this state, with foreign building and loan associations, such contracts

Contracts—*concluded.*

being made through agents of such associations located in this state, are Nebraska contracts, and their construction, validity and enforcement are governed by the laws of this state. *National Mutual Building & Loan Ass'n v. Retzman*, 667

4. A construction that will completely emasculate a clause of a contract will not be adopted, if any other reasonable construction is admissible. *State v. Mortensen*..... 376

5. The board of public lands and buildings is vested with the general management and control of the penitentiary and may, in its discretion, let out by contract the labor of any or all the convicts. *State v. Mortensen*..... 376

6. A written contract for the hiring of convict labor, drawn under the provisions of section 16, chapter 86, Compiled Statutes, is not valid unless executed by the warden of the penitentiary, and approved by the governor and the board of public lands and buildings. *State v. Mortensen*..... 376

7. The alleged contract upon which this action is grounded would, if valid, impose no active duties upon the board of public lands and buildings. *State v. Mortensen*..... 376

8. Where parties have made a contract under a mutual mistake as to the existence of a fact which is a material inducement to it, such mistake may give a right to rescission, but is no ground for reforming the contract, and making it as the parties might presumably have done had they been aware of the truth. *Farmers Loan & Trust Co. v. Suydam*.. 407

9. The state, like an individual or private corporation, may refuse to keep its engagements; and the board of public lands and buildings, as a governmental agency having full authority in all matters relating to the management of the penitentiary, is vested with power to determine whether a contract for the leasing of convict labor shall be kept or broken. The action of the members of the board in the matter is the action of the state; their determination is its determination. *State v. Mortensen*..... 376

Contribution. See ATTACHMENT. LIFE ESTATES, 1.

Where trustees of an insolvent corporation have, with knowledge of the pendency of an action against it, divided among shareholders nearly all its available assets; one of the trustees, who is also treasurer and who paid out the money divided, can not recover contribution from another director, because of payment of a judgment against him, as trustee, for so converting the company's assets. *Sharp v. Call*..... 72

Convicts. See ACTION. CONTRACTS, 6, 7, 9.

Corporations. See BANKS AND BANKING. CARRIERS. CONTRIBUTION.

Action.

1. Where a debtor corporation transfers all of its assets to a new one, organized for the purpose of continuing the business of the old, and no provision is made for payment of its debts and it ceases to do business, one holding a judgment against the old corporation may bring an action at law against the new one. *Douglas Printing Co. v. Over*..... 320

Character.

2. The character of a corporation is determined from its articles of incorporation and the statute authorizing its formation. *McLeod v. Lincoln Medical College*..... 550
3. The fact that an educational institution may acquire and convey property necessary to the accomplishment of its object, and may charge tuition for instruction, does not render it an incorporation for the pecuniary benefit of its members. *McLeod v. Lincoln Medical College*..... 550
4. A corporation organized to "plant, harvest, store, purchase, manufacture, market, sell and deal in chicory" *held* a manufacturing corporation within the purview of section 37, chapter 16, Compiled Statutes. *Bolton v. Nebraska Chicory Co.* 681

Directors and Stockholders.

5. The directors of a corporation can not bind it by contract with another corporation of which they are also directors, and which they represent in making such contract. *McLeod v. Lincoln Medical College*..... 555
6. The majority stockholders of a corporation have no power to exclude the minority stockholders therefrom, by organizing a new corporation and transferring all the property and good will of the old to the new corporation, without the consent of the minority stockholders. *McLeod v. Lincoln Medical College*..... 550
7. The minority stockholders can maintain an action in their own names to set aside an illegal transfer of all property and good will of the corporation, when such transfer is made by the board of directors of the corporation pursuant to instructions of the majority of the stockholders. *McLeod v. Lincoln Medical College*..... 550

Officers.

8. The authority of a general manager to conduct the ordinary business of a corporation, organized for the purpose of yarding, feeding and taking care of cattle, hogs, sheep and horses consigned for sale to a certain market, is not broad enough to authorize him to sign a petition for paving a city street

Corporations—*concluded.*

and thus charge the real estate of the corporation, abutting thereon, with the cost of such improvement. *Trephagen v. City of South Omaha*..... 577

9. The act of signing the name of the corporation to such a petition is one which falls within the managing powers of the board of directors, who are by law and by its articles of incorporation made its managing agents. *Trephagen v. City of South Omaha*..... 577

10. The burden is upon the city, which seeks to enforce a special tax against specific lots to pay for such improvement, to show that the general manager was duly authorized by the corporation to sign such petition for and on its behalf. *Trephagen v. City of South Omaha*..... 577

Powers.

11. The power of a corporation to make valid contracts is measured by its charter; and the scope of the authority of its officers and agents acting for it is limited, and a person dealing with such corporation is chargeable with notice of such limitations. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*..... 220

12. Where the cashier of a banking corporation has attempted to obligate the bank as a surety on a replevin undertaking, the only presumption fairly arising from such act is that the corporation has no interest in the controversy, and attempted to obligate itself solely as surety for accommodation of the plaintiff in the replevin action. *Sturdevant Bros. & Co. v. Farmers & Merchants Bank*..... 220

Costs.

Fees of officers and witnesses for services rendered in a prosecution for the violation of an ordinance of a city, either in police court or in district court upon appeal, can not be collected from such city, unless their payment by the city is required by statute or by ordinance authorized by statute. *Kreader v. City of Fremont*..... 762

Counties.

1. The salary allowed a county clerk for services as clerk of the county board must be accounted for as fees of his office. *Mitchell v. County of Clay*..... 796

2. The county board acts judicially in fixing the amount of the salary of the clerk when acting as clerk of the board, but when such fees have been allowed, as such, and paid to the clerk, if the total amount of his fees for the year, including the fees so allowed, is more than the limit of his annual salary as fixed by statute, he is liable to the county for the excess. *Mitchell v. County of Clay*..... 796

Counties—*continued.*

3. Prior decisions as to the powers of county commissioners in passing upon claims against the county and in making settlements with county officers examined and discussed. *Mitchell v. County of Clay*..... 779
4. When the law commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is *quasi* judicial. *Mitchell v. County of Clay*..... 779
5. County commissioners act *quasi* judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed. *Mitchell v. County of Clay*.. 779
6. But they have no judicial power or discretion as to interpretation of the law. Whenever the course to be pursued or the amount to be allowed is fixed by law, they must follow the law, and their acts in so doing or endeavoring so to do are ministerial only. *Mitchell v. County of Clay*..... 779
7. The action of county commissioners in adjusting the accounts of county officers under sections 43 and 44, article 1, chapter 18, Compiled Statutes, is ministerial only. *Mitchell v. County of Clay*..... 779
8. A settlement with a county officer which, in substance, is an adjustment of his accounts, does not become *quasi* judicial, so as not to be reviewable otherwise than by appeal, merely because claims were filed for sums claimed to be due such officer and allowed for the purpose of enabling warrants to be drawn therefor. *Mitchell v. County of Clay*.. 779
9. If, in such case, the compensation to be allowed the officer is fixed by law, the allowance of the claim is formal only. *Mitchell v. County of Clay*..... 779
10. On the other hand, if the amount to be allowed is in the discretion of the commissioners, or if, in fixing such amount, the law requires them to decide questions of fact, their action is *quasi* judicial. *Mitchell v. County of Clay*... 779
11. In the absence of a statute, a county is not liable for necessaries furnished to persons not paupers while quarantined in their residence for the time being. *Dodge County v. Diers* 361
12. The limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of previous years and two-thirds of the

Counties—*concluded.*

levy of the current year, gives no authority to the board to take into account the levy of the current calendar year prior to the making of such levy. Until it is made there is no "levy of the current year." *Clark v. County of Lancaster*, 717

13. The adoption of plans and specifications is a necessary preliminary to advertising for and letting a contract by the year for the building of bridges, and such advertising and letting must be in accordance with the plans and specifications so adopted. *Clark v. County of Lancaster*..... 717

14. When a board of county commissioners audit and adjust the claim of an officer whose salary is prescribed by statute, it acts ministerially and not judicially. *Chase County v. Kelly* 426

15. Under the authority of chapter 34 of the laws of 1897, the county board may, in the exercise of good faith, make a supplemental allowance of compensation for the services of the clerk of the county court after the services have been rendered. *County of Adams v. Bowen*..... 405

16. There is no authority for the letting of annual contracts for repairing of bridges or for the doing of such repairing under an annual contract; where the amount exceeds $100. *Clark v. County of Lancaster*..... 717

County Officers. See COUNTIES. SCHOOLS AND SCHOOL DISTRICTS, 5, 6.

Courts. See APPEAL AND ERROR, 22. JURISDICTION. STIPULATIONS. WILLS, 6-9.

When, in a criminal prosecution before a police judge in a city of the first class, governed by chapter 18 of the laws of 1901, it is shown that the judge is disqualified to act by reason of interest, bias or prejudice, it is not erroneous for the mayor to appoint a justice of the peace of the city to act in place of the judge, as provided by section 117 of that chapter. *Seay v. Shrader*..... 245

Criminal Law. See EVIDENCE, 1-5. INSTRUCTIONS, 10-14. RAPE.

Evidence.

1. The word "evidence," when used in an instruction, is understood to include all the means employed at the trial to ascertain the truth respecting the matters in dispute. *Lamb v. State*..... 212

2. On the trial of an information charging larceny of cattle, it is not error to receive in evidence the hides of the animals obtained from a packing house in another state. *Lamb v. State*..... 212

3. A photograph, used for the purpose of identifying a person

Criminal Law—*continued.*

implicated in the theft of cattle, is admissible in evidence without showing when, where or by whom it was taken. *Lamb v. State*..... 212

4. On the trial of a person charged with instigating another to steal cattle, the declarations of the thief while engaged in the perpetration of the crime are admissible in evidence as part of the *res gestæ*. *Lamb v. State*..... 212

5. When a conspiracy is once shown to exist by the requisite *quantum* of proof, the acts and declarations of each of the conspirators, in furtherance of the common design, are the acts and declarations of all. *Lamb v. State*..... 212

6. A conspiracy to steal and sell cattle does not end with the theft, but continues at least until the sale has been made. *Lamb v. State*..... 212

7. A conspiracy, like any other fact which is the subject of judicial investigation, may be proved inferentially or by circumstantial evidence. *O'Brien v. State*..... 691

8. The acts and declarations of a conspirator, during the pendency of the conspiracy, and in furtherance of the common purpose, are admissible in evidence against his associates. *O'Brien v. State*..... 691

9. A conspiracy to steal and sell hogs for the benefit of all engaged in the illegal enterprise is pending until the sale has been made and the proceeds divided. *O'Brien v. State*.. 691

10. When the evidence upon which the trial court decided an issue of fact is not preserved in the record, it will be presumed that the decision is right. *Hoy v. State*..... 516

11. An attempt to escape by one under arrest accused of crime is an inculpatory circumstance properly to be considered by a jury and to be given such weight as it seems fairly entitled to, with the other evidence introduced at the trial, in determining the question of the guilt or innocence of the accused. *Williams v. State*..... 402

