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JAMES C. GRAHAM ET AL. V. MARIE HIESEL.

FILED MARCH 23, 1905. No. 13,755.

1. **Review.** Action of the trial court in excluding evidence examined, and approved.

2. **Evidence** examined, and *held* sufficient to sustain the judgment of the trial court.

ERROR to the district court for Sarpy county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

H. Z. Wedgwood, for plaintiffs in error.

A. E. Langdon, contra.

OLDHAM, C.

This is an action of forcible entry and detainer to recover possession of a house and lot in the village of Papillion, originally instituted before a justice of the peace of Sarpy county, and in which plaintiff recovered a judgment for possession of the property. On an appeal from this judgment to the district court for Sarpy county the cause was tried to a jury, a verdict was rendered for plaintiff, there was a judgment on the verdict, and to reverse this judgment defendants bring error to this court.

The only controversy is as to the nature and duration of defendants' tenancy. The evidence shows that defendants purchased a small stock of harness from the husband of the owner of the premises; that after such purchase they entered into possession of the building and occupied the same as a residence and place of business; that when they first entered both parties occupied jointly for a short time, when the owner of the building removed to Hooper, Nebraska, leaving defendants in possession; that there was talk of a rent and an agreement to pay a stipulated sum per month for the use of the building; no contract as to

the length of time the building was to be occupied was mentioned; that afterwards defendant Graham entered into a pretended contract with the husband of the owner of the building for the leasing of the building for ten years for rent not to exceed $7 a month, and with a further condition that defendants would not prosecute plaintiff's husband on a charge of burglary. This pretended agreement was signed by the husband of the owner of the building, and not by the owner, and when offered in evidence was properly excluded by the district court as being void, both under the statute of frauds and as against good morals. The further evidence shows that, after the owners of the building had removed, the rent was collected by their agent, who agreed with the defendants as to the time at which the rent should be paid, and which, at their suggestion, was made to run from month to month, and to fall due on the 4th of each month. Rent was collected in this manner for several years, when the building was sold to the present owner, who is plaintiff in this action. After plaintiff's purchase of the premises, defendants remained in possession several months, paying the rent from month to month, when notice of more than 30 days was served on them for the purpose of terminating the tenancy. On expiration of this notice the statutory notice of three days was served, and thereafter the action in forcible entry was instituted.

The lower court gave numerous instructions, most of which were unnecessary, but none of which submitted any question which was prejudicial to the rights of the defendants. An examination of the testimony shows that no other judgment than that rendered by the district court could have been sustained under the evidence, and for this reason it is unnecessary to further review the instructions.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

COMMERCIAL NATIONAL BANK OF OMAHA, APPELLEE, V. JOHN GRANT, APPELLANT.

FILED APRIL 5, 1905. No. 13,406.

Pledge: FORECLOSURE: DEFICIENCY JUDGMENT. In an action to foreclose the lien of a pledge, the district court has jurisdiction to render judgment for a deficiency remaining after the pledged property has been exhausted.

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Hall & McCulloch, for appellant.

W. W. Morsman, contra.

SEDGWICK, J.

The defendant John Grant gave his promissory notes to the plaintiff, and as collateral to secure the payment thereof pledged to the plaintiff shares of the capital stock of the Grant Paving Company. This action was brought in the district court for Douglas county to foreclose the lien of the pledge. For this purpose the petition contained the usual allegations and prayer, and also contained the prayer that the plaintiff should have permission to apply for judgment for any deficiency which might remain after the sale of the stock. There was a decree of foreclosure and the stock pledged was sold thereunder. Objections were filed to the confirmation of the sale and to the entering of a deficiency judgment. These objections were overruled and the sale confirmed, and a judgment entered against the defendant for the deficiency. From this decree the defendant appeals.

1. Some technical objections were interposed to the regularity of the sale of the pledged stock, but these objections were practically abandoned at the argument, and do not seem to be substantial nor to require further discussion.

2. The main question which the defendant, who is appellant here, presents to this court is as to the power of the court to enter a deficiency judgment in an action to foreclose a pledge. We have no doubt that the judgment of the district court is correct in this regard. It is insisted by the defendant that, when an action to foreclose a pledge has proceeded so far as to confirm the sale which has been ordered and apply the proceeds thereof upon the indebtedness, the plaintiff may commence an action in the same court to recover the deficiency, but he cannot file a pleading in the same action and ask for that deficiency. This may be in harmony with the old practice alluded to in the Michigan case which seems to be relied upon (*Johnson v. Shepard,* 35 Mich. 115), but it is not in harmony with our code. We have but one district court, and but one form of action, and may join as many causes of action as we may have whether they be legal or equitable or both. Why should a plaintiff be compelled to have two actions instead of one when the whole matter can be disposed of in one action? The answer made in the argument is that the causes of action which may be united in the same suit must be existing and not merely prospective causes of action. It seems to be supposed that *Weinland v. Cochran,* 9 Neb. 482, in which such language is used, disposes of this case. In that case it was sought to unite a cause of action to set aside a fraudulent conveyance and subject the land to the lien of the judgment, when judgment should be obtained, with a cause of action upon an indebtedness to obtain the judgment, and it was said that no right of action to set aside the fraudulent conveyance existed until the judgment had been obtained. There, the cause of action to set aside the conveyance was based upon the judgment. Here, the cause of action is based upon the prom-

issory notes, which existed when this action was begun. The plaintiff in this case might have begun his action upon the note at the time he began his action to foreclose, or he might begin his action to foreclose, or he might bring both actions together, under our code. The appellant virtually concedes this when he says that probably the plaintiff might have brought his action upon the notes and in the same action have asked that the securities be sold and applied upon the judgment; that is, he may set up both matters in his petition, provided he sets out the right one first, but he cannot invert the order. It may be conceded that the chancery courts of an early day had no jurisdiction of common law actions. The chancery courts and common law courts being then entirely distinct tribunals, questions frequently arose as to the jurisdiction and prerogatives of the respective courts. An action brought in the wrong court must fail because of a want of jurisdiction to entertain it. At a later day and while the distinction between courts of law and courts of equity was maintained, the practice obtained in some of the states, where both courts were presided over by the same judge, of transferring causes from the equity side to the law side of the court, or *vice versa*. Under such practice questions might arise in regard to jurisdiction of causes of action which cannot arise under a practice giving the same court general chancery and common law jurisdiction. In such a court there can be no question of jurisdiction, and, under section 87 of our code, there can be no question of the proper practice and procedure.

It was admitted upon the argument that there is no distinction between actions of foreclosure of pledges and those of foreclosure of chattel mortgages in this regard. That it is the proper practice to enter deficiency judgments in such cases is indicated or assumed, if not declared, and so far as we have observed has never been denied, in jurisdictions under code practice similar to ours. 7 Cyc. 102, and notes.

In an action to foreclose a chattel mortgage, the su-

preme court of Oregon held that a personal judgment could not be rendered against one who had purchased the property from the mortgagor, without showing that such purchaser had sold or disposed of the property, or that it could not be produced or delivered so as to satisfy the indebtedness. The reason for this is that the purchaser was not originally liable for the indebtedness and would not make himself so by simply purchasing the property. The court, however, said:

"I think it might properly be decreed, where the evidence showed that the party in such case had disposed of the property, that he be required to pay its value, or a sufficient part thereof to make up any deficiency that might be found after applying the proceeds of the sale of the remaining property to the payment of the debt." *Commercial Nat. Bank v. Davidson,* 18 Ore. 57, 22 Pac. 517.

The supreme court of Illinois in *Wylder v. Crane,* 53 Ill. 490, which was an action to foreclose a chattel mortgage, said:

"It is urged that the court below should have rendered a decree against Crane (the mortgagor) for the balance of the debt due to plaintiff in error. If, after failing to establish a right to equitable relief against the property, he was entitled to such a decree, having, as he had, a complete remedy at law, he should have asked for the decree. Such relief was not prayed for in the bill, and to have received it he should have asked for it under the prayer. If entitled to receive it, and he had asked for it, the court below would have granted it."

And the supreme court of South Carolina held, in an action to foreclose a mortgage on property which is in the possession of the defendant, who holds both a senior and junior mortgage on the same property, and who is not personally indebted to the plaintiff, it is error to give a personal judgment against such defendant. The ground for this decision is plainly stated in the opinion:

"As far as we can see, the defendant was not personally indebted to plaintiff, either by contract, or in any

other way." *Edwards v. Dorgan,* 30 S. Car. 177, 8 S. E. 858.

It is said by the supreme court of Washington in *Weir v. Rathbun,* 12 Wash. 84, 40 Pac. 625, that their statute, fairly construed, contemplates a decree for the foreclosure of a mortgage and, in a proper case, for a personal judgment in the same action. The opinion does not disclose the provisions of the statute alluded to.

This court appears to be committed upon the principle involved. In *Kloke v. Gardels,* 52 Neb. 117, the plaintiffs alleged in their petition that they had sold real estate to the defendant and had given him a written contract of sale of the same, by which contract the defendant had agreed to pay a stated sum which was paid upon the delivery of the contract, and agreed to pay the remainder of the purchase price on a given day, and that possession of the land was agreed to be given to the defendant upon the payment of the purchase price; that the defendant had failed to pay the purchase price as agreed, and "there was a prayer that Gardels be required to perform his part of the agreement, or, in case of his refusal, the real estate might be sold and the proceeds of such sale applied to the payment of the amount the court should find due the plaintiffs, and in case of a deficiency, Gardels might be decreed liable therefor." A decree was entered by default that, "in case Gardels should fail to pay the sum found due by a day stated, his interest in such real estate should be appraised, advertised and sold by the sheriff of the county to make and raise the sum found due; and if there was not realized from the proceeds of such sale a sufficient sum to pay the amount found due by the decree, Gardels should be liable to the plaintiffs for such deficiency." Afterwards, in pursuance of this decree, the defendant's interest in the land was sold and the proceeds applied upon the amount found due the plaintiffs, and the plaintiffs then filed "a formal petition reciting the proceedings to foreclose the land contract, the decree rendered therein, the sale of the premises, and the application of the proceeds to the amount found

due by the decree, and the amount remaining due them after such application of the proceeds of sale, and prayed for judgment against Gardels for such deficiency." The defendant answered the petition and the plaintiffs replied to the answer. In the opinion, after saying that the power to render a deficiency judgment was not derived from the statute, the court said:

"But there is in this state but one form of action, namely, a civil action; and the differences between actions at law and actions in equity, so far as the form of such actions is concerned, are abolished by the code, and the district courts, both by statute and the constitution, are invested with general legal and equitable jurisdiction. The district court, then, was not without jurisdiction to render the deficiency judgment asked for in this case simply because the deficiency grew out of an executory contract for the sale of real estate which had been foreclosed as a mortgage. It may be that Kloke and others were under the necessity of filing a petition (of course in the same action) as in a suit at law for the recovery of the deficiency which they claim to be due them. It may be that Gardels should have been given an opportunity to answer as in other actions at law; that issues should have been framed and tried to a jury; and had all this been done certainly it would not be claimed that the district court was without jurisdiction to enter a judgment for the deficiency found by such jury. * * * How, then, can it be said that the district court was without jurisdiction of the subject matter of this proceeding for deficiency judgment? * * * We do not decide in this case whether a district court which has foreclosed an executory contract for the sale of real estate as a mortgage, and caused the premises to be sold and the proceeds applied toward the payment of the amount found due, may in that action and as a court of equity, without further pleadings, render a personal judgment against the parties liable for the deficiency. But we do decide in this case that the district court had unquestioned jurisdiction to entertain the pro-

ceeding as instituted herein for the deficiency judgment and itself try the issues and render the judgment for deficiency without a jury, as neither party demanded one."

It appears from the latter part of this quotation from the opinion that the question left undetermined was whether the court could proceed to enter the deficiency judgment against the objection of the defendant without requiring an issue to be made up in the action and allowing the defendant, if insisted upon, a jury trial thereon. That the court should proceed in the same action to dispose of the whole matter and render a judgment for the deficiency is clearly determined.

What effect should be given to the action of our legislature in enacting the provisions of section 847 of the code so far as relates to the entering of deficiency judgments in the foreclosure of real estate mortgages and afterwards repealing the same, it is not necessary to determine in this case. If it were an open question in this state as to the duty of a court of equity to enter a deficiency judgment in the foreclosure of real estate mortgages, in the present condition of our legislation the writer would be inclined to give careful consideration to the opinion of the supreme court of Wisconsin in *Sauer v. Steinbauer,* 14 Wis. 76. This question, however, is not involved in the case at bar.

The judgment of the district court is

AFFIRMED.

GEORGE KEELER ET AL. V. STATE OF NEBRASKA.

FILED APRIL 5, 1905. No. 13,870.

1. Juror: CHALLENGING. If the *voir dire* examination of a juror considered as a whole does not show incompetency, a challenge upon that ground is properly overruled, although during his examination statements are made which, if unexplained, might be ground for challenge.

2. Verdicts in criminal cases should be certain and import a definite

meaning free from ambiguity. If the meaning of the verdict in the light of the whole record is clear, beyond any reasonable doubt, it is sufficient.

3. **Juror:** CHALLENGING. It is not ground for challenge that a juror is more than sixty years of age.

4. **Verdict:** SIGNING. If the record shows that T. Blankenbeckler was a member of the jury, and the verdict is signed "T. P. Blankenbeckler, Foreman," it will be presumed that the person so signing was the same person designated as T. Blankenbeckler in impaneling the jury.

5. **Instruction:** REASONABLE DOUBT. The instruction attempting to define a reasonable doubt in *Spies v. People*, 122 Ill. 1, has been frequently disapproved by this court; but when it is carefully guarded, and it appears from the whole record that the jury have not been misled thereby, the giving of this instruction will not require a reversal.

6. ———: REVIEW. It is not error to refuse a requested instruction if the same matters are substantially covered by instructions given.

7. **Venue:** EVIDENCE. If it appears from the whole evidence, beyond a reasonable doubt, that the crime charged was committed in the county of the trial, the venue is sufficiently proved.

8. **Burglary:** Evidence. In a prosecution for burglary, the charge that it was committed in the night season is to be proved like any other fact. If the whole evidence shows that fact beyond a reasonable doubt it is sufficient.

9. ———: ———. In a criminal case it must be proved beyond a reasonable doubt that the defendant committed the crime charged. If the fact that the crime charged was committed is proved beyond all doubt, it is still not sufficient to prove that the defendant had opportunity to commit it, and may have been the guilty party, but, if the evidence excludes all reasonable doubt, it is sufficient.

10. **Sentence.** It is in the discretion of the trial court, upon a vedict of guilty, to prescribe the punishment within the limits fixed by the statute. This court will not ordinarily interfere with that discretion unless it is manifest from the evidence that the punishment inflicted is excessive. When two or more defendants are tried together for the same offense, and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may become necessary for this court to determine from the evidence, as an original question, whether the punishment of the defendants or some of them should be reduced.

ERROR to the district court for Burt county: ALEXANDER C. TROUP, JUDGE. *Judgment modified.*

John M. Macfarland and *H. Wade Gillis,* for plaintiffs in error.

Norris Brown, Attorney General, and *W. T. Thompson, contra.*

SEDGWICK, J.

In this case the plaintiffs in error seek to reverse a judgment of the district court for Burt county by which they were adjudged guilty of burglary and sentenced to a term of years in the penitentiary.

1. Exceptions were taken to the competency of several of the jurors as disclosed upon their *voir dire* examination. Four jurors are especially mentioned in the briefs, and special attention is called to the competency of the juror Benson. This juror was a foreigner by birth, but had resided in this county thirty-five years. He was a farmer and appears from his examination to be possessed of ordinary intelligence and information. The attorney for defendants examined him, and that part of his examination which is relied upon to show his incompetency is as follows:

Q. You understand that the presumption of the innocence of a defendant is a matter of evidence that follows him through all the case?

A. Yes, sir.

Q. If you have a reasonable doubt as to the evidence, do you think your mind is in such a condition that you can freely give these defendants the benefit of that doubt?

A. I have no idea either one way or the other.

Q. This is the question I ask you, if after hearing the evidence in the case and the law, then you have a reasonable doubt, do you feel, if the court tells you to do so, that you could freely give the defendants the benefit of that doubt? (Not answered.)

Defendants' Attorney: Now, after you hear all the evidence and law in the case, and you have a reasonable

doubt as to the guilt of the defendants, do you feel that your mind is in such a condition you can freely give these defendants the benefit of that doubt?

Defendants' Attorney: Do you understand the question?

A. Yes, I understand it pretty well. I could not understand what you were driving at.

Q. The law says I shall ask you the question if after you hear the evidence of the witnesses and the instructions of the court there remains a reasonable doubt as to the guilt of the defendants, do you feel you could give them the benefit of that doubt freely?

A. No, sir.

Q. They would have to prove themselves innocent, would they?

A. Yes, sir.

The juror was thereupon challenged "for cause." The court then questioned the juror and was answered, as follows:

The Court: Do you understand that it devolves upon the state to prove the defendants guilty and they need not open their mouths at all as to their guilt or innocence?

A. I don't understand that really, ask that again?

Q. You understand the law to be that it devolves upon the state of Nebraska to prove these defendants guilty and they need not open their mouths at all as to their guilt or innocence, do you understand that?

A. I do.

Q. That being so, and there should be a reasonable doubt as to the defendants' guilt, the law is that the defendants should have the benefit of that doubt; now the question is, that being the law, can you freely and willingly give to the defendants the benefit of that doubt?

A. Yes, I understand what it is now.

Defendants' Attorney: With that understanding you think you can try the case on the evidence of the witnesses and the law as given you by the court?

A. Yes, sir.

The juror then stated that he was sixty-five years old, and was challenged by defendant upon that ground. The former challenge as to his competency was not renewed. This would be sufficient ground for the conclusion that the former challenge was waived, and that the ruling thereon could not now be cause for reversal. But, as stated in the brief, the answers of this juror furnish a fair illustration of the general ground for challenge of jurors upon which the defendants rely. It is said in the brief that the juror "states that he understands that it is the law of the state that the defendant should prove himself innocent, does not say that he would give them a fair and impartial trial, nor that he would give them the benefit of the doubt." This is not a natural construction of the juror's answers. His answers taken together show that he did not understand the technical meaning of some of the language used by the court and counsel in framing their questions. But they do not show that he had any incorrect ideas of his duty as a juror. Objections to the competency of other jurors are mostly similar in character. No sufficient grounds for these objections are pointed out in the brief.