12. The fact that property alleged to have been stolen was taken without the consent of the owner, may be inferred from circumstances shown in evidence as well as by direct testimony that none was given. *Van Syoc v. State*..... 520

13. In a criminal prosecution, only such confessions of the defendant as are shown to have been made voluntarily, without fear of punishment or hope of reward, are admissible in evidence. *State v. Force*..... 162

14. The father of the accused, shortly after the commission of the alleged crime, pointed a shotgun at his head and said: "James, you are my prisoner: I have a right to arrest you;

Criminal Law—*continued.*

you shall go to Harrison and tell the sheriff, county attorney and coroner's jury all about the killing of H. R., and you will get clear; but if you don't you will get convicted." Accused consented to the demand of his father, and made a confession to the officers named. *Held*, That evidence of such confession was inadmissible. *State v. Force*..... 162

15. Further confessions by the accused, subsequent to such extorted confession, will be equally inadmissible, if so related in point of surrounding circumstances and proximity of time as to raise a presumption that the influences resulting in the first confession have not ceased to operate upon his mind. *State v. Force*..... 162

16. Evidence examined, and *held*, that certain subsequent confessions were surrounded by such circumstances, and removed from the influences leading to the first confession by such a lapse of time, as to raise a presumption that they were voluntary, and therefore admissible against accused. *State v. Force*..... 162

17. Evidence of a conspiracy found sufficient to sustain the verdict. *O'Brien v. State*..... 691

18. Evidence in a trial for larceny found sufficient to support the verdict. *Lamb v. State*..... 212

19. Evidence in a trial for larceny *held* sufficient to support a verdict of guilty. *Van Syoc v. State*..... 520

20. Evidence in a prosecution for sending a threatening letter to C., *held* sufficient to support a verdict of guilty. *Reno v. State*..... 391

Information.

21. An information which, after charging larceny in the usual form, alleges in substance that the defendant did feloniously and purposely aid, abet and procure the thief to commit the crime, is not demurrable on the ground that it states a mere legal conclusion. *Lamb v. State*..... 212

22. An information under section 217 of the criminal code must set out the names of the parties allowed to play the games complained of, if known to the prosecutor, or allege that they are unknown if such is the fact. *Moore v. State*..... 653

23. The word "feloniously" can serve no practical purpose in an information charging all the essential elements of a felony. *Richards v. State*, 65 Neb. 808. *Reno v. State*..... 391

24. When it appears that the charge in the complaint is substantially the same as that set forth in the information, a plea of a want of a preliminary examination, or a variance

Criminal Law—*continued.*

between the complaint and the information, is unavailing. *Van Syoc v. State*..... 520

25. An information charging a person with larceny can not be said to be bad for duplicity or uncertainty because, after alleging the felonious taking of the property charged to have been stolen, it is specifically alleged that such felonious taking was "with the intent to unlawfully and feloniously convert the same to his own use against the will of the said Jesse W. McNiel" (the owner). *Van Syoc v. State*..... 520

Instructions.

26. When no proper instruction has been requested, it is not prejudicial error for a trial court not to specially instruct the jury as to the law applicable to evidence tending to prove an attempt to escape by a prisoner accused of a crime. *Williams v. State*..... 402

27. Oral directions to the jury relative to the reception of a verdict *held* not to be violative of the rule requiring all instructions to be in writing; nor to be evidence of coercion of the jury. *Williams v. State*..... 40[illegible]

28. An instruction which in substance advises the jury that the presumption of innocence remains with the accused till by competent evidence the state establishes guilt beyond a reasonable doubt, is not subject to the objection that the burden of proof is thereby shifted to the defendant. *Van Syoc v. State* ..... 52[illegible]

29. The failure of the court to instruct the jury, that a defendant charged with rape can not be convicted without evidence corroborating the prosecutrix, is not error, unless it appears that such an instruction was requested. *Edwards v. State*, 386

30. Where the jury are not required to fix the punishment, the trial court is under no obligation to tell them what penalty is annexed by law to the crime charged in the information. *Edwards v. State*..... 386

31. An instruction, in which the jury are told that the presumption of innocence continues until the material allegations of the information are established by the evidence "to the exclusion of all reasonable doubt," is entirely accurate. *Edwards v. State*..... 386

32. The instruction on the subject of reasonable doubt is, perhaps, less intelligible than the phrase defined, but yet plain enough to be within the comprehension of ordinary men. *Edwards v. State*..... 386

Jury.

33. A person informed against for a felony, after the regular

Criminal Law—*concluded.*

panel has been discharged, may be lawfully tried by a jury summoned under the provisions of section 664 of the code. *Lamb v. State*..... 212

34. A deputy sheriff was a material witness for the state in a criminal prosecution for larceny; he also had charge of the jury during its deliberations. *Held*, That the fact of his having been called as a witness would not, of itself, disqualify him from serving in the latter mentioned capacity. *Van Syoc v. State*..... 520

Larceny.

35. One by whose incitement or instigation a felony is committed, when he is neither actually nor constructively present, is an aider, abetter or procurer within the meaning of section 1 of the criminal code. *Lamb v. State*..... 212

36. Section 1 of the criminal code, which was adopted in 1873, is applicable to all acts made felonies by subsequent legislation. *Lamb v. State*..... 212

Record.

37. Affidavits used on the trial of an issue of fact, do not become part of the record by being certified to this court by the clerk of the district court. The law, and not the clerk, determines what shall constitute the record. *Hoy v. State*.... 516

38. Where a record of the trial court filed in this court is found to be incorrect, the remedy is by appropriate preceedings to secure a correction thereof in the lower court. *Reno v. State*, 391

Self-Defense.

39. A person attacked, or formidably threatened, by three persons acting in concert, may avail himself of the right of self-defense by using commensurate force against the nearest assailant, although it is not from him, but from the others, that great bodily harm is apprehended. *Hoy v. State*..... 516

40. The right of self-defense does not belong alone to persons engaged in the pursuit of their lawful business; it is available to every person, regardless of the nature of his business, who is assaulted, or who, upon just grounds, apprehends an immediate unlawful attack. *Hoy v. State*..... 516

Venue.

41. In a criminal prosecution the office of the venue in a complaint is to name the place where the alleged offense was committed, and to show that the court before whom the information is laid, has jurisdiction to proceed. It is not an error fatal to the jurisdiction of the court to recite these matters in the English language, and no particular form of words is indispensably requisite for that purpose. *Seay v. Shrader*.. 245

Curtesy.

Plaintiff's mother died in 1883, siezed in fee of real property in this state, leaving their father as surviving spouse. *Held*, That the father took a life estate in the property as tenant by curtesy. *Withnell v. Withnell*..... 605

Custodia Legis.

The pendency of an action for the foreclosure of an alleged chattel mortgage, in which a temporary injunction has been granted restraining the defendant from selling, consuming or disposing of the property in controversy during the pendency of the action, withdraws the property from pursuit. In such case the property is in the constructive custody of the law. *Ryan v. Donley*..... 623

Death. See PARENT AND CHILD.

Deeds. See INSANE PERSONS, 3-5.

Divorce. See HOMESTEAD, 3, 4. JURISDICTION, 1.

Easements.

1. In order to acquire an easement by prescription, the adverse user must not only be continuous in point of time, but also substantially identical, during the whole of the statutory period, with respect to manner and extent. *Dunn v. Thomas*, 683

2. One who seeks to acquire an easement of maintaining a ditch over another's land by adverse user must maintain it without material change of location for the full statutory period. That he may have had a ditch somewhere upon the land for ten years, does not give him a right to maintain it in a new location, or to use an extension thereof made within the period. *Dunn v. Thomas*..... 683

3. Where the owner of two adjoining tracts of land sells one of them, the purchaser takes the tract sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the tract which the vendor retains. *Znamanacek v. Jelinek*..... 110

4. Where the owner of two adjoining tracts of land constructs a dam of a permanent character across a stream on one tract, which causes the water to overflow a portion of the other tract; upon a sale of such other tract to one having knowledge of the existence of such dam and its character, in the absence of evidence of a contrary intent, there arises an implied contract that the mutual benefits and servitudes, as regards such dam, shall remain *in statu quo*. *Znamanacek v. Jelinek*..... 110

Ejectment. See ADVERSE POSSESSION.

Elections.

1. The contestant in a proceeding to contest an election may voluntarily dismiss the proceedings at any time before issue is joined. *Moore v. Waddington*..... 615
2. When such dismissal has been entered, the court, until it is set aside, is without jurisdiction to allow another party to intervene and be substituted as contestant. Whether such dismissal can be set aside, *quære*. *Moore v. Waddington* 615
3. In such case, the trial court has no authority to set aside the dismissal without notice to the contestant. *Moore v. Waddington* 615
4. After a motion to set aside such a dismissal, and an application for leave to intervene was made by the plaintiff in error, the incumbent challenged the jurisdiction of the court to set aside the dismissal, or to allow the intervention. *Held*, That an order sustaining such challenge in the case before us is not shown to be prejudicially erroneous. *Held*, further, That contestant is a necessary party to proceedings in error to review such order. *Moore v. Waddington*... 615

Eminent Domain.

1. A mortgagee is an owner within the meaning of the statute providing for the taking of land under the power of eminent domain; and as such owner he has the right to prosecute an independent appeal from the freeholders' award. *Omaha Bridge & Terminal R. Co. v. Reed*..... 514
2. In proceedings for the condemnation of land under the power of eminent domain, the money awarded by the freeholders, or by the district court on appeal, stands in place of the land and belongs to lienholders to the extent of the value of their liens. *Omaha Bridge & Terminal R. Co. v. Reed* 514
3. On appeal by a mortgagee from an award made by freeholders in a condemnation proceeding, the question to be tried and determined is, the value of appellant's lien on the property appropriated. *Omaha Bridge & Terminal R. Co. v. Reed*..... 514
4. An appeal by a mortgagee in a condemnation proceeding is not effective as to the landowner against whom no summons has been issued. *Omaha Bridge & Terminal R. Co. v. Reed*.. 514
5. If the landowner is not brought into the district court by the mortgagee's appeal, the corporation, at whose instance the condemnation proceeding was initiated, may bring him in, if it is necessary to do so for the protection of its rights. *Omaha Bridge & Terminal R. Co. v. Reed*..... 514
6. A landowner who fails to appeal from the freeholders'

Eminent Domain—*concluded.*

award in a condemnation proceeding, is conclusively bound by it. *Omaha Bridge & Terminal R. Co. v. Reed*..... 514

7. Where a city tortiously appropriates private land to the public use, the owner of the land thus appropriated is not bound to look to the fund contemplated by section 158, chapter 12*a*, Compiled Statutes, for the payment of a judgment rendered in an action brought by him to recover damages for such appropriation of his property. *City of Omaha v. State*..... 29

Equity. See APPEAL AND ERROR, 3, 7. ESTOPPEL, 1. EXECUTIONS, 2, 3. JUDGMENTS, 10, 13. WILLS, 6.