2. The jury returned a verdict as follows:

"VERDICT OF JURY.

"THE STATE OF NEBRASKA, }
BURT COUNTY, } SS.

"Adjourned February Term, A. D. 1904, to wit:....190..

"THE STATE OF NEBRASKA,
Plaintiff,
v.
GEORGE KEELER, THOMAS GRAY *alias* THOMAS ROGERS, AND SAMUEL T. BRADLEY *alias* SAMUEL T. BULLIS,
Defendants.

"We, the jury in this case, being duly impaneled and sworn to try said case, do find the said defendants George

Keeler, Thomas Gray alias Samuel T. Bradley alias Samuel T. Bullis, and each of them guilty of burglary in manner and form as charged in the information.

"T. P. BLANKENBECKLER, *Foreman.*"

It will be noticed that the name "Thomas Rogers" is omitted after the word "alias" in connection with the name of the defendant Thomas Gray. That is, in the verdict the name is "Thomas Gray alias" instead of "Thomas Gray alias Thomas Rogers" as he is named in the information. It is insisted that this verdict is invalid at least as to two of the defendants because they are not named therein with sufficient certainty. The views that obtain in the different states are not entirely harmonious as to what irregularity in this regard will vitiate the verdict. In Texas a verdict that the defendant is "guilty in the fist degree" is not a good verdict (*Wooldridge v. State,* 13 Tex. App. 443, 44 Am. Rep. 708), nor one which finds the defendant "guity" (*Harwell v. State,* 22 Tex. App. 251, 2 S. W. 606); but in Florida a verdict which finds the defendant "guily" is good. *Higginbotham v. State,* 42 Fla. 573, 29 So. 410, 89 Am. St. Rep. 237. Many other peculiar holdings may be found in the reports, but we are satisfied with the rule of the Florida court. It was, in the case referred to, quoted from a former decision of that court as follows:

"Verdicts in criminal cases should be certain and import a definite meaning, free from ambiguity. Any words which convey, beyond reasonable doubt, the meaning and intention of the jury are sufficient, and all fair intendments will be made to support the verdict. If the intention is clearly manifested, bad spelling or faulty grammar will not vitiate the verdict."

Williams v. State, 6 Neb. 334, is not inconsistent with this rule. In that case the jury found no one guilty and of course the verdict was insufficient. Under the liberal rule above stated it is doubtful whether this verdict could be upheld as against all of these defendants, if the descrip-

tion of the parties found guilty by the jury was not made more definite and certain by reference to other parts of the record. To determine the meaning of the verdict all the parts of the record must be taken into consideration; the indictment and instructions, and in some instances, as in this case, the polling of the jury may be considered. If upon the whole record, so construed, it is clear beyond any reasonable doubt that the jury found the defendant or defendants, who were being tried, guilty of the charge contained in the indictment, the verdict is sufficiently definite. The court in its instructions gave the jury five different forms of verdicts which might be used by the jury from which to select the one which conformed with their finding. Among these forms was the following: "We, the jury, duly impaneled and sworn to try the issues joined in the above entitled cause, do find the said defendants George Keeler, Thomas Gray alias Thomas Rogers, and Samuel T. Bradley alias Samuel T. Bullis, and each of them, guilty of burglary in manner and form as charged in the information." When this verdict was received, the jury were polled. This appears from the record as follows: "Thereupon, on request of defendants, the jury were polled, and each of the jurors, being separately asked, 'Was and is this still your verdict as to the defend- and George Keeler,' answered, 'yes,' and, being further separately asked, 'Was and is this your verdict as to the defendant Thomas Gray alias Thomas Rogers,' answered 'yes,' and, being further separately asked, 'Was and is this still your verdict as to the defendant Samuel T. Bradley alias Samuel T. Bullis,' answered, 'yes.'" These defendants were all named correctly as defendants in the title of the case as stated upon the verdict, and each of the jurors, when the jury was polled, answered that the verdict rendered was intended by him to be his verdict as to each one of the defendants correctly named, and as named in the information. No reasonable person could doubt who were the parties found guilty by the jury, and the verdict must be held to be sufficient.

3. The challenge on the ground that the juror is over sixty years of age is of course not well taken. Sec. 657 of the code. The provision there is, that the juror must be over twenty-one years of age, and that he shall not be compelled to sit if he is over sixty years of age. The statute in regard to the qualifications of jurors in counties having 60,000 inhabitants can, of course, have no application in this case, even if it should be construed as defendants contend.

4. The verdict is signed "T. P. Blankenbeckler, *Foreman,*" and the record of the impaneling of the jury shows that one "T. Blankenbeckler" was one of the jurors. It is contended that this discrepancy in the names raises the presumption that T. P. Blankenbeckler, who signed as foreman, was not a member of the jury; but the initial letter of one's middle name is not of so much importance as to have this effect, and the contention is without merit.

5. The defendants complain of instruction numbered ten given by the court upon its own motion. This is substantially the instruction given in the so-called *Chicago Anarchists'* case, attempting to define a reasonable doubt. It has recently been several times disapproved by this court. We consider it of doubtful propriety, and may, under some circumstances, become dangerous so as to require a reversal. In this case, however, it is carefully guarded, and in the condition of this record we cannot say that the defendants have been prejudiced by this instruction.

6. Nearly all of the instructions given were excepted to, and in the brief several are specified which it is claimed are erroneous. But we find no prejudicial error in these instructions. Many instructions were requested by defendants. Some of these appear to have been given by the court; others present matters that are fairly put before the jury in the instructions given. We do not find any error in refusing requested instructions. Questions upon the instructions are not mainly discussed in the brief. Upon the whole we think the instructions submit the case fairly to the jury.

7. The defendants object that the evidence was not sufficient to warrant their conviction. It is urged that the venue of the burglary is not sufficiently proved. It appears that at the close of the evidence the state recalled as witness the cashier of the bank, who had already testified in the case, and he was asked the question: "Where is this —What county and state is this First National Bank of Lyons, Nebraska, located in?" And he answered: "Burt county, Nebraska." If this was the only evidence in the record upon this point, the objection would be serious. Several witnesses, in describing the bank burglarized or in otherwise referring to it, spoke of it as being in Lyons, and other statements made by witnesses identify the location as in that town. Taking the whole evidence, there can be no reasonable doubt that the bank building in which the crime was committed was in Burt county.

8. It is also contended that the evidence does not show that the burglary was committed in the night season. It was the 16th of November. The cashier left the building between five and six o'clock in the evening. He testifies that it was "hardly dark," and again, on his cross examination, he was asked: "It was still light?" and answered: "I would not say it was light, I had lit a lamp and left it. We always would leave a lamp burning. * * * I would not say how dark or how light it was." A witness who was sleeping in a building not far from the bank testifies that during the night, he thought it was about two o'clock, he heard three several sounds of explosions in the direction of the bank. It appears that the burglary was discovered soon after daylight in the morning; that the team with which the burglars escaped was taken during the night, and was seen being driven rapidly from the scene of the burglary toward Hooper before daylight in the morning. From these and other circumstances disclosed in the record, the jury were clearly warranted in finding that the burglary was committed in the night time, beyond reasonable doubt.

9. The principal reliance of defendants appears to be

upon the insufficiency of the evidence to connect them with the burglary, so as to show beyond a reasonable doubt that they are the guilty parties. It was proved beyond question that the door of the bank building was broken open and the building was entered, and that the safe which contained about $1,400 in currency was broken open by the use of powerful explosives and the money contained therein was taken away. No one comes upon the witness stand and testifies as to having seen this done, and no one, of course, testifies as to having seen these defendants engaged in the act of committing this crime. Each one of these defendants was seen in the town of Lyons shortly before the commission of the crime. The defendant Keeler was known by several of the witnesses. He had been in Lyons upon former occasions. On those occasions he was dealing in horses and had a large number with him. The last time he was seen there in that occupation was a year or two before the robbery. During the few days immediately preceding the robbery he was seen there by several witnesses. He was not engaged in his former occupation and apparently had no business to attend to. The other two defendants were strangers in Lyons. It does not appear that any resident there had ever seen either of them there before. Immediately before the robbery they were seen several times by different citizens on the street in the town of Lyons. One of them was, at the noon hour, when it was not supposed that any one was in the bank, observed looking into the window of the Farmers Bank in an unusual manner, described by the witness as "Indian fashion." In the early morning after the robbery was committed, a team and buggy was stolen from a stable not far from the bank. This team was driven toward Hooper, a small town in Dodge county, and situated on the line of the railroad. It was driven so rapidly as to attract the attention of several who had opportunity to see it. When within about three miles of Hooper, the buggy, which was a two-seated vehicle, was hidden in the field, and the horses turned loose. At about seven o'clock that morning these

three defendants and another person were seen walking toward Hooper from the vicinity of the hidden buggy. When they arrived in Hooper, two of them went into a saloon and there inquired when the train left for Omaha. They found that they had arrived in Hooper a few minutes before the departure of the train. These three defendants and their companion, who has not been found, took the train which went directly from Hooper to Omaha; and a witness who was also on the train, and who observed their conduct which he described as peculiar, testifies that they remained on the train until near a small station before reaching Omaha; that he did not see them leave the train, but knows that they were not on the train when the train arrived at the Union Depot in Omaha. Another witness testifies that two of these defendants came into his place of business in Omaha on the 2d day after the robbery and bought something to eat, and one of them offered him in payment a $20 gold piece, and afterwards took out of his pocket and exhibited a handful of gold, consisting of $20, $10 and $5 gold pieces. The money stolen from the bank was in gold pieces of these denominations. The defendants were afterwards arrested in Kansas City. It is shown that the team and buggy referred to was stolen by the parties who committed the burglary. Articles that were plainly identified as being in the bank the night before the robbery were found in the buggy when it was first discovered after the robbery. There was no evidence tending to explain the presence of these defendants in Lyons immediately before the robbery, nor to show any legitimate business that these four men were engaged in together that could account for their arrival at Hooper, as they did on the morning of the robbery. There is no evidence that in any way explains any of the foregoing circumstances upon the theory that these defendants were not present at the robbery. The verdict of the jury is not so unsupported by the evidence as to require a reversal of the judgment.

10. One of these defendants was sentenced to a term of

seven years and two to a term of ten years each in the penitentiary. It is urged that these sentences are too severe and should be reduced by this court. Ten years is the extreme limit of the statute. Criminal code, sec. 48. The term prescribed is "not more than ten nor less than one year." It is left to the discretion of the court, who sees the witnesses and hears the evidence, to fix the punishment within these limits. The extreme penalty will not be imposed except in extreme cases. But this court will not interfere with the discretion of the trial court unless it is manifest from the evidence that the penalty inflicted is excessive. We discover nothing in the evidence to indicate that the defendant George Keeler, whose sentence was seven years, was less guilty than either of the other two defendants, whose sentences were for the term of ten years each. There is nothing in the record showing the age or experience of either of the other two defendants. But Keeler is shown to be a man of experience in business, and was undoubtedly aware of the enormity of the crime which he committed. Of course, if the penalty inflicted upon the other defendants was just, the fact that Keeler's punishment was less than his crime called for would furnish no ground for reducing their punishment. If these defendants had all been sentenced to the same term of imprisonment, we would not have considered it to be our duty under the evidence in this case to interfere with the discretion of the trial court, the punishment being within the statutory limit. But these sentences cannot all be justified from this evidence. We are called upon to say whether the term of imprisonment should be seven years or ten years for each of these defendants, and in this we are not assisted by the findings of the trial court. Determining it then as an original question, upon this record we conclude that the defendants Thomas Gray alias Thomas Rogers and the defendant Samuel T. Bradley alias Samuel T. Bullis should be sentenced to a term of seven years each in the penitentiary.

The judgment of the district court is therefore modified

so as to make the sentences of the defendants Thomas Gray alias Thomas Rogers and Samuel T. Bradley alias Samuel T. Bullis seven years each instead of ten years each in the penitentiary, and otherwise the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

LANCASTER COUNTY ET AL. V. JOHN W. MCDONALD.

FILED APRIL 5, 1905. No. 14,088.

1. **Commissioners' Opinions.** Opinions prepared by the commissioners of this court and published officially, are in all respects to be regarded as the opinions of the court. It is immaterial whether a commissioner or one of the judges formulates the opinion of the court.
2. **Dicta.** The determination of a matter which is involved in the litigation and discussed at the bar is not to be regarded as mere dictum, even though it is only indirectly involved in the decision of the question upon which the case turns.
3. **Taxation:** ASSESSMENT. The word credits as used in section 28, article I, chapter 77, Compiled Statutes, 1903, means net credits. The indebtedness of the taxpayer may be deducted from gross credits to find the true value of credits for assessment.
4. ———: ———. The statute distinguishes between items of property to be scheduled for taxation. The other items named in the schedule are not to be considered as credits so as to allow indebtedness to be deducted therefrom. Notes and mortgages which represent moneys loaned or invested are not subject to such deduction.

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

James L. Caldwell, F. M. Tyrrell and *Charles E. Matson,* for plaintiffs in error.

S. L. Geisthardt, contra.

SEDGWICK, J.

The principal question in this case involves the construc- of the word "credits," as used in the revenue law (ch. 77, Compiled Statutes, 1903; Ann. St. 10400-10896). In listing his personal property for assessment in 1904, the defendant in error included an item designated by him as "bills receivable," amounting to $13,541.82, and an item of $32,904.85, represented by notes and real estate mortgages. He claimed the right to offset and deduct from these items debts owing by him. The assessor refused to allow this claim. Objections to this assessment were duly filed with the county board of equalization and were overruled, the board refusing to allow the indebtedness to be deducted from these items. Upon appeal to the district court this action of the board of equalization was reversed, and these proceedings bring this decision of the district court here for review. In *State v. Fleming,* 70 Neb. 523, 529, this court said:

"In making a return of his taxable property under the provisions of chapter 73 of the laws of 1903 the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return."

1. In the first attack upon this proposition, it is contended that as this language is used in the syllabus prepared by one of the commissioners, and is fortified by reasons given in his opinion only, it is not entitled to the same consideration as are decisions of the court. There were two opinions in that case; one by the chief justice and the other by Mr. Commissioner DUFFIE, and it is suggested that there is language in the opinion of the court itself which indicates that the opinion of the commissioner did not in all respects have the sanction of the court. The opinions prepared by the commissioners and published officially are in all respects to be regarded as the opinions of the court. Both opinions expressed the judgment of the court, and it is immaterial whether a commissioner or one of the judges formulated the opinion of the court.

2. It is next urged that the matter determined in the paragraph of the syllabus above quoted was not necessary to a determination of the case and is therefore to be regarded as dictum only. It appears from the opinion that it was contended in that case that the whole of the revenue act of 1903 was invalid because many of its provisions, which it was contended were of such importance that they should be regarded as inducements to the act, were in conflict with the constitution; and in that connection it was contended that the meaning of the act is that the gross credits of the taxpayer should be assessed for taxation, and that no reductions should be made on account of his indebtedness. This it was urged was so great an injustice as to be impossible of execution. It was in answer to this argument that the opinion undertook to show that by the term "credits," as used in the statute, was meant net credits; and probably in this view the discussion was justified and the conclusion reached not entirely dictum.

3. It is insisted that the conclusion upon this point announced in the opinion referred to is unsound; that it does not announce a proper construction of the statute, and should therefore not be adhered to. The plaintiff in error contends for what is said to be a literal construction of the statute. The words, it is said, are to be given their plain and ordinary meaning, and that the statute prescribes that credits must be listed for taxation, and defines the word "credits" to include "every demand for money, labor or other valuable thing, whether due or to become due." This construction of the statute was considered in the opinion above referred to, and the result of such a construction was made plain by a quotation from *Florer v. Sheridan,* 137 Ind. 28, 36 N. E. 365, 23 L. R. A. 278, as follows:

"Consider for a moment its practical operation under such a construction. A has an account against B for $1,000, or a debt against him for a like amount, evidenced by a promissory note. B holds an account or promissory note, evidencing a *bona fide* indebtedness against A for the

same sum of money. Equity, except where one of the parties is insolvent, treats these claims as compensating each other. Neither owes nor could recover, in an action, against the other, and yet, if appellant's theory is right, $2,000 must be placed upon the tax duplicate, because the holders never met and settled or surrendered their claims. In such case, each is a chose in action held by the party to whom it belongs, and must, under the contention of counsel, be returned to the assessor, and yet it is obvious that neither, as against the other, has a penny of credit, either in money or just value. If the owner is taxed upon such credit it is upon fiction. The tax duplicate in this way would be increased, but not from property of value in the state." The court concluded: "Credits are, by the constitution, property, and as such are to be taxed. Their just value is to be ascertained by subtracting the *bona fide* indebtedness from the gross amount of the notes, accounts and other choses in action, and the balance is to be returned as belonging to the individual. Surely, the difference thus found is the precise amount and just value of the credits of the party in the legal and proper sense of the term. Section 1, article 10, of the constitution does not say the gross amount of all notes, accounts and other choses in action shall be taxed, and we cannot so construe it without perverting its language and obvious meaning."

It will not be contended that the proper construction of our statute would require that, in the case supposed in the above quotation, A and B would both be taxed upon the $1,000 claim which each was supposed to have held against the other. It follows that the literal construction contended for cannot be given the statute, and we must look to the whole enactment of the legislature, and determine by a consideration and comparison of all its provisions what was intended by the legislature to be taxed in the provision requiring credits to be listed.

The 5th section of the act defines the word "credit": "The word 'credit' includes every demand for money, labor or other valuable thing, whether due or to become due."