Dismissal.

1. Record examined, and the findings of the trial court sustained, and its judgment, dismissing plaintiff's action for want of equity, approved. *Klabunde v. Byron Reed Co*..... 120

New Trial.

2. In an equitable action for a new trial, evidence offered for the purpose of proving the plaintiff had a substantial and meritorious defense in the prior action was objected to and excluded on the ground of irrelevancy and immateriality, and a ruling of the trial court procured limiting the evidence to the alleged ground of fraud, and the suit was tried upon that theory. *Held*, On appeal to this court from a judgment dismissing the suit, that it is proper to adopt the same theory in determining whether the plaintiff is entitled to a new trial and that, for the purpose of the case, it will be assumed that a valid and meritorious defense existed in his favor in the original action. *Klabunde v. Byron Reed Co*... 126

3. Equity will relieve against a judgment or decree on the ground of fraud, actual or constructive, committed by the successful party, or where, from excusable neglect, a defendant has been prevented from interposing a meritorious defense or establishing grounds entitling him to affirmative relief in such action. *Klabunde v. Byron Reed Co*..... 126

Relief.

4. A defendant in an action is not restricted to the counterclaim provided for in sections 100 and 101 of the code, but, in a proper case, may seek affirmative relief, either against the plaintiff or against codefendants, by cross-petition. *Armstrong v. Mayer*..... 187

5. In such case, the cross-petition gives rise to a cross-suit, auxiliary to and dependent upon the original suit, but for many purposes distinct. *Armstrong v. Mayer*..... 187

6. The basis of the right to bring such a cross-suit is to be found in sections 1 and 429 of the code, and in the considera-

Equity—*concluded.*

tion that in cases where the code is silent, remedies furnished by the old common law or equity practice, not inconsistent with its provisions, may be resorted to in order to prevent failure of justice. *Armstrong v. Mayer*..... 187

7. A cross-petition is maintainable either to aid in the defense of the original suit, where affirmative equitable relief is required to make such defense effective, or to obtain a complete adjudication of the controversies between the original complainant and the cross-complainant over the subject matter of the original suit. *Armstrong v. Mayer*..... 187

8. Under the chancery practice, where the purpose of a cross-bill is defensive merely, it need not be based on equitable grounds nor seek equitable relief; but when its purpose is more than defensive, and it seeks relief affirmatively, its scope must be limited to matters which are cognizable in a court of equity, if not to matters cognizable upon equitable grounds. *Armstrong v. Mayer*..... 187

9. It is also required, under the chancery practice, that the cross-suit be germane to the original suit. The new issues which a defendant may introduce by cross-bill are limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim for relief. *Armstrong v. Mayer*..... 187

10. It seems that the rules of chancery practice are so far enlarged by the code that, although a cross-petition is more than merely defensive and seeks affirmative relief beyond the purposes of defense, such relief need not be equitable, nor need the cross-petition be based on equitable grounds. *Armstrong v. Mayer*..... 187

11. The matters set up in a cross-petition must be germane to the original suit. A cross-petition is not maintainable for purposes of affirmative relief as a cross-suit beyond the requirements of a complete adjudication upon the subject matter of the original suit. *Armstrong v. Mayer*..... 187

Estates. See CURTESY. LIFE ESTATES. TRUSTS.

Estoppel. See EXECUTIONS, 2, 3.

1. The rule that the purchaser of the equity of redemption, who purchases subject to a mortgage, and who deducts from the purchase price sufficient to pay such mortgage, is estopped to defeat the mortgage on the ground of usury, is not applicable when the vendee and the mortgagor, at the time of sale, agree that the incumbrance is tainted with usury, and there is retained out of the purchase price only enough

Estoppel—*concluded.*

to pay the incumbrance, less any usurious penalties. *National Mutual Building & Loan Ass'n v. Retzman*..... 667

2. Evidence examined, and *held* that defendant was not estopped to set up the plea of usury. *National Mutual Building & Loan Ass'n v. Retzman*..... 667

3. Where the record discloses that a defendant has raised the question and insisted in the district court that there was not sufficient evidence to warrant the submission of a material issue to the jury, and the court nevertheless insists on submitting the issue, the defendant is not estopped on appeal to raise the same question here, because he requested and obtained an instruction defining the law relating to the issue as he understands it to be. *Haslam v. Barge*..... 644

4. A plaintiff will not be heard to complain of a defect of parties in a counterclaim, where the record discloses that the omitted party is equally necessary to a determination of his own cause of action. *First Nat. Bank v. Avery Planter Co.* 329

Evidence. See ASSAULT AND BATTERY. CHATTEL MORTGAGES, 4. CRIMINAL LAW, 1-20. ESTOPPEL, 2. INSANE PERSONS, 3. MARRIAGE, 3. PARENT AND CHILD, 1, 2. PAYMENT. QUIETING TITLE. TRIAL.

Admissibility.

1. The word "evidence," in its technical meaning and common acceptation, includes all the means by which any fact in dispute at a judicial trial is established or disproved. *O'Brien v. State*..... 691

2. Ordinarily hearsay testimony is inadmissible. *Donner v. State* 56

3. What the law requires is the production of original evidence, the best evidence obtainable; secondary evidence being admissible only when for some reason primary evidence can not be secured. *Donner v. State*..... 56

4. A witness is not permitted to state what appears from books or records where it is shown that the books were not kept by the witness nor the entries made by him nor in his presence, such statements being merely hearsay testimony. *Donner v. State*..... 56

5. Testimony of a witness for the prosecution in the case at bar, admitted over the objections of the defendant, which is set out in the opinion, examined and *held* to be hearsay testimony and its admission prejudicially erroneous. *Donner v. State*..... 56

6. Where a note is negotiable in form and by its terms payable

Evidence—*concluded.*

on demand, evidence of a contemporaneous oral agreement, destroying its negotiability, and making the time of payment contingent on the happening of an uncertain event, is inadmissible. *Mallory v. Estate of Fitzgerald*..... 312

7. The date of a person's birth may be testified to by members of his family, although they may know of the fact only by hearsay founded on family tradition. *Grand Lodge A. O. U. W. v. Bartes*..... 636

8. A declaration, to be competent evidence as part of the *res gestæ*, must be made at such time, and under such circumstances, as to raise the presumption that it was the unpremeditated and spontaneous explanation of the matter about which made. *Pledger v. Chicago, B. & Q. R. Co*..... 456

9. The admission or exclusion of such evidence rests largely in the discretion of the trial court; such discretion is not an absolute discretion to be exercised arbitrarily but a legal discretion, the abuse of which constitutes reversible error. *Pledger v. Chicago, B. & Q. R. Co*..... 456

10. Upon the face of the record in this case, *held*, that it was not an abuse of discretion to exclude the declarations offered in evidence as part of the *res gestæ*. *Pledger v. Chicago, B. & Q. R. Co*..... 456

Parol.

11. Where the rights of innocent third parties are not involved, it is permissible to show by parol evidence that the contract between the indorser and indorsee of a promissory note was different from that which results by legal implication from a blank indorsement. *Jaster v. Currie*..... 4

Sufficiency.

12. Evidence *held* to sustain trial court's finding that plaintiff is the owner of the note and mortgage in question. *Gilbert v. Garber*..... 419

13. Evidence in an action on a guaranty *held* to justify a peremptory instruction for defendants. *Lemmert v. Guthrie Bros.*..... 499

14. Evidence sufficient to take a question to the jury, will ordinarily support a verdict upon it. *New Orleans Coffee Co. v. Cady*..... 412

15. Evidence *held* to sustain the peremptory instruction for defendant. *Agnew v. Omaha Nat. Bank*..... 654

16. Evidence *held* insufficient to sustain an injunction. *Braasch v. Cemetery Ass'n*..... 300

Executions.

1. When an officer effects a valid levy on personal property consisting of ponderous articles, the fact that he leaves such

Executions—*concluded.*

property on the premises of the debtor, in charge of a custodian, who is in the employ of the debtor and who permits the debtor to use such property, does not constitute an abandonment of the levy as to the debtor and those having notice. *Meyer v. Michaels*..... 138

2. At an execution sale, where the amount of a tax lien, which has not been mentioned or included in the decree, has been deducted from the gross appraised value of property by appraisers, and the purchase is made for less than two-thirds of the gross appraised value, upon the assumption that such taxes are a valid lien, the purchaser, taking advantage of the deduction thereof, will be presumed to have undertaken to pay such taxes, and will not be heard to deny their validity in an equitable proceeding seeking to enjoin their collection. *Equitable Trust Co. v. City of Omaha*..... 342

3. Pleadings in a suit to enjoin the collection of taxes examined, and *held* that the judgment thereon was properly entered. *Equitable Trust Co. v. City of Omaha*..... 342

Executors and Administrators. See CHATTEL MORTGAGES, 6.

Fees. See COUNTIES, 1, 2.

Findings. See APPEAL AND ERROR, 3, 4.

Forcible Entry and Detainer.

1. In an action of forcible detainer, a tenant, by failing to avail himself of the plea of not guilty and by pleading as a defense to the action a verbal agreement to extend his term, waives any objection he might have urged to the sufficiency of the notice to terminate his lease. *Snyder v. Porter*..... 431

2. One who claims that the action taken by his landlord is insufficient to terminate his lease, must pay or tender payment of the rent due or he will be considered as a tenant holding over his term under section 1021 of the code. *Snyder v. Porter* 431

Fraud. See ATTORNEY AND CLIENT, 1. EQUITY, 2, 3. WILLS, 5.

1. If the intention not to perform a promise be shown to have existed at the time the promise was made, the promise is fraudulent. *Pollard v. McKenney*..... 742

2. Where a wife prevails upon her husband, who is fatally ill, to convey certain of his property to her by promising to make a certain disposition thereof among his heirs at law, it will be presumed from her wilful failure to make such disposition that her promise was made without any intention of her performing it, and was therefore fraudulent. *Pollard v. McKenney*..... 742

Fraudulent Conveyances.

1. The open and admitted inclusion of a small claim on behalf of another creditor, in a chattel mortgage given to secure *bona fide* indebtedness, will not, of itself, render such mortgage and possession fraudulent and unlawful as against attaching creditors. *Taylor v. Harle-Haas Drug Co*..... 546
2. The rule that conveyances between husband and wife whereby creditors are delayed in the collection of their debts will be closely scrutinized, does not throw upon the wife the burden of proving the good faith of conveyances to her made by third parties, where it is not made to appear that the husband purchased the property or that his funds were used in payment. *Rice v. Allen*..... 349
3. To a petition in equity alleging fraudulent transfers of property and seeking to reach the fund conveyed, the debtor who transferred them is a necessary party. *First Nat. Bank v. Gibson* 21
4. Such action may be commenced where the debtor resides, and the transferee served with summons at his residence in another county. *First Nat. Bank v. Gibson*..... 21

Guaranty.

1. The failure of the holder of a negotiable note to notify the guarantor of the default of the makers within a reasonable time after default, does not absolutely discharge the guarantor, but only to the extent that he is damaged by the delay. *Lemmert v. Guthrie Bros*..... 499
2. The guarantor's contract is a guaranty of the maker's solvency, and unless there is a different intention expressed in the contract, he is entitled to reasonable notice of the default of the maker. *Lemmert v. Guthrie Bros*..... 499
3. Guthrie Brothers signed the following guaranty upon the back of a note: "For value received, we hereby guarantee payment of the within note, and waive demand and notice of protest on same, when due." The makers failed to pay at maturity, although solvent, and demand was not made upon guarantors until eighteen months after maturity, when makers had become insolvent. *Held*, That guarantors were discharged from liability, and further, that they did not thereby waive notice of the nonpayment of the note by the makers. *Lemmert v. Guthrie Bros*..... 499

Guardian and Ward.

It is not conduct contrary to public policy or fraudulent for a guardian, before applying for a license to sell real estate belonging to his ward, to procure the obligation of an intending purchaser to bid an adequate price at the sale or,

Guardian and Ward—*concluded.*

after the confirmation, to advance and account for the amount of the bid, at the instance and on behalf of the purchaser. *Hyatt v. Anderson*..... 702

Habeas Corpus.

1. On *habeas corpus* the inquiry is confined to matters which are jurisdictional, mere irregularities or errors, however gross, which do not render the procedings a nullity, not being considered. *Keller v. Davis*..... 494
2. Whether the provisions of section 488 of the criminal code, requiring the jury to ascertain and declare in their verdict the value of the property stolen, apply to prosecutions had under section 117 of the criminal code, *quære. Keller v. Davis* 494
3. Where, in an application for a writ of *habeas corpus*, there is a trial to the court, evidence is adduced, and judgment rendered on the merits, before the appellate court will inquire whether the judgment is supported by sufficient evidence, it must appear of record that a motion for a new trial was made and overruled. *Keller v. Davis*..... 494

Homestead. See MORTGAGES, 4.

1. The courts of this state have no jurisdiction to try and determine the validity of homestead entries duly allowed by the officers of the land department of the general government *Tiernan v. Miller & Leith*..... 764
2. A party entering public lands as a homestead is entitled to the possession thereof and can not be enjoined from exercising his right of possession by one who without right held a prior possession. A lease of the land by the homesteader gives the lessee a like right of possession. *Tiernan v. Miller & Leith*..... 764
3. The district court has the power to quiet the title to a homestead in one of the spouses without the concurrence of the other. *Cizek v. Cizek*..... 797
4. After decree of divorce, the husband has no right of possession in the separate property of the wife, occupied as a homestead while the marriage relation subsisted. *Cizek v. Cizek*, 797
5. A wife may claim a homestead in a life estate held by her husband. *Downing v. Hartshorn*..... 364
6. A husband, holding a life estate in property of a former wife, married again and continued to occupy it as a homestead. The property was subject to a mortgage, which he paid, taking an assignment. Afterwards he reassigned the mortgage to the plaintiff, as security for a new debt. His wife did not join in the assignment. *Held*, That this

Homestead—*concluded.*

amounted to an incumbrance of the homestead, and that the mortgage was not enforceable, as against the life estate. *Downing v. Hartshorn*..... 364

Husband and Wife. See FRAUDULENT CONVEYANCES, 2. HOMESTEAD, 3-6.

Indictment and Information. See CRIMINAL LAW, 21-25, 41.

Infants.

Infants have a right to sue by guardian or next friend, to recover damages for injuries done to the person by the tortious acts of another. *Clasen v. Pruhs*..... 278

Injunction. See CUSTODIA LEGIS. EXECUTIONS, 2, 3. HOMESTEAD, 2.

1. A court of equity will enjoin the use of a tract of land for cemetery purposes so situated that the burial of the dead there will injure life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs. *Braasch v. Cemetery Ass'n*..... 300

2. A burial ground near dwellings is not necessarily a nuisance, and the court will only interfere and enjoin its use on clear and convincing proof of probable injury. *Braasch v. Cemetery Ass'n*..... 300

3. A court of equity will not enjoin the further execution of a contract and enjoin the prosecution of any claim for compensation for work and material already furnished in good faith under it, except on condition of the payment of a fair value for the work and material so furnished. *Clark v. County of Lancaster*..... 717

4. Where defendant was proceeding under color of a lawful contract, the institution of an action to enjoin further proceedings under it, and the ordering of a temporary injunction on condition of the furnishing of a bond, which is not given, do not necessarily deprive the subsequent proceedings of defendant under the contract of their good faith and color of lawfulness. *Clark v. County of Lancaster*..... 717

5. If the manufacturer of a compound or preparation according to a secret formula is himself guilty of false or misleading representations in any material respect in connection therewith, or if his trade-mark, label, or advertisements contain distinct false assertions which operate to deceive the public as to its nature, composition or origin, he has no standing in a court of equity, and a suit to enjoin misuse of his trade-mark, trade-name or label is not maintainable. *Newbro v. Undeland*..... 821

6. But mere statements of opinion as to its curative properties

Injunction—*concluded.*

or as to the cause of a disease, concerning which there is a conflict of expert opinion, are not false representations, within the meaning of the rule, even though somewhat sweeping or even extravagant. *Newbro v. Undeland*..... 821

Insane Persons.

1. The legal settlement of an insane person, within the meaning of section 26, chapter 40, Compiled Statutes, is the county which would be primarily liable for the support of such person, if a pauper. *Clay County v. Adams County*.... 106
2. If a person, neither insane nor a pauper, abandons his residence in one county and removes with his family to another, and settles in the latter with the intention of making it his home, and thereafter becomes insane, the latter county can not recover of the former for expenses incurred on behalf of such insane person, unless it appears that he became a public charge, as an insane person, less than thirty days after abandoning his residence in the former county. *Clay County v. Adams County*..... 106
3. The burden of showing that a conveyance was made by an insane person during an interval of lucidity, is upon the party claiming under the instrument. *Gingrich v. Rogers*.. 527
4. The deed of an insane person may be avoided, as against a grantee, for value, without notice of his grantor's insanity. *Gingrich v. Rogers*..... 527
5. Neither the county court, nor a person under guardianship because of insanity, nor the guardian of the latter, nor all together can ratify or confirm a conveyance of lands by the ward made previous to the guardianship but while he was insane. *Gingrich v. Rogers*..... 527

Instructions. See APPEAL AND ERROR, 5. BANKS AND BANKING, 3. CRIMINAL LAW, 26-32. EVIDENCE, 15. PRINCIPAL AND AGENT. TRIAL, 4.

Civil Actions.

1. It is not error to refuse a peremptory instruction for a verdict for plaintiff, where defendant has introduced evidence tending to support a counter-claim set up in the answer. *New Orleans Coffee Co. v. Cady*..... 412
2. The weight and credibility of testimony are to be exclusively determined by the jury; and an instruction that "evidence as to the genuineness of handwriting is generally regarded as of a weak and unsatisfactory character" is erroneous; and it is not less so because of the fact that there is such evidence on both sides of the issue. *Davis v. Lambert*..... 242
3. In order to determine whether a particular paragraph of the

Instructions—*continued.*

charge to the jury is erroneous, it should be read in the light of the whole charge and the entire record. *Pledger v. Chicago, B. & Q. R. Co* 456

4. Conflicting instructions are erroneous, and one which misstates the law upon a vital issue is not cured by another which states the law correctly. *Chicago, R. I. & P. R. Co. v. Sporer* 8

5. The omission to write the word "given" on an instruction, signed by the judge, read by him to the jury and delivered with the other instructions for consideration in the jury box, does not constitute reversible error. *Clasen v. Pruhs*..... 278

6. Instructions as to duties and liabilities of parent to child, *held* not prejudicial. *Clasen v. Pruhs*..... 278

became a member of a beneficial insurance association, *held* proper. *Grand Lodge A. O. U. W. v. Bartes*..... 636

8. Instructions relating to rights and duties of a railway company at a crossing, examined and approved. *Riley v. Missouri P. R. Co*..... 82

9. Instructions relating to transfer of partnership property, *held* not erroneously given. *Ulrich v. McConaughey*..... 773

Criminal Actions.

10. An instruction which informs the jury that the material facts charged in the information must be established by the evidence beyond a reasonable doubt, is unobjectionable, if supplemented by other instructions clearly indicating what facts are material. *Lamb v. State*..... 212

11. The court in effect charged (1) that circumstantial evidence, to warrant conviction, must be of such a character as to exclude every reasonable hypothesis excepting only the one implying defendant's guilt; (2) that every incriminating circumstance which may be considered as evidence of guilt must be proved to a moral certainty or beyond a reasonable doubt. *Held*, To be a correct statement of the law and to include every material feature of the instructions upon that point requested and refused. *Lamb v. State*.... 212

12. Instructions tendered and refused examined and found to contain no correct and pertinent proposition of law, not embraced in the general charge. *Lamb v. State*..... 212

13. There being no evidence tending to prove that defendant was present when the alleged crime was committed, it was not error to refuse to instruct on the assumption that he was present. *Lamb v. State* 212

14. The prohibition contained in section 473 of the criminal

Instructions—*concluded.*

code against referring to, or commenting upon, the failure of an accused person to testify, was intended as a restraint upon the prosecuting attorney and, to some extent, upon the court as well. *Lamb v. State*..... 212

Insurance. See INSTRUCTIONS, 7.

1. A member of a mutual insurance company, who accepts membership subject to such provisions of the constitution as are then in force or may be thereafter adopted, is bound by a reasonable amendment to the constitution subsequently adopted. *Hall v. Western Travelers Accident Ass'n*..... 601

2. Such companies are self-governing bodies, and courts will interfere in case of amendments to their constitution only when the amendment is unfair, operates oppressively or to the disturbance of vested rights; amendments which do not thus operate are not unreasonable. *Hall v. Western Travelers Accident Ass'n*..... 601

3. A change of beneficiaries not made in accordance with the by-laws of a beneficial association is ineffectual. *Counsman v. Modern Woodmen of America*..... 710

4. The policy sued upon provided for suspension of the insurance during the time any premium note remained overdue and unpaid; a loss occurred while plaintiff was in default of payment of his first premium note; the note named the agent as payee, but was owned by insurer. *Held*, That plaintiff's default, unless waived, suspended his insurance. *Hooker v. Continental Ins. Co*..... 754

5. Plaintiff pleaded a contract for an extension of time in which to pay his matured premium note to a date beyond that of the loss, also, a waiver by receipt of payment after notice of plaintiff's loss under the policy. *Held*, That a verdict against the plaintiff is supported by the evidence. *Hooker v. Continental Ins. Co.*..... 754

6. Instructions in action on policy of insurance, *held* to show no error. *Hooker v. Continental Ins. Co*..... 754

7. Evidence in an action on a policy of insurance, *held* sufficient to sustain the verdict of the jury. *Grand Lodge A. O. U. W. v. Bartes*..... 636

Interest.