Section 3 defines property: "The word 'property' includes every kind of property, tangible or intangible, subject to ownership." The statute as well as the constitution requires that all property shall be taxed. The word "property" as above defined includes also credits, and these and other general definitions given by the statute are to be taken in connection with, and are controlled by, the meaning plainly intended to be given to these terms in special provisions which we are called upon to construe. Section 28 provides for the listing of property for assesment: "All his moneys, credits, bonds, or stocks, shares of stock of joint stock or other companies, when the capital stock of such company is not assessed in this state, moneys loaned or invested, annuities, franchises, royalties, and all other personal property." Moneys loaned or invested and bonds and stocks are specified, but they are clearly forms of credit and there must be some reason for specifying them in this provision. If by the term "credits" in this schedule the legislature intended the thing defined as "credit" in section 5—"Every demand for money, labor or other valuable thing, whether due or to become due"—and it was intended that gross credits should be taxed, it would certainly have been wholly unnecessary to have included also "moneys loaned or invested." If we consider that the legislature intended to classify credits, then the purpose of this provision in regard to the schedule becomes apparent. It is suggested in the opinion referred to that merchants might be largely indebted for the stock carried by them, and at the same time have credits due them from customers for amounts approximately the value of their stock. Goods bought upon credit might also be sold upon credit, and the amount of such credit held by the merchants might largely exceed the moneyed capital of his business. It seems reasonable that the legislature should have intended to allow such credits and debts to offset each other, and at the same time to require that money which was loaned or invested as a speculation should be taxed without the right of deducting the general indebtedness of the taxpayer.

The constitution of 1851 of Ohio provided that "laws shall be passed taxing by a uniform rule all moneys, credits," etc. This was a positive requirement that all credits should be taxed, and the supreme court of that state construed that language of the constitution to mean that debts could not be deducted from moneys and credits, and that a statute attempting to allow such deduction was therefore void. One of the judges dissented from this proposition and maintained that credits should be ascertained by deducting liabilities from claims and demands. *Exchange Bank v. Hines,* 3 Ohio St. 1. In *Latimer, Colburn & Lupton v. Morgan,* 6 Ohio St. 279, that court adhered to its conclusion that "credits" in the constitution meant gross credits, and that liabilities could not be deducted therefrom. Soon afterwards the legislature by statute declared that the term "credit" meant "the excess of the sum of all legal claims and demands * * * over and above the sum of the legal *bona fide* debts owing by such person." It is said by that court in *Hubbard v. Brush,* 61 Ohio St. 252, 55 N. E. 829, that this legislative definition of the word "credit" has been acquiesced in for more than forty years, "and *Exchange Bank v. Hines,* in as far as it denied the right to deduct liabilities from claims and demands, has been ignored"; and, after stating that the determination of the case depended upon the meaning of the word "credits" as it appears in the constitution, and that the power to determine that meaning devolved upon the court and not upon the legislature, the court said:

"The word 'credits' in the connection in which it is used in the constitution is not made at all clear by a resort to the lexicographers. It is apparent, however, that if the framers of the constitution had intended to specifically tax book accounts, promissory notes and the like, it would have only required the addition of a few words, not at all incompatible with the brevity required in such instruments, to manifest that intention. The ease with which it could have been done gives to the omission a signification entitled to some consideration. The administration of the

laws governing taxation has developed the difficulties, if not the impracticability, of permitting the subtraction of debts and liabilities of the owner of real estate and tangible personal property from its value for taxation. Though even here there are those who contend that the deduction should be made.

The difficulties, however, attending a deduction of liabilities from claims and demands have not proved formidable, since the practice was authorized by the legislature, and the practice itself has received general approbation. For these considerations, not to specify others, we are of opinion that the legislative declaration is in accord with the constitution, and therefore hold that the corporation involved in this controversy rightfully, in listing its property for taxation, deducted its liabilities from its claims and demands."

In that case, and in many others, the word "credits" in statutes and constitutional provisions requiring "credits" to be taxed is held to mean net credits. We think the reasoning in *State v. Fleming, supra,* upon this point is sound, and is supported by the authorities there cited. The conclusion is that the legislature intended that moneys loaned or invested shall be taxed without deductions on account of indebtedness, and the "credits" that are to be taxed are the true credits. The taxable credits of an individual or business is the amount that can be realized upon an adjustment of accounts. To determine the real credits of a business, account must be taken of its liabilities. The statute names items that are ordinarily considered as credits; that are not to be so considered for the purpose of ascertaining the taxable credits. All other items of property required to be listed are distinguished from credits for the purpose of taxation, and are to be listed at their true value without deductions for indebtedness.

4. Were the items in question credits within the meaning of section 28, or were they bonds or money loaned or invested and so not subject to reduction on account of in-

debtedness? In the district court the cause was determined upon a demurrer to the petition. The holding was that this petition stated sufficient facts to entitle the appellant there to have his assessment changed by deducting the amounts of his debts from the credits listed by him. The allegation of the petition is that these credits consist of notes and mortgages of the value of $56,385.05. There is a schedule of these notes and mortgages attached, but there is no allegation and nothing to show the origin and character of these notes and mortgages. If they represented moneys loaned or invested, within the meaning of section 28, they are not credits within the meaning of that section, and being specifically named for taxation, they are not subject to reduction on account of general indebtedness. The allegation of the petition which, after stating the indebtedness to be deducted, is in these words: "So that the true and actual value of the credits of all kinds belonging to the appellant and subject to taxation was nothing"—is the statement of a conclusion only, and is not confessed by the demurrer, which admits only those matters of fact which are traversable and are well pleaded. The question whether a loan broker, who has both credits and debits arising from the ordinary transaction of his business, might offset such debits against the credits, to find the true value of his credits, is not raised by the petition. The demurrer to the petition should have been sustained. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

BARNES, J., dissenting.

I concur in the reversal of the judgment of the trial court, and in the rule announced in the prevailing opinion; that for the purposes of taxation debts cannot be set off against notes and mortgages which represent moneys loaned or invested—but dissent from the conclusion an-

nounced therein that the taxpayer in making up his credits for taxation may deduct therefrom the amount of his indebtedness, and that the word "credits" as used in our present revenue law means "net credits."

It appears that the defendant included in his schedule of personal property, which he delivered to the assessor of Lancaster county for the purpose of taxation for the year 1904, as credits, unsecured bills receivable, amounting to $13,541.82, and notes secured by mortgages, amounting to $32,904.85. He also included therein a list of debts owing by him to certain individuals and corporations, amounting to $70,700, and sought to have such indebtedness set off against his credits, so that he would entirely escape taxation on those items. The county board of equalization refused to grant his request, and ordered that his credits be assessed and taxed at one-fifth of the value thereof as set forth in his schedule. He thereupon appealed from said order, and filed his petition in the district court setting forth the foregoing facts more fully and at large, to which petition the plaintiff filed a general demurrer. The court overruled the demurrer and rendered a judgment for the defendant, by which the order of the board of equalization was reversed, and defendant was allowed to set off his debts against the credits so listed by him for taxation.

By the prosecution of this proceeding in error the plaintiff presents for our decision the question, can a taxpayer, under our present revenue law, set off his debts against the credits which he is required to list for taxation, and only pay taxes on the excess of such credits, if any, over and above the amount of his indebtedness? The revenue act of 1903 (sec. 12, art. 1, ch. 77, Comp. St., Ann. St. 10411) provides: "All property in this state not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value which shall be entered opposite each item and shall be assessed at twenty per cent. of such actual value. Such assessed value shall be entered in a separate column opposite each item, and shall be taken and considered as the taxable value of such property, and

the value at which it shall be listed and upon which the levy shall be made. Actual value as used in this act shall mean its value in the market in the ordinary course of trade." By section 28 it is provided: "Personal property shall be listed in the manner following: First. Every person of full age and sound mind, being a resident of this state, shall list all of his moneys, credits, bonds, or stocks, shares of stock of joint stock or other companies, when the capital stock of such company is not assessed in this state, moneys loaned or invested, annuities, franchises, royalties, and all other personal property." The section which in part is last above quoted is a literal copy of section 7 of the revenue law of 1879, which was in force at the time of the adoption of the present act. The former law, however, contained the following: "Sec. 27. In making up the amount of credits which any person is required to list for himself, or for any other person, company, or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all *bona fide* debts owing by such person, company, or corporation, to any other person, company, or corporation, for a consideration received; but no acknowledgment of indebtedness not founded on actual consideration, believed when received to have been adequate, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt within the meaning of this section." An examination of the present law discloses that the section last quoted is wholly omitted therefrom; neither does it contain any provisions of a similar nature. I therefore conclude that, by the adoption of the present law, the legislature intended that the taxpayer shall no longer be allowed to deduct his debts from the credits which he is required to list for the purpose of taxation. This thought is strengthened by the fact that it is a matter of common knowledge that, under the former law, much property in this state entirely escaped taxation, and its provisions were wholly inadequate to produce a proper and sufficient amount of revenue to pay the current expenses of the state and its various

municipal subdivisions. So it seems apparent that the provision for deducting debts from credits was purposely omitted from the present act.

The prevailing opinion follows the rule announced by Commissioner DUFFIE in *State v. Fleming,* 70 Neb. 523, 529, and construes the present revenue law to permit the taxpayer to deduct from the credits due him all just debts owing by him at the time of the assessment; and it is reasonable to believe that the district court took that view of the matter, and was governed by the opinion of the commissioner, which was filed and published with the opinion written by Chief Justice SULLIVAN in that case. By an examination of the opinion of the chief justice it appears to have been expressly held by the court that the question here presented was not involved in that case. So the conclusion of the commissioner that the word "credits" in the present revenue law should be held to mean "net credits" is mere *obiter dictum,* and in the present case should have been treated as such. *Obiter dictum* is a mere observation by a judge on a legal question suggested by a case before him, but not arising in such a manner as to require decision by him. It is therefore not binding as a precedent on the other judges or the court, although it may be entitled to more or less respect; and, while I have great respect for the learning and ability of the commissioner, yet it would seem that his conclusions, as expressed in his opinion, are not based on sound premises. The question involved in that case was whether the conditions imposed by the pressent revenue act on foreign corporations seeking the privilege of doing business in this state were valid. It was sought by counsel to obtain a construction of the law relative to the question now involved in this controversy, but the chief justice said:

"This court cannot attempt, prior to an actual controversy arising, to direct the officers charged with the enforcement of a law relating to their duty in putting it in operation."