1. Where a plaintiff has obtained a verdict on which judgment has been entered, and on appeal the supreme court holds that the verdict is excessive and orders a new trial unless plaintiff remit the amount deemed excessive, and plaintiff does enter a remittitur for such excess, he is entitled to interest

Interest—*concluded.*

on the amount of the judgment allowed to stand from the date of the original entry. *Rawlings v. Anheuser-Busch Brewing Co.* 84

2. Where payment is made upon a judgment in excess of the amount of the interest then due thereon, the entire unpaid remainder due on the judgment, including interest, bears interest as provided by law from the date of such payment. *Rawlings v. Anheuser-Busch Brewing Co.* 84

Intervention. See ATTORNEY AND CLIENT, 2. BANKRUPTCY, 2.

Issues. See APPEAL AND ERROR, 6.

Judgments. See APPEAL AND ERROR, 1, 2. INTEREST. RES JUDICATA.

Collateral Attack.

1. The district court being vested with jurisdiction of actions to quiet title, a judgment rendered by it in such an action is exempt from collateral attack, even though the petition upon which it is based fails to show that the plaintiff is entitled to the relief demanded. *Howell v. Ross* 1

2. Presumptions indulged to sustain a record against a collateral attack can only be made to supply the record in matters regarding which it is silent, and can not be permitted to contradict the record in matters in which it speaks for itself. *Cizek v. Cizek* 800

3. Where the court had jurisdiction of the parties and of the subject matter, and such subject matter was brought before it by the pleadings, its decree is not open to collateral attack, although the jurisdiction may have been exercised and the subject matter dealt with erroneously or irregularly. *Cizek v. Cizek* 797

4. In case the pleadings are sufficient to bring the subject matter before the court, the decree may not be attacked collaterally merely for want of findings; such defect goes no further than to render the decree irregular or erroneous. *Cizek v. Cizek* 797

5. In an action on a judgment of a sister state, it is competent for the defendant to show that he was induced by the fraudulent conduct of the plaintiff to come within the jurisdiction of the court rendering the judgment. *Jaster v. Currie* 4

6. Full faith and credit is not denied the judgment of a sister state by permitting the defendant in an action on such judgment to show that jurisdiction of his person was fraudulently obtained. *Jaster v. Currie* 4

7. The rule, requiring each state to give full faith and credit to

Judgments—*concluded.*

the judicial proceedings of every other state, will not shield a judgment of a sister state from attacks that might have been made upon it in the state where it was rendered. *Jaster v. Currie*..... 4

8. A party who has been induced by the fraud of his adversary to go into a jurisdiction other than that of his residence, for the purpose of being there served with process, need not appear specially and move to quash the service. He may entirely ignore the proceeding, without waiving his right to defend against the judgment. *Jaster v. Currie*..... 4

Vacation.

9. Subdivision 4 of section 602 of the code is declaratory of the power of courts of equity under the old practice, and does not authorize the vacation of a judgment, after the term, in the absence of some substantial injury. *Van Every v. Sanders* 509

10. Equity will not interfere with a judgment, on a mere showing of a nominal or technical violation of the plaintiff's rights; substantial injury must be shown. *Van Every v. Sanders* 509

11. The intentional production by a litigant of false testimony to establish a cause of action or defense will, in a proper case, justify the annulment of a decree or judgment which is the product of such testimony. *Miller v. Estate of Miller*..... 441

12. In an action to vacate a judgment on the ground of fraud, the plaintiff must allege sufficient to show that the failure to secure a just decision at the former trial is not attributable to his own fault or negligence. *Miller v. Estate of Miller* 441

13. The revival of a void judgment casts a cloud on the title to defendant's lands, which a court of equity has power to remove. *Rice v. Allen*..... 349

Void.

14. Where a judgment is void for want of jurisdiction over the person of the defendant, the latter may wait until an effort is made to enforce the judgment, before instituting proceedings to have such judgment voided or set aside. *Rice v. Allen* 349

15. Where a judgment, apparently valid upon its face, is void for want of service upon the defendant, and subsequently such judgment becomes dormant, it is not validated by personal service upon the defendant of an order of revivor, to which no appearance is made. *Rice v. Allen*..... 349

Jurisdiction. See ALIMONY. APPEAL AND ERROR, 22. APPEARANCE. ELECTIONS, 2. HOMESTEAD, 1, 3. PLEADING AND PRACTICE, 5, 6. WILLS, 6-9.

1. Jurisdiction of the court in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist. *Cizek v. Cizek*..... 800
2. A probate court is without jurisdiction to try and determine title to real estate. *Best v. Gralapp*..... 815
3. This court has, under the existing law, no jurisdiction of an action brought against the state to enforce specific performance of a contract, or for any other purpose. *State v. Mortensen* 376
4. Jurisdiction of the subject matter is conferred by the law, and can not be conferred by consent of the parties. *Cizek v. Cizek* 800
5. Where a suit in equity is to be regarded as part of the proceedings for settlement of the estate of a deceased person, it must be brought in the county court, which has exclusive original jurisdiction of such matters. *Youngson v. Bond*..... 356
6. Hence a suit by an administrator with the will annexed for construction of the will in order to enable him to administer the estate properly, is not maintainable in the first instance in the district court. *Youngson v. Bond*..... 356
7. It seems that a distinction is to be drawn between such a case and a suit by trustees under a will, after settlement of the estate, to obtain a construction of the provisions of the will relating to their trust, and that in the latter case suit must be brought in the district court. *Youngson v. Bond.* 356
8. Section 16, article 6 of the constitution, does not preclude a county court from construing a will, in a proper case, and determining the effect and meaning of a devise of lands so far as is necessary to give proper directions to an executor or administrator with the will annexed. *Youngson v. Bond*, 356
9. The construction of the will in such a case, is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby. *Youngson v. Bond*..... 356

Jury. See APPEAL AND ERROR, 10. CRIMINAL LAW, 33, 34.

Justice of the Peace. See *Courts.*

1. Extrinsic evidence to show the nature of the case tried before a justice of the peace, upon a motion directed against an alleged change of issues on appeal, should be clear, convincing, and satisfactory, and should be carefully scrutinized. *Inglehart v. Lull* 173

2. A justice of the peace has no authority to accept money in lieu of the bail required by section 298 of the criminal code; and in case he does so, his bondsmen are not liable for his failure to properly account for the same. *Snyder v. Gross* .. 340

Lands. See ADVERSE POSSESSION.

Larceny. See CRIMINAL LAW, 12, 18, 19, 25, 35, 36.

In a prosecution for larceny under the provisions of section 117 of the criminal code, the jury returned a verdict of guilty, but did not include therein a declaration of the value of the property stolen. The sentence pronounced was two years' imprisonment in the penitentiary. *Held*, That as the value of the property did not affect the character of the crime, the defect in the verdict was at most error, and did not deprive the court of jurisdiction to pronounce sentence. *Keller v. Davis* 494

Life Estates. See CURTESY. HOMESTEAD, 5, 6.

1. Where a tenant for life pays off a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce the lien for reimbursement over and above the proportion of the debt which he is bound to contribute. *Downing v. Hartshorn* 364

2. But his right to preserve and enforce the lien exists for the purpose of reimbursement or contribution only; so far as his estate or interest is concerned, in the absence of intervening interests or other special circumstances making such result inequitable, the lien is extinguished, and a subsequent assignment of the whole charge is, in substance, the creation of a new incumbrance thereon. *Downing v. Hartshorn* 364

3. The mortgage or other charge upon the entire estate may be kept alive as to the individual estate or interest of the person paying it off, by taking an assignment. *Downing v. Hartshorn* 364

4. If in such case, however, the preservation of the lien as to such estate or interest would operate fraudulently or inequitably, it will not be permitted, and the lien will be deemed extinguished so far as it covered and to the proportion chargeable upon the individual estate or interest of the person paying it off. *Downing v. Hartshorn* 364

Life Estates—*concluded.*

5. The rule that a tenant for life who buys in an outstanding incumbrance is regarded as holding it for the benefit of the reversioner as well as for his own benefit, means only that he will not be permitted to acquire an adverse title by or through such purchase or otherwise cut out the reversioner's right of contribution without affording the latter an opportunity to redeem. It will not operate to prevent assignment of the incumbrance to a third person and a foreclosure suit by the latter to require the reversioner to redeem to the extent of his proportion and to subject the property to satisfaction of the incumbrance in default thereof. *Downing v. Hartshorn*..... 364

Limitation of Actions. See ATTACHMENT, 1. SUBROGATION, 1. WATERS.

1. The statute of limitations respecting actions for the recovery of real property, as construed by this court, is not open to the objection that it operates to deprive the owner of his property without due process of law. *Linton v. Heye*..... 450

2. Such statute runs against married women during coverture, whether residents or nonresidents of this state. *Linton v. Heye*..... 450

Mandamus. See SCHOOLS AND SCHOOL DISTRICTS, 4.

1. The district court should proceed in a case as directed by the mandate of this court. In an action to foreclose a mortgage, the mandate directed the district court to enter a decree in favor of the plaintiff for the amount due on the mortgage. On the case being remanded, certain parties claiming to have acquired an interest in the mortgaged premises pending the appeal were allowed to intervene in the case, and the court refused to enter a decree in favor of the plaintiff, as directed by the mandate, until the rights of the interveners had been heard and determined. *Held*, That the plaintiff was entitled to a mandamus, commanding the district court to proceed in the case as required by the mandate of this court. *State v. Thompson*..... 157

2. The courts will not by means of the writ of mandamus compel municipal or public corporations to perform specifically their ordinary business contracts. *State v. Mortensen*, 376

Marriage.

1. Where upon an agreement of marriage the parties expressly agree that the ceremony shall be celebrated in accordance with the rules and customs of a particular religion and church, such rules and customs become a part of the contract and binding upon the parties. *Wanecek v. Kratky*.... 770

Marriage—*concluded.*

2. Where one of the parties to a marriage contract fails to perform his agreement at the time fixed for the ceremony, no reasonable excuse existing for such failure, the other party may rescind the contract and maintain an action for damages. *Wanecek v. Kratky*..... 770

3. Evidence examined, and *held* not to establish a written contract of marriage. *Haslam v. Barge*..... 644

Mortgages. See CONSTITUTIONAL LAW. HOMESTEAD, 6. LIFE ESTATES. NEW TRIAL, 5. SUBROGATION, 3.

1. A foreclosure sale of real property, whether the purchaser is the mortgagee or a stranger to the action, is not a cancelation or extinguishment of the mortgage debt, so long as the mortgagor, by resisting confirmation or prosecuting appellate proceedings, prevents the mortgagee from obtaining actual payment either in land or money. *Salisbury v. Murphy* 2

2. Pleading and proof that acknowledgment of a mortgage upon a family homestead taken by an officer and stockholder in a loan company which was agent for the loaner, *held* not to invalidate the acknowledgment. *Gilbert v. Garber*... 419

3. Similar pleading and proof *held* not to show incapacity of such an officer and stockholder to act as witness of the mortgage. *Gilbert v. Garber*..... 419

4. A mortgagee of a farm which is resided upon by the mortgagor and embraces his homestead exemptions, is entitled to a receivership to take charge of that portion of the premises not embraced in the homestead exemptions. *Sanford v. Anderson*..... 249

5. A petition for the foreclosure of a trust deed given by a guarantor alleged that the plaintiff recovered a judgment at law against the principal, and that an execution issued thereon has been returned unsatisfied. *Held*, That such allegation does not relieve the plaintiff from conforming to the requirements of section 850 of the code, requiring a petition for foreclosure to state whether any procedings at law have been had for the recovery of the debt secured by the instrument sought to be foreclosed. *Michigan Trust Co. v. City of Red Cloud*..... 585

6. An appraisement of real estate for the purposes of a judicial sale, can not be successfully assailed on the ground that the appraisers were mistaken in their valuation of the property. *Green v. Doerwald* 698

7. Where on an appeal from an order of confirmation of sale of real estate made in pursuance of a decree in foreclosure

Mortgages—*concluded.*

proceedings, certain sections of the code providing for the appraisal of real property sold under judicial proceedings are challenged as unconstitutional and it appears that the determination of the question can avail the appellants nothing, the validity of the sections thus challenged will neither be investigated nor determined. *Green v. Doerwald*, 698

8. One acting in good faith and without negligence, and for a valuable consideration, may safely deal with an apparently and actually unincumbered title, the subject of which is not in adverse possession. *Boggs v. McEwen*..... 705

Municipal Corporations. See CONSTITUTIONAL LAW, 6-9. COSTS. EMINENT DOMAIN, 7. TELEGRAPHS AND TELEPHONES.

1. Section 14, chapter 45, Compiled Statutes, authorizes any precinct, township, city of the second class, or village "to issue bonds in aid of works of internal improvements, improving streets in cities of the second class and villages, highways," etc. *Held*, That the phrase, beginning with the word "improving," is a limitation of the preceding language, and limits the authority to issue bonds to such as are issued in aid of the works specifically enumerated in such phrase. *State v. Weston* 695

2. The provisions of section 158, chapter 12*a*, Compiled Statutes, 1901, relative to the assessment of damages against abutting and adjacent lands, for lands appropriated by a city in the exercise of the right of eminent domain, does not contemplate the creation of a fund thereby to pay the owners of lands appropriated, but provides a means whereby the city may reimburse itself, in whole or in part, for payment made to such owners. *City of Omaha v. State*..... 29

3. The "special fund" referred to in section 7 of said chapter has no reference to the assessment levied in pursuance of said section 158, but refers to a levy made for the payment of a specific judgment in pursuance of section 2, article VI, chapter 77, Compiled Statutes. *City of Omaha v. State*..... 29

4. The levy of the assessment contemplated by said section 158 imposes no personal liability upon the owner of the land against which it is assessed. *City of Omaha v. State*..... 29

5. Under the statutes in force in the year 1898, no special tax could be assessed upon and made a charge against specific real estate in a city of the first class, to pay for the construction of a wooden sidewalk without the adoption of a resolution fixing the cost of such construction, as a special assessment thereon, at a meeting of the city council of which, at least, ten days' notice had been given before holding the same, or personal service of notice thereof on the persons

Municipal Corporations—*concluded.*
owning or occupying the property to be assessed. *Trephagen v. City of South Omaha*..... 577

6. At that time, cities of the first class had no power to levy a special tax on specific lots, for the purpose of paying the cost of removing garbage therefrom. *Trephagen v. City of South Omaha* 577

7. The liability of a city, for injuries resulting from defective streets or sidewalks, rests exclusively upon express or implied provisions of the statute, and it is competent for the legislature to limit such liability or remove it entirely. *Goddard v. City of Lincoln* 594

8. Section 110, article 1, chapter 13, Compiled Statutes, provides, that cities of the first class shall not be liable for such injuries, unless notice in writing, of the defect causing the injury, shall have been filed with the city clerk, at least five days before the injury occurred. In an action to recover of a city for such injury, *held*, that a petition failing to allege the filing of such notice with the clerk, as required by said section, is fatally defective. *Goddard v. City of Lincoln* 594

9. Where a duty is imposed by the legislature, that body may qualify and limit it, and one complaining of an omission to discharge such duty will not be heard to complain of the qualifications and limitations accompanying it. *Goddard v. City of Lincoln* 594

Negligence.

1. If a passenger on a steam railroad extends his person through the window of the car of a rapidly moving train in which he is riding, he is chargeable with such gross negligence as will prevent a recovery of damages for an injury to which such act on his part contributes. *Union P. R. Co. v. Roeser*..... 62

2. The doctrine of comparative negligence is not recognized in this state. *Riley v. Missouri P. R. Co*..... 82

Negotiable Instruments. See BILLS AND NOTES.

New Trial. See APPEAL AND ERROR, 23. EQUITY, 2, 3.

1. A sound discretion is reposed in the trial court in refusing a new trial on the ground of newly discovered evidence which is cumulative in its character. *Riley v. Missouri P. R. Co.* 82

2. An application for a new trial on the ground of surprise and newly discovered evidence is addressed to the sound discretion of the trial court; and its ruling thereon will not

New Trial—*concluded.*

be disturbed, unless there is an abuse of discretion shown. *Grand Lodge A. O. U. W. v. Bartes*..... 636

3. Before the defendant is entitled to a new trial on the ground of newly discovered evidence, it must appear that due diligence was exercised to procure such evidence upon the original trial, and that it is through no fault or neglect of the party making the application that such evidence was not then produced. *Grand Lodge A. O. U. W. v. Bartes*..... 636

4. The ruling of the trial court on the application for a new trial, on the ground of surprise and newly discovered evidence, *held* to be without prejudicial error. *Grand Lodge A. O. U. W. v. Bartes*..... 636

5. The pendency of a motion for a new trial, in an action where a decree has been rendered directing the sale of real estate in foreclosure proceedings, will not of itself operate as a supersedeas or stay the issuance of an order of sale in pursuance of the terms of the decree. *Walker v. Fitzgerald*, 52

Notice. See MUNICIPAL CORPORATIONS, 5, 8. RECEIVERS, 3, 4.

Serving notice of a motion to have the record corrected, and of the hearing thereof in the district court, on the attorney of the defendant who was prosecuting the error proceedings, *held* sufficient. *Reno v. State*..... 391

Nuisance. See INJUNCTION, 1, 2.

Officers.

1. The legislature intended that the secretary of state should retain for his services, as a member of the brand and mark committee, twenty per cent. of all the fees received for recording brands and marks. *State v. Porter*..... 203

2. Money received by the secretary of state for recording brands and marks, under the provisions of the act of 1899, was not received by virtue of his office, but under color of his office. *State v. Porter*..... 203

3. The sureties on official bonds do not undertake to answer for acts done by their principal under color of his office, but only for acts done by virtue of his office. *State v. Porter*... 203

4. The state has no legal title to any part of the fees received by the secretary of state for recording brands and marks under the provisions of the act of 1899; but that officer having, in collecting such fees, assumed to act in an official capacity, the law does not permit him, when called to account by the state, to deny that he so acted. *State v. Porter*, 203

5. Official misconduct is not established by showing that trust funds have been used by a public officer for the very purpose the legislature and the owners of the funds intended they should be used. *State v. Porter*..... 203

Parent and Child. See ASSAULT AND BATTERY.

1. Where it is averred that the parent had necessary means to provide food and clothing for a child and failed to do so, such allegation not being admitted, it is proper to admit proof of the financial ability of the parent to so provide, when such evidence is restricted by instruction to this purpose alone. *Clasen v. Pruhs*..... 278
2. Evidence of inhuman treatment of child *held* sufficient to sustain the verdict. *Clasen v. Pruhs*..... 278
3. A parent may recover for the loss of expected services of children, not only during minority but afterwards, on evidence justifying a reasonable expectation of pecuniary benefit therefrom. *Draper v. Tucker*..... 434
4. A verdict for only $10, for the pecuniary loss sustained by reason of the death of a minor child three years and four months old, is inadequate in amount. *Draper v. Tucker*.... 434

Partnership.

1. A partner who, without notice to or knowledge of his copartner, takes substantially all of the ready money of the firm and absconds, has no standing in equity to demand an accounting after his copartner has wound up the business and paid the partnership debts. *Hart v. Dietrich*..... 685
2. Where a chattel mortgage is signed by one member of the firm, without authority and without the knowledge or consent of his partner or the mortgagee, and delivered to a third party to be delivered to the mortgagee, and the mortgagee upon learning of such mortgage takes time to decide whether to accept and does not accept it until after a dissolution of the firm and until after he had notice of such dissolution, such mortgage is not binding on the partner not joining therein. *Meyer v. Michaels*..... 138
3. Where one partner of a firm conveys or assigns partnership property, and such assignment is concurred in by the other member of the firm, the assignee will have a right to the property assigned superior to one whose claim is based upon a subsequent assignment from one member of the partnership. *Ulrich v. McConaughey*..... 773

Payment.

Evidence *held* to sustain the trial court's finding, as to an alleged payment through execution of a new note and mortgage. *Gilbert v. Garber*..... 419

Pleading and Practice. See APPEAL AND ERROR. BANKRUPTCY, 2, 3. EQUITY. JUDGMENTS, 12. TRIAL.

Appeal and Error.

1. When it does not clearly appear on the face of the petition that the contract declared on is void because of illegality, it

Pleading and Practice—*continued.*

is error to sustain an objection to the introduction of plaintiff's evidence on that ground. *Horton v. Rohlff*..... 95

2. The question of a defect of parties and of the legal capacity of the plaintiff to maintain an action can not be successfully urged for the first time in this court. *Taylor v. Weckerly*.. 739

3. Evidence in an action on a bond *held* sufficient to sustain the finding of the trial court. *Taylor v. Weckerly*..... 739

Demurrer.

4. A general demurrer admits the truth of all material facts well pleaded, but does not admit conclusions of law. *State v. Porter*..... 203

Jurisdiction.

5. When the lack of jurisdiction does not appear on the face of the record, but must be established by evidence *aliunde*, one may plead to the jurisdiction, or unite a plea to the jurisdiction with other defenses to the action, without waiving his right to insist on a lack of jurisdiction. *Linton v. Heye*.... 450

6. The preceding rule is limited to cases where the plea to the jurisdiction stands alone, or is united with such defenses as go to defeat a recovery by the plaintiff, and does not extend to cases where such plea is joined with a cross-petition or counterclaim, which necessitates a trial on the merits of the issues tendered by the plaintiff's petition. *Linton v. Heye*.. 450

Petition.