Notwithstanding this statement it was said in the opinion of the commissioner:

"In making a return of his taxable property under the provisions of chapter 73 of the laws of 1903 the taxpayer may deduct from the credits due him all just debts by him owing at the time of such return."

And it seems clear that such statement was *obiter*. It appears that *State v. Fleming* and the prevailing opinion are based on *Florer v. Sheridan*, 137 Ind. 28, 36 N. E. 365; 23 L. R. A. 278; *Latimer v. Morgan*, 6 Ohio St. 279, and *Hubbard v. Brush*, 61 Ohio St. 252, 55 N. E. 829. In *Florer v. Sheridan* the only question involved was whether a statute of the state of Indiana, by which it was provided that the taxpayer might deduct his indebtedness from his credits and return the excess of credits, if any, for taxation, was constitutional. It is not authority in this case for the reason that the Indiana statute expressly provided for the deduction of debts from credits, while our present revenue law contains no such provision.

Coming now to the consideration of the Ohio cases cited to support the opinion of the majority, I find that the question of the taxation of credits was first brought to that court in *Exchange Bank v. Hines*, 3 Ohio St. 1. It was insisted by the bank that it had the right, under section 10 of the tax law of that state, adopted April 13, 1852, to deduct its liabilities from its credits which it was required to list for taxation. The court held that the provision of the statute which authorized such deduction was repugnant to the section of the existing constitution, which provided: "Laws shall be passed, taxing, *by a uniform rule*, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money." In passing on the question the court said, among other things:

"In legal parlance, and in the sense in which the term is used in the constitution, credits are *choses in action*—things *incorporeal*, consisting in the right of one person to demand and recover from another a sum of money or other things in possession. The value of a credit grows out of

the right to have and receive property in possession, either by a sale and transfer of the claim to another person in exchange for money or other things, or by requiring or enforcing payment from the debtor. Credits, therefore, although fictitious, nevertheless constitute property—substantial, convertible, and productive property. Money is invested in credits for profit, and credits are given in exchange on the sale of property of all kinds, real and personal. If A holds a credit or obligation against B, it is not any the less valuable as property, because A may be indebted to C.; and if A collect the amount of his claim against B, and apply the proceeds to the payment of his indebtedness to C, it amounts to the same thing, and is fully as valuable to him, as if he had sold a tract of his land, and made the same application of the proceeds of the sale. If a person hold good obligations against sundry persons, of the aggregate value of ten thousand dollars, and be indebted to sundry other persons to the amount of ten thousand dollars, the fact of such indebtedness can neither lessen the amount nor the value of his obligations against others. The indebtedness being to persons, other than those whose obligations he holds, could not be set off or otherwise lessen the value of his credits. A person's indebtedness constitutes no charge upon the credits which he holds against others, any more than it does upon any of his other property, real or personal. The constitution requires *all credits,* as well as *'all moneys,'* etc., to be taxed. And with deference to the opinion of others, I must confess myself wholly unable to comprehend the ground on which it has been claimed, that the taxable credits of a person consist simply of the excess, if any, of the aggregate amount of his choses in action over and above the gross amount of his liabilities."

The question next came before that court in the case of *Latimer v. Morgan, supra,* where the decision in the case of *Exchange Bank v. Hines* was followed and approved. Among other things, the court said:

"We are fully satisfied with the correctness of the de-

cision in the case of *Exchange Bank v. Hines,* and feel no disposition to disturb it."

In the year 1856, and after the decision of the foregoing cases, the legislature of Ohio passed an act which provided, in substance: "That a foreign corporation doing business in that state, and required to list its credits for taxation, might deduct from its claims and demands, arising out of the business transacted in that state, its *bona fide* debts arising from the same source." It appears that the taxing boards had recognized the provisions of the act as valid for something like forty years, and when its validity was challenged in *Hubbard v. Brush, supra,* the court sustained the statute, and made use of the language quoted in the prevailing opinion. So it would seem clear that the cases cited are not in point, and do not support the conclusions announced by the majority. The fact is that in every case to which our attention has been directed by counsel, where the courts have allowed a deduction of debts from credits, the opinion was based either on an express statute authorizing such deduction, or some constitutional provision to that effect. The prevailing opinion cites no case to the contrary, and after considerable research I have been unable to find a case where the deduction has been allowed, without express statutory or constitutional authority therefor.

It is said in the prevailing opinion: "The taxable credits of an individual or business is the amount that can be realized upon the adjustment of accounts." That the credits to be taxed are the true credits. The statute defines taxable credits as follows: "The word credit includes every demand for money, labor, or other valuable thing, whether due or to become due." This generic term or definition includes moneys loaned or invested, and the fact that such loans or investments are evidenced by promissory notes secured by mortgages renders them none the less credits. No reason exists why debts should not be set off against them as well as against what may be called ordinary credits. It must be remembered, however, that

the statute contains no provision for setting off debts against credits of any kind, whether they be loans or investments, or those arising in the ordinary course of trade or business, secured or unsecured. Under the rule announced by the majority, one has only to see to it that his credits do not take the form of loans or investments, set off his debts against such credits, and by that means pay no taxes at all on that form of his property, although such credits are just as valuable, and as sure to be paid in full as though they were for money loaned or invested, secured by real estate mortgages. Under this rule A, who holds a note for $1,000 taken in the ordinary course of trade against B, who is perfectly solvent, and who will pay it when due, as surely as though it were secured by a real estate mortgage, escapes taxation thereon, while his neighbor C, who holds a like note against D, which is for money loaned, and is secured in some manner, is compelled to pay taxes thereon. Again, if we are authorized to hold under the present revenue law that the taxpayer may deduct his debts from his credits, which are defined to be property, there seems to be no good reason why we should hold that he cannot deduct his debts from the value of any kind of property which he owns. And it would be but just to hold that a taxpayer, who is the owner of real property in this state, say of the value of $5,000, upon which he has executed a mortgage for $4,000 to secure the payment of a part of the purchase price, should not be permitted to set off his debt of $4,000 against the value of his land, and pay taxes on only one-fifth of the remainder, $1,000.

It is conceded in the prevailing opinion that the law in express terms makes no provision for the deduction of debts from credits; but it is stated, in substance, that the legislature in speaking of "credits" must have meant "net credits," and that the only way to ascertain the amount of net credits of the taxpayer is to deduct the amount of his debts from the gross amount of his credits. By adopting this course of reasoning we would interpolate and read the word "net" into the provisions of the act, and thus by

judicial decision amend the revenue law. This is what I protest against; this is what we should not do. It was well said by Judge Pinney in *School Directors of Pelican v. School Directors of Rock Falls*, 81 Wis. 428:

"It is well settled that the courts have no right to extend a statute upon their own notions of what is equitable, just, and wise to matters in respect to which the legislature has given no expression. To do so is the office of legislation and not of interpretation or construction. Courts cannot imagine an intent, and extend the letter of the act to it."

"Where the words of a statute are plain, explicit and unequivocal, a court is not warranted in departing from their obvious meaning, although from considerations arising outside of the language of the statute it may be convinced that the legislature intended to enact something different from what it did in fact enact." *Woodbury & Co. v. Berry*, 18 Ohio St. 456.

When the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislation, and not by judicial action. To interpolate the word "net" into the present revenue act, and thus make the law read "net credits," would violate all well established canons of construction. Courts cannot correct supposed errors, omissions or defects in legislation. To do so is to usurp the powers and duties of the lawmaking body. *Ogden v. Glidden*, 9 Wis. 40.

If it be contended that to tax credits without allowing any deduction on account of debts would work a hardship on the taxpayer, it may be stated that he is permitted to list his property, including credits, and in the first instance fix the value thereof. One listing his credits should fix the actual value of each item, not necessarily at its face value, but at such a sum as he is willing to declare under oath he can, with reasonable certainty, realize therefrom, either in money or other thing of value, and he will only be required to pay taxes on one-fifth of the value of his

credits so fixed by himself. This, of course, means that he shall fairly value them, so that neither the assessor nor the board of equalization will have occasion to increase such valuation.

For the foregoing reasons, I am of opinion that under the revenue law of 1903, as it now stands, each taxpayer must list his credits for taxation, valued in the manner above suggested, and he cannot deduct the amount of his debts from such credits. If the law, thus enforced, works any injustice or oppression to the taxpayers of the state, relief should be sought in further legislation.

FRANK BARKER V. STATE OF NEBRASKA.

FILED APRIL 5, 1905. No. 13,919.

1. **Information.** The information in this case, which is a copy of the one set out in the opinion in *Willis v. State*, 43 Neb. 102, charges the accused with the crime of murder in the first degree, and is sufficient to sustain a conviction of that offense.