7. A petition in which it is alleged that the plaintiffs are the owners of and have a legal title to certain real estate, describing it, that defendant by his wrongful acts has cast a cloud on their title, and which contains a prayer for general equitable relief, states a cause of action and will resist a general demurrer. *Andersen v. Andersen*..... 565

8. If such petition contains other allegations and demands constituting a cause or causes of action over which the court has no jurisdiction, such matters will not render it vulnerable to a demurrer but should be treated as surplusage. *Andersen v. Andersen*..... 565

9. A petition for relief against a judgment, which goes no further than to allege the rendition thereof, without stating its nature or setting forth facts showing that it operates or might operate to the prejudice of the plaintiff in some substantial particular, does not state a cause of action. *Van Every v. Sanders*..... 509

10. In an action by an administrator for damages for causing the death of his intestate, it is proper to allege such facts

Pleading and Practice—*continued.*

as will show a pecuniary loss to the next of kin. *Union P. R. Co. v. Roeser*..... 62

11. In such action the petition is not demurrable because it alleges a contract to support the next of kin made by the deceased in his lifetime, without alleging that the estate of the deceased is insufficient for that purpose. *Union P. R. Co. v. Roeser*..... 62

12. An allegation of possession under a chattel mortgage, by agreement with the mortgagor, renders unnecessary any allegation of demand of payment of demand notes secured by the mortgage, in order to show the mortgagee's right of possession. *Taylor v. Harle-Haas Drug Co*..... 546

13. In an action on a bond, executed after judgment and pending the transfer of the cause to this court by proceedings in error, conditioned that the obligors "shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal," a petition, which merely alleges that the original judgment of the lower court was affirmed and is unpaid, fails to state a breach of the bond. *German Nat. Bank v. Beatrice Rapid Transit & Power Co*..... 115

14. Where the petition does not disclose the illegality of a contract, it is necessary to plead and prove it as a defense. *Horton v. Rohlff*..... 95

Reply.

15. It is not error to strike from a reply matter setting out a new cause of action, held by plaintiff against the defendant, different from and in addition to the one contained in the petition, even though such matter might constitute a valid and proper counterclaim as against the counterclaim in the answer, provided the latter had been pleaded as the foundation of an original action. *Snyder v. Johnson*..... 266

Verification.

16. A verification of a pleading need not be in the exact words of the statute; it is sufficient if the substance of the statutory requirements is fairly set forth. *Abbott v. Campbell*.. 371

17. A verification by an attorney, in an action upon an instrument for the payment of money only, is not defective because it fails to state expressly that the instrument sued on is in writing. *Abbott v. Campbell*..... 371

Warranty.

18. Where the warranty of property sold is indorsed as a condition upon the notes given for it, and plaintiff brings suit on the notes and sets forth the condition in his petition, without objection, explanation or request for reformation,

Pleading and Practice—*concluded.*

it is not error to strike from his reply matter impeaching the original consideration for the condition, when the reply states that the indorsement was a condition for signing the notes. *Snyder v. Johnson*..... 266

19. Although it appears from defendant's answer that the warranty, on which he bases his counter-claim, was made upon property sold to him jointly with another, where he had given his separate notes for his part and alleges that they were in consideration of a personal warranty to himself of the property, it is for other party to negative this, if he can, and show that there was no separate personal warranty to the defendant, and that such agreement which might have been made was a general one in favor of both vendees. *Snyder v. Johnson*..... 266

Police Power. See CONSTITUTIONAL LAW, 6-9.

Presumptions. See APPEAL AND ERROR, 3. JUDGMENTS, 2.

Principal and Agent.

1. It is not error to submit to a jury the question of the extent of a selling agent's authority to accept payment in something besides money, where there is evidence of statements by the principal's general manager tending to show such authority. *New Orleans Coffee Co. v. Cady*..... 412

2. It is error to submit to a jury the question as to whether goods were purchased from one H., as principal, or from him as agent of plaintiff, where the evidence points only to the latter conclusion. *New Orleans Coffee Co. v. Cady*..... 412

Principal and Surety. See BONDS. OFFICERS, 3.

Process.

If a party has been fraudulently brought within the jurisdiction of a court for the purpose of serving process upon him, the service is not lawful, even though he might, by exercising diligence, have gotten out of the jurisdiction after the fraud ceased to be operative and before the process was served. *Jaster v. Currie*..... 4

Quieting Title. See PLEADING AND PRACTICE, 7, 8.

Evidence examined, and found sufficient to sustain the decree entered in the trial court quieting title to the real estate in controversy in the plaintiff, appellee in this court. *Best v. Gralapp*..... 815

Railroads. See CARRIERS. INSTRUCTIONS, 8. TAXATION. TRIAL, 7.

It is the duty of a railway company in constructing its crossings over a highway to take all reasonable precautions to lessen the danger to the public in crossing its road. *Chicago, R. I. & P. R. Co. v. Sporer*..... 8

Rape.

1. Sections 11 and 12 of the criminal code describe three classes of crimes, each of which is totally distinct from the other two. The second clause of section 12 makes it unlawful for a man to have sexual intercourse with a female child, with her consent, whether she is or is not his daughter or sister. *Edwards v. State*..... 386
2. In the prosecution for an assault upon the person of a girl under the statutory age of consent, with intent to commit a rape, it is not necessary to allege or prove that the acts were done against her will. Whether she consented or resisted is immaterial. *Liebscher v. State*..... 395

Receivers. See MORTGAGES, 4.

1. The statute does not authorize the appointment of a receiver at the instance of a holder of a certificate of tax sale of real estate sold for delinquent taxes, who has obtained a decree directing the sale of the property to satisfy his lien on the ground that the property is insufficient in value to satisfy the lien for delinquent taxes on which such decree is based. *Walker v. Fitzgerald*..... 52
2. The order of a district court appointing a receiver, is not subject to collateral attack, because such order was made in a law action, or because the petition fails to disclose all the facts usually required in a petition for that purpose. *Murphy v. Fidelity Mutual Fire Ins. Co*..... 489
3. On an application for the appointment of a receiver, the five days' notice required by statute may be waived by the parties entitled thereto. *Murphy v. Fidelity Mutual Fire Ins. Co*... 489
4. Where the application is made in a suit then pending, notice may be served on the attorney of record representing the party against whom the application is made, and such attorney may waive the time required by statute and authorize the court to proceed to an immediate hearing of the application. *Murphy v. Fidelity Mutual Fire Ins. Co*..... 489

Record. See APPEAL AND ERROR, 25. CRIMINAL LAW, 37, 38. NOTICE.

Replevin. See BANKS AND BANKING, 4-6. PLEADING AND PRACTICE, 12.

1. In an action of replevin, where one of the parties claims the property by virtue of a levy thereon by him as an officer, it is not error to direct the jury, in case they find for him, to find the fair, reasonable and market value of such property. *Meyer v. Michaels*..... 138
2. If the plaintiff in replevin to whom the property has been delivered may, under any circumstances, show that, subsequent to the delivery, the property has been taken from him

Replevin—*concluded.*

under an execution against the defendant in the action, he can not do so without at the same time abandoning any claim of his own to the property and consenting that it may be applied in satisfaction of the judgment on which the execution against the defendant issued. *Meyer v. Michaels*... 138

Res Judicata.

1. After a final decree entirely dismissing plaintiff out of an action, a second decree in favor of a cross-petitioner was entered in the same action at the following term of court, before appeal from the first decree. *Held*, That second decree, taken while plaintiff was entirely excluded from participation in the action, was of no validity as against plaintiff after reversal of the decree against her. *Gilbert v. Garber*.. 419
2. A final order or decree is conclusive as evidence in a subsequent action between the same parties or their privies, upon the matters therein adjudicated. *Agnew v. Omaha Nat. Bank*..... 654
3. To constitute an order or decree final, and conclusive as evidence in a subsequent action, it must have been a complete disposition of the main thing or matter in controversy, leaving nothing for the further determination of the court. *Agnew v. Omaha Nat. Bank*..... 654
4. When a suit is dismissed as to one of two or more defendants without prejudice, such defendant ceases to be a party to the record, and the effect of the dismissal is to leave such defendant in the same position as if he had never been a party to the action. *Agnew v. Omaha Nat. Bank*..... 654
5. If, before such order of dismissal, there has been a decision or decree upon one of several issues made by the pleadings, but such decision does not fix or determine the liability of the defendant who is subsequently dismissed, such preliminary decree does not estop the defendant dismissed from litigating in a subsequent action the same issue. *Agnew v. Omaha Nat. Bank*..... 654
6. A preliminary decree was entered finding that a partnership existed, reserving the case for supplemental proceedings and an accounting. Before final decree, one of the defendants was dismissed out of the case, without prejudice. *Held*, That in a subsequent action between plaintiff and the defendant dismissed, the latter was not concluded by the preliminary decree finding the existence of a partnership. *Agnew v. Omaha Nat. Bank*..... 654

Sales.

Where a warranty, accompanying a sale of property, was indorsed as a memorandum on each of two notes given for

Sales—*concluded.*

the property, and on the first was added to the warranty that a breach should avoid the note, but on the second no such condition was added, the fact of the condition being on only the first note does not, of itself, limit the liability on the warranty to avoidance of that note. *Snyder v. Johnson* 266

Schools and School Districts.

1. Chapter 63 of the laws of 1901, commonly known as the adjunct school district act, provides no method for submitting the question of creating an adjunct district a second time, and no officer or person is thereby granted authority to submit the question or give notice thereof. *State v. County Commissioners* 100
2. To create an adjunct school district, it requires the concerted action of all of the common school districts embraced therein. And the question must be submitted to, and voted on, by all of such districts. *State v. County Commissioners*.... 100
3. Where the question was submitted to only a part of such school districts, and in many of the districts embraced in the proposed adjunct district no vote was taken on the proposition, the election is void and no adjunct district is created thereby. *State v. County Commissioners*..... 100
4. In such a case, a writ of mandamus to compel the county board to levy a tax to carry on the business of an adjunct school district must be denied. *State v. County Commissioners* 100
5. Section 2, subdivision 7, chapter 79, Compiled Statutes, provides the minimum and not the maximum salary to be paid county superintendents in the various classes therein enumerated. *Chase County v. Kelly*..... 426
6. In counties of less than 2,000 school population, the number of days which a county superintendent may be employed in the discharge of his office is left to the sound discretion of the superintendent himself. *Chase County v. Kelly*..... 426

Specific Performance. See ACTION.

1. A suit in the district court to enforce the specific performance of a parol agreement to devise real property and to quiet title in the plaintiff, as against those claiming under a will duly allowed and admitted to probate in the county court, is not a collateral attack on the judgment admitting such will to probate. *Best v. Gralapp*..... 815
2. A covenant in an unrecorded lease for the term of five years at an annual rental payable annually, to the effect that the lessee shall on the 15th day of June in each year execute to

Specific Performance—*concluded.*

the lessor a chattel mortgage on the growing crops, to secure the payment of the rent for that year, will be specifically enforced against the lessee and those claiming title to the crops, acquired after the commencement of the suit to establish the lien of the landlord and to sell the property as upon foreclosure. *Ryan v. Donley*..... 623

3. An agreement to execute, after they are growing, a mortgage upon crops, may be enforced specifically in equity if sufficiently definite in its terms and clearly established, and the situation of the parties and property is such that justice and equity call for such a remedy. *Sporer v. McDermott*..... 533

States. See ACTION.

Statute of Frauds.

1. Part performance of such a character that the court can not restore the promisee to the situation in which he was when the agreement was made or compensate him in damages, is sufficient to take the case out of the statute of frauds. *Best v. Gralapp*..... 811

2. An unwritten contract, which by its terms is not to be performed within a year from the making thereof, is not taken out of the statute by an oral acknowledgment made within a year from date of performance. *Haslam v. Barge*..... 644

Statutes. See ALIMONY. APPEAL AND ERROR, 19. BANKS AND BANKING, 1. BENEFICIAL ASSOCIATIONS. CHATTEL MORTGAGES, 5. CONSTITUTIONAL LAW. CONTRACTS, 6. CORPORATIONS, 4.

1. An immaterial change in the title of a legislative bill, whenever made, is without legal effect. *Union P. R. Co. v. Sprague*..... 48

2. If the valid and invalid parts of a statute are severable and it is apparent that the latter was not an inducement to the adoption of the former, the law will be upheld and enforced to the extent that it is in harmony with the constitution. *Union P. R. Co. v. Sprague*..... 48

Stipulations.

A stipulation in an action that the property which is the subject of the controversy shall be sold and the proceeds deposited with the clerk to be paid out when the court shall have made an order that one or the other party is entitled to them, is not effectual as a release of errors and a waiver of the right of review in this court. An intent by the parties to bar themselves from the right of access to the courts must be manifested by express words or by the strongest implication. *Ryan v. Donley*..... 623

Subrogation.

1. Where the circumstances of the advancement of money to pay a prior mortgage are such as to entitle the loaner to a subrogation, and are such as to give him no legal right aside from such subrogation, the statute of limitations does not run against his claim for such subrogation and the enforcement of the prior mortgage until ten years from the latter's maturity. *Boevink v. Christiaanse*..... 256
2. While ordinarily the original creditor is a necessary party to any suit for subrogation to his rights, where he has satisfied his claim by a formal instrument, duly recorded, and sufficient for that purpose, he is not a necessary party. *Boevink v. Christiaanse*..... 256
3. One who has advanced money to pay a valid mortgage against the property of a decedent, at the request of his executrix, and upon the county judge's assurance that she was authorized to execute a mortgage for that purpose, and has taken her note and mortgage upon the same property, is, upon its subsequently appearing that she had no authority and that the mortgage given by her is void, entitled to subrogation to the rights of the original mortgagee to the extent that his money has gone to discharge that mortgage. *Boevink v. Christiaanse*..... 256

Sunday.

Playing at the game of baseball in this state on Sunday is forbidden by the statute. *State v. O'Rourk*, 35 Neb. 614, reaffirmed. *Seay v. Shrader*..... 245

Taxation. See CONSTITUTIONAL LAW, 9, 18. CORPORATIONS, 8-10. RECEIVERS.

Local taxing officers of the several counties can not enforce collection of taxes on the unused roadbed of a railroad company by distress warrant. *Chicago, B. & Q. R. Co. v. County of Custer*..... 429

Telegraphs and Telephones.

1. A village may impose a reasonable occupation tax upon telegraph companies, doing business within the village, which have complied with the telegraph law adopted by congress in 1866. *Western Union Telegraph Co. v. Village of Wakefield*..... 272
2. Such tax should be so restricted as to not include any interstate business or business of the government of the United States transacted by such company. *Western Union Telegraph Co. v. Village of Wakefield*..... 272

Trade-Marks. See INJUNCTION, 5, 6.

Trespass. See ATTACHMENT.

Trial. See APPEAL AND ERROR. ASSAULT AND BATTERY, 3. CRIMINAL LAW. EVIDENCE. INSTRUCTIONS. PLEADING AND PRACTICE.

Evidence.

1. Conflicting evidence is for the jury, and when there is a conflict of evidence upon a material issue it is error to direct a verdict for either party. *Chicago, R. I. & P. R. Co. v. Sporer* 8

2. Evidence may be said to be conflicting when there is substantial evidence upon either side of the controversy. A fact may be so conclusively established that slight evidence, suspicious and uncertain, will not be allowed to overthrow it. *Chicago, R. I. & P. R. Co. v. Sporer*..... 8

Demurrer.

3. The overruling of a demurrer does not prevent a finding, after the evidence has been taken, that there is no cause of action. *Sporer v. McDermott*..... 533

Instructions.

4. When the trial court gives an accurate, pertinent and intelligible instruction covering a particular point, it is not bound, at counsel's request, to give another instruction expressing the same idea in more perspicuous phrase. *O'Brien v. State*..... 691

Open and Close, Right to.

5. In the trial of a case the party first required to produce evidence is entitled to open and close the argument. *Zweibel v. Myers*..... 294

Order of Proof.

6. Before the acts and declarations of a conspirator are entitled to be considered as evidence against his associates, the conspiracy itself must be established, but the order of proof is a matter within the discretion of the trial court. *O'Brien v. State*..... 691

Question for Jury.

7. In this case it was for the jury to determine the rate of speed at which defendant's train was running at the time of the accident, and whether, under the conditions obtaining at the crossing, the company was negligent in running its train at such rate of speed. *Chicago, R. I. & P. R. Co. v. Sporer*..... 8

8. The existence of negligence should be proven to and passed upon by the jury as any other fact. *Riley v. Missouri P. R. Co*..... 82

Verdict.

9. A verdict rendered in plain disregard of the instructions, is contrary to law, and will, ordinarily, be set aside without

Trial—*concluded.*

an examination of the instructions to determine whether correct or not. *Haslam v. Barge*..... 644

10. The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it. *Chicago, R. I. & P. R. Co. v. Sporer*..... 8

11. In an action on a note, where evidence of an oral agreement destroying its negotiability is received over objection, the court may disregard it in determining whether a verdict should be directed against the party offering it. *Mallory v. Estate of Fitzgerald*..... 312

Trusts. See WILLS.

1. Plaintiffs and their father sold, for $40,000, real property in which he held a life estate and they the remainder. Plaintiffs received $24,000 and the father retained $16,000, and mingled it with his own property. The father lived nine years after the sale, his age not being shown in the record. *Held*, That these facts do not show plaintiff's ownership of the $16,000 retained and used by the father. *Held*, further, That the father's declaration of an intention to invest the same for the plaintiffs did not create a title thereto in them. *Withnell v. Withnell*..... 605

2. Record and evidence examined, and *held* not to show error. *Held*, further, That the trial court was justified in rejectin plaintiff's claim of equitable title to the property involved in the action. *Withnell v. Withnell*..... 605

3. An express trust in land does not arise and can not be created by parol; *aliter*, resulting and constructive trusts. *Pollard v. McKenney*..... 742

4. Where a person obtains the legal title to real estate belonging to another by means of fraud, actual or constructive, a court of equity will fasten a constructive trust upon the property, and convert the grantee or those claiming under him, by descent, into trustees of the legal title, and enforce the trust for the benefit of the grantor or those claiming under him. *Pollard v. McKenney*..... 742

5. A decree establishing a constructive trust should not be limited to a cancelation of the conveyance whereby the constructive trustee acquired title to the land; the trust should be ascertained and enforced. *Pollard v. McKenney*..... 753

Undertakings. See BONDS.

Usury. See ESTOPPEL, 1, 2.

Vendor and Purchaser. See EASEMENTS, 3, 4.

Waiver. See APPEAL AND ERROR, 20.

Warranty. See PLEADING AND PRACTICE, 19. SALES.

Waters.

A lower riparian owner obtains no right to receive the water of a stream, as against an upper owner, by user for the statutory period of prescription. *Dunn v. Thomas*..... 683

Wills. See JURISDICTION, 5-9. SPECIFIC PERFORMANCE, 1.

1. An agreement to devise land, upon sufficient consideration, may be enforced specifically in a proper case. *Best v. Gralapp* 811
2. It is sufficient if the agreement is that the promisee shall receive the property, or that it shall be left him at the decease of the promisor. There need not be an express promise to make a will. *Best v. Gralapp*..... 811
3. Equity will impress a trust upon the property in such cases, which will follow it into the hands of personal representatives or devisees of the promisor. *Best v. Gralapp*..... 811
4. An agreement to leave property by will is not ambulatory or revocable after performance on the part of the promisee. *Best v. Gralapp*..... 811
5. Where the fraud relied upon, for the vacation of a decree admitting a will to probate, is of such a character that it would have been available to defeat the probate of the will, an allegation that the plaintiff had no actual notice of the proceedings, is not sufficient to excuse his failure to contest the will, where it appears that notice of the proceedings was given according to law, and he had notice of facts sufficient to put him upon inquiry. *Miller v. Estate of Miller*... 441
6. Where no trust is created, neither the executor, nor the heirs or devisees, who claim only a legal title in the estate, will be permitted to come into a court of equity for the purpose of obtaining a judicial construction of the provisions of a will. Where only purely legal titles are involved, equity will not assume jurisdiction to declare such legal titles, but will remit the parties to their remedies at law. *Andersen v. Andersen*..... 565
7. The district court has no original jurisdiction in an action to contest a will, or set aside the probate of the same. *Andersen v. Andersen*..... 565
8. The county court has original jurisdiction in the probate of a will and its order admitting it to probate is conclusive, unless, by a direct proceeding by appeal or otherwise, it is reversed. *Andersen v. Andersen*..... 565
9. The county court has jurisdiction to construe wills for the

Wills—*concluded.*

purposes of the administration and settlement of estates. But the construction of a will, in such a case, is for the information and benefit of the executor or administrator only, in order to advise him what course to pursue. It will protect him from any charge of maladministration of the estate, but it adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants, under the devise, will not be affected thereby. *Andersen v. Andersen*..... 565

Witnesses. See CRIMINAL LAW, 34.

1. A member of a family, living therein, is presumptively qualified as a witness to prove the age and pedigree of the other members; but when it is shown on cross-examination that the knowledge of such witness is derived, not from family tradition and repute, but from statements made by a stranger, the testimony should be excluded. *Grand Lodge A. O. U. W. v. Bartes*..... 631
2. The plaintiff, wife of the deceased, with whom she had lived for twenty years before his death, and to whom she had talked regarding his birthday at different times, and who had a general acquaintance with the family history and tradition, *held* to be a competent witness to testify as to the age of her deceased husband. *Grand Lodge A. O. U. W. v. Bartes*..... 636
3. A wife who has lived for twenty years with her husband will be presumed to know his age and to be qualified to testify thereto, unless the contrary clearly appears from the record. *Grand Lodge A. O. U. W. v. Bartes*..... 636
4. Because the first knowledge obtained by a wife as to her husband's age is derived from an incompetent source, this will not disqualify her from testifying as to his age, where, by reason of her membership in the family, knowledge of such fact is obtained from other sources to which no valid objection applies. *Grand Lodge A. O. U. W. v. Bartes*..... 636
5. The trial court has a large, though not an unlimited, discretion in granting or refusing permission to ask a witness leading questions. *Edwards v. State*..... 386