2. **Instructions:** REVIEW. Objections to the instructions of the district court will not be regarded unless the record affirmatively shows that they were excepted to and called to the attention of that court by a motion for a new trial. Rule relaxed in cases of capital punishment.

3. **Evidence.** The evidence in this case contained in the bill of exceptions is amply sufficient to support the verdict.

4. **Juror:** DISQUALIFICATION. An opinion based solely on rumor and newspaper reports will not disqualify a juror, where it is shown that the opinion is merely hypothetical, and such as will not prevent his returning a fair and impartial verdict upon the evidence adduced on the trial, under the instructions of the court.

5. **Evidence:** BOOK OF ACCOUNTS. A charge against a deceased person in a so-called account book, offered in evidence to show that he was alive on the date corresponding to such charge, is not competent evidence unless it is first shown by whom the charge was made, the time when it was entered in the book, that the book itself is such a book of accounts as is admissible in evidence

under the statute, and that he personally procured the service charged for at the time the entry was made.

6. **Review.** Assignments of error which involve questions (such as the right of the state to prosecute by information) that have been often determined by this court, and have by our repeated decisions been declared to be the settled law of this state, will not be further considered or discussed.

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

Hamer & Hamer, for plaintiff in error.

Norris Brown, Attorney General, and *W. T. Thompson, contra.*

BARNES, J.

At the April, 1904, term of the district court for Webster county, Frank Barker was charged with the murder of his brother Daniel Barker and his sister-in-law Alice Barker. He was tried on the first count of the information, which charged him with killing his brother Daniel, and was found guilty of the crime of murder in the first degree, the jury fixing the death penalty; and from the judgment and sentence of the court he prosecutes error.

1. His first contention is that the information does not charge him with the crime of murder in the first degree, and is not sufficient to sustain a conviction of that offense. The length of the information is so great that we cannot copy it in full in this opinion. It is sufficient to say, however, that it charged that the accused, "contriving and intending of his deliberate and premeditated malice one Daniel Barker feloniously to kill and murder, in and upon the said Daniel Barker, then and there being, did unlawfully, willfully, forcibly, purposely, and of deliberate and premeditated malice, make an assault." Then follows a description of the pistol used by the accused, with a minute statement of the shooting; a description of the wound inflicted; a statement of its effect; the death of the

victim, and concludes: "So said E. U. Overman, county attorney as aforesaid, does say that the said Frank Barker, him the said Daniel Barker unlawfully, purposely, and of his deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." In fact the information is identical in form and substance with the one quoted in *Willis v. State,* 43 Neb. 102, and which was approved by this court by the following language:

"The information charging the plaintiff in error with the crime of murder in the first degree and on which he was tried, set out in the opinion and in all things approved."

So it appears that this contention is entirely without merit.

2. It is next contended that the court erred in his instructions to the jury, and such alleged errors are discussed at length under ten different heads, or in that many subdivisions of the plaintiff's brief. An examination of the record discloses that no objections were offered to the instructions and no exceptions were taken to any of them. In other words, it appears from the record that the accused and his counsel apparently accepted them, at the time they were given, as a correct statement of the law. Again, none of the instructions was complained of in the motion for a new trial, and for these reasons we cannot consider the objections now for the first time urged against them. In *Morgan v. State,* 51 Neb. 672, which was a case of murder in the first degree, where the question of the death penalty was involved, the court said:

"Objection to an instruction on the ground that it contains two or more distinct propositions will not be noticed when made for the first time in this court."

In the case of *Lackey v. State,* 56 Neb. 298, the court further said:

"The correctness of the ruling of a district court in giving or refusing instructions cannot be considered here

unless such ruling is first challenged in the district court by motion for a new trial."

The question was also presented in *Ream v. State*, 52 Neb. 375, and the court said:

"An instruction will not be reviewed unless the record affirmatively discloses that an exception was taken thereto in the trial court."

In *Sullivan v. State*, 58 Neb. 796, where the defendant was convicted of murder, it was held:

"Objections to instructions not brought to the attention of the district court by a motion for a new trial cannot be successfully urged in this court."

We may say, however, that, although not required to discuss objections to instructions made at so late a stage of the case, still we conclude that in a capital case it is our duty to satisfy ourselves that the defendant's life has not been put in jeopardy by a misstatement of the law to the jury, and with that end in view we have examined the instructions and find that they appear to be a correct statement of the law, as applied to the facts disclosed by the record.

3. It is also claimed that the evidence does not support the verdict, and that the jury should have found the accused guilty, if at all, of murder in the second degree, only. If the accused were the slayer of Daniel Barker, and the jury have found that he was, the record presents as strong and conclusive evidence that the killing was done with deliberate and premeditated malice as the human mind could well conceive. The evidence cannot be quoted in full in this opinion. The most we can do is to give a brief summary of its purport and effect. It appears that the accused had been keeping company with one Lizzie Rinkle, with a design to speedy matrimony, for over a year and a half. On Friday evening, January 29, 1904, three days before the tragedy, he was at her house. At that time he urged her to marry him immediately. This she refused to do until after March 2, following. He told her at this time of his intention to buy his brother Dan out, in which

event he desired her to marry him as soon as she could get ready. He told her they would take immediate possession of the property and move into the house occupied by his brother; that he was to have all the property which his brother and his brother's wife possessed, except their wearing apparel and keepsakes; that Dan and his wife would go to Denver, and that not later than the following Monday or Tuesday he would have to take them to the train; that it was not known that they intended to go, and he did not want anything said about it; in fact he requested her not to tell what he had said to her about the matter. On the following Sunday, January 31, the accused again visited Miss Rinkle, and informed her that he was quite sure he would buy his brother out, and that if he did he would have to take "Dan and his wife," as he called them, to the train on Monday night. On this occasion Charles Rinkle, a brother of Lizzie, came into the room where they were, and the accused thereupon exhibited a revolver, saying, "Isn't it a daisy"? That he left Miss Rinkle's on that occasion about half past one o'clock in the morning, stating that he was going to his brother Dan's, and if he bought him out he would call again on the following Tuesday or Wednesday; and it was shown that he went directly to his brother's place. On Tuesday night the accused called upon Miss Rinkle again, and informed her that he had bought his brother Dan out, and that Dan and Alice, as he called them, had gone on the Tuesday morning train to Denver; that they had driven his team to Red Cloud Monday forenoon, and sent a boy back with it. At this conversation he informed her that his brother had left everything except the carpets, wearing apparel and keepsakes; that his sister-in-law had taken the carpets. He also said he saw his brother pass through on the train that morning and waved at him through the window. The record further discloses the fact that on Saturday, the 30th day of January, the accused purchased the revolver and cartridges afterwards found concealed on the premises where the crime was committed; that the cartridges con-

tained in the revolver discharged a bullet of the same size and caliber as the ball found at the base of the skull of Alice Barker at the *post-mortem* examination. The evidence also disclosed beyond a reasonable doubt that no other person saw either Daniel or Alice Barker alive after Sunday the 31st day of January. On the following Friday their bodies were found buried in a hole under a shed on the premises where they resided, and when found were destitute of all clothing except their night robes. The day before the bodies were found, the clothing, personal effects and keepsakes belonging to Daniel and Alice Barker, together with the carpet which they had on their bedroom floor, and which was covered with large spots of blood, were found in the hay loft of the barn, covered with hay. It also appears that the accused had been in and about the premises, doing the chores and performing what other labor was necessary in caring for the stock and other things about the place, each day from and including Sunday the 31st day of January until he was arrested and the bodies were found.

Assuming that the verdict of the jury which found the accused guilty of the act of killing was true, it appears from the evidence, as summarized in the foregoing statement, that the accused deliberated and premeditated on the murder at least three days before committing it. He had formed the intent to kill, and planned the mode and manner of its execution that length of time before the day of the tragedy. So there can be no reasonable doubt of the fact that the act of killing was done by the accused purposely and of his deliberate and premeditated malice. On the whole, the verdict of the jury is amply sustained by the evidence and should not be disturbed.

4. It is claimed by counsel for the accused that the court erred in overruling his objections to H. W. Fowler and Charles C. Bennett as jurors, for cause; and that by reason of such ruling he was required to exercise two of his peremptory challenges in order to exclude them from the jury. As the answers of these jurors on their *voir dire* were the

same in substance and effect, the two assignments of error will be considered together. These persons, when examined to ascertain their qualifications to act as jurors, each stated that he had formed an opinion as to the guilt or innocence of the accused, but that such opinion was based entirely on newspaper accounts and common neighborhood rumors. After they had been interrogated by counsel on both sides, the court examined each of them with the following results:

Q. If retained as a juror, do you feel that you could try this case solely upon the evidence introduced here from the witnesses, and render a verdict in accordance with that evidence and the instructions of the court?

A. Yes, I believe I could.

Q. If you were retained as a juror would you do that?

A. Yes, sir.

Q. And dismiss from your mind anything that you have heard in any way as rumors or newspaper reports?

A. Yes, sir.

Q. And you feel now that if you were retained you could render such a verdict from the evidence, as it comes from the witnesses in court, directed by the court?

A. Yes, sir.

Q. Fairly and impartially, and without any leaning, or prejudice or bias for or against the defendant?

A. Yes, sir.

Q. And you will do so if retained?

A. Yes, sir."

On this examination the court overruled the challenges, and it seems that his ruling was strictly in accordance with the provisions of section 468 of the criminal code, which reads as follows:

"If a juror shall state that he has formed, or expressed, an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon

rumor, or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say, on oath, that he feels able notwithstanding such opinion to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial, and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case."

This statute has been construed and often upheld; and, in many cases where the answers of the jurors were the same or similar to those above quoted, this court has held that it was not error for the district court, in its discretion, to retain such jurors in the trial of criminal cases. *Palmer v. People*, 4 Neb. 68; *Bohanan v. State*, 18 Neb. 57; *Basye v. State*, 45 Neb. 261; *Dinsmore v. State*, 61 Neb. 418. Whatever may be the rule in other jurisdictions, it is well settled in this state that the court did not err in overruling the objection to the competency of the jurors above named.

5. It is contended that the court erred in sustaining the state's objections to certain questions propounded to the witness W. R. Geer, and in excluding the offer to make certain proof by him. It appears that Geer was working in a shoe store owned by one Smith, in Red Cloud, Nebraska, at or about the time this tragedy occurred; that a shoe was exhibited to him by counsel for the accused, which was identified as belonging to Daniel Barker. It appeared that the shoe had been repaired some time before the murder was committed, but the exact time was not shown. Over the objections of the state, the witness was permitted to testify that he thought he repaired the shoe for Daniel Barker, and that it looked as though it had not been worn after the repairs were made. The accused then offered a book in evidence belonging to Geer's employer, which it was claimed contained a charge, of date of February 1, 1904, of ten cents against Daniel Barker, and which charge it was claimed corresponded to the value of the repairing done on the shoe above mentioned. The state objected on

the ground that it was incompetent, irrelevant and immaterial, and that no foundation for its introduction had been laid. This objection was sustained, and the accused excepted. A mere statement of the matter is sufficient to show that the objection was properly sustained. It contained no accounts between the parties; no proof was offered to show that the book was a regular book of accounts; no testimony was given or offered to show when the repairing was done, when the charge which it was claimed the book contained was made, or by whom it was made, and in fact nothing was shown to render the offer in any manner material or competent. So we hold that the court properly excluded this evidence.

6. Counsel for the accused have argued some other contentions in relation to the admission and exclusion of evidence. We are not required to examine these assignments, for the reason that none of the rulings complained of were particularly challenged in the petition in error. When the error complained of concerns the admission or rejection of testimony on the trial, the record must show that the alleged error was specifically assigned in the petition in error, and it is not enough merely to allege, as was done in this case, "For errors in the ruling of the court in admitting evidence objected and excepted to by the defendant." *Walrath v. State,* 8 Neb. 80; *Dillon v. State,* 39 Neb. 92; *Wilson v. State,* 43 Neb. 745; *Berneker v. State,* 40 Neb. 810.

7. Counsels' brief contains some other assignments of error, which relate to questions that have been so frequently determined by this court, and are so well settled, that we decline to discuss them. Nevertheless, for the reason that this case involves the execution of the death penalty, we have carefully read the whole record, and examined every question presented, in order to make sure that the trial court had properly and carefully guarded the rights of the accused; and, after due consideration, our conclusion is that the record shows the commission of one of the most brutal and deliberate murders recorded in

the history of the state; that the facts and circumstances disclosed therein are not only consistent with the guilt of the accused, but inconsistent with any other rational conclusion, and in the trial of the case there was no reversible error.

For the foregoing reasons, the judgment of the district court is in all things affirmed; and it is ordered that Friday, the 16th day of June, 1905, be and the same is hereby, fixed and appointed as the day for carrying into execution the judgment and sentence of the district court.

AFFIRMED.

GEORGE F. HUBER, BY HIS NEXT FRIEND, JOHN F. HUBER, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

FILED APRIL 5, 1905. No. 13,743.

Evidence in an action to recover damages for personal injuries examined, and *held* to justify a peremptory instruction of a verdict for the defendant.

ERROR to the district court for Merrick county: JAMES G. REEDER, JUDGE. *Affirmed.*

J. E. Dorsheimer and *Matthew Gering,* for plaintiff in error.

John Patterson, J. W. Deweese and *F. E. Bishop, contra.*

AMES, C.

The trial judge directed a verdict for the defendant in an action to recover damages for a personal injury. The plaintiff prosecutes error.

The line of the defendant company extends northerly and southerly through Central City in this state. At the time the railroad was built, a good many years ago, the

whole of the town was on the west side of its track, the eastern boundary of the village being the western line of the railroad right of way. Afterwards an addition was surveyed and platted adjacent to the eastern line of the right of way. Extending easterly and westerly through the original townsite, and having for its eastern terminus the railroad right of way, is a public highway known as Eighteenth street. In the addition is platted a narrow street so situated that it might be, to the extent of its width, a continuation of Eighteenth street, but it has never been actually used as such. There has never been a public street or highway opened or established or used, except as below stated, across the railroad right of way between the termini mentioned of the streets above named. On the contrary, the space upon the right of way between said termini has at all times been occupied by the defendant by a fenced inclosure for live stock yard purposes. About opposite of the south line of Eighteenth street, which is several feet south of the south line of the corresponding street in the addition, is a gate in the stock yard inclosure which is left open, or at least unfastened, when the latter is not in use. Along the western boundary of the right of way has at all times been maintained by the defendant an open ditch several feet deep for drainage purposes, so that there has never been actually or apparently a public thoroughfare between the two streets at the point in question. There are some dwelling houses in the addition, and some citizen has laid a plank across the ditch at the south side of Eighteenth street, and people have been more or less in the habit of walking over the plank and through the yard, when the latter has not been in use. It may be assumed, though the evidence is conflicting in respect thereto, that there has been worn by this means a path in the locality described. But one block northward and one block southward from this point, at Seventeenth and Nineteenth streets respectively, public crossings were maintained by the city and the defendant. Adjacent to the stock yard on the north, and at about the north line of Eighteenth

street extended, the company maintained a water tank. Still further north some two blocks was the passenger station. Engines hauling trains through the city were furnished at this tank with a supply of water, and cinders were at the same time discharged upon the ground east of the track, north and south of the tank. The cinders were gathered up and carried away at intervals of a day or two, or two or three days at most. The heap of them that is alleged to have been the cause of the injury complained of lay north of the tank and was composed of fine, soot-like ashes, in shape like a sand dune some two or three feet high at its crown, which was about the same number of feet from the eastern rail of the track, the western edge of the heap being in contact with the rail. This heap was north of the north line of Eighteenth street extended, and some fifty or sixty feet north of the alleged path. On the occasion in question the plaintiff, then a boy between eleven and twelve years of age, and another boy of about the same age named Miller, crossed the plank over the ditch and, leaving the path, walked north along the right of way to a place north of the tank, where they crossed over to the east side in the hope, as the plaintiff testified, of seeing on an incoming train from the north a brother of Miller who was in the service of the defendant as brakeman. They idled about the tank and its vicinity until the train arrived and had stopped at the station, the engine had been detached, supplied with water and returned and recoupled to its load, and the train was ready to move forward on its journey. Then the Miller boy went some distance away to a straw stack, but the plaintiff went and stood on the heap of cinders just described. For what purpose he did so it is difficult to imagine. He says, in hope of catching a glimpse of the brother of his companion, Miller, in the caboose as the train sped past, but his companion was not with him, and he had never seen the brother and, of course, could not have recognized him. The alleged negligence of which he complains, and solely on account of which he seeks to recover, is that the cinders or

ashes were piled so near the track that the mound sloped gradually to the easternmost rail, and that he lost his balance and fell, and that by reason of the fact just mentioned he slid down the incline and his foot was thrust over the rail, where it was caught by a passing wheel and crushed, whereas, if the mound had been further away or if the cinders had been removed from immediate contact with the rail, his foot, upon his falling, would have come in contact with the rail on the outer side of the latter, and so would have been prevented from getting under the wheel and have escaped injury. In the light of the uncontradicted evidence this theory is incredible. The cars projected laterally from the track some two and a half feet, so that the outer part or side of them must have passed nearly or quite over the crown of the heap of cinders. The locality was visited immediately after the injury by witnesses called by the plaintiff, who testified that there were tracks apparently made by someone walking through the cinders, but that there was no indication that anyone had fallen on the mound or had slid down its slope under the train or toward the track. No one but the plaintiff was present when he received his injury or can testify how it was inflicted, but the circumstances are conclusive to the effect that it did not happen in the manner related by him. We do not think that it is incumbent upon us, or was upon the trial court or jury, to speculate about the matter.

Counsel for plaintiff contends that the cinder heap was an attractive object for children, and that children were in the habit of playing upon it with the knowledge of, and without objection by, the defendant. The first of these propositions is far from obvious, and the second is sharply disputed, and we think that both are immaterial. However "alluring" a pile of loose cinders may have been as a place of amusement, it is clear from the plaintiff's own story that it was not that character or feature of the ash heap that caused his presence upon it. His sole purpose, as it seems from his account, was to use the mound as an

eminence from which to look into a window of the passing caboose and discover the brakeman. He was allured, not by the ash heap, but by the caboose and brakeman. This fact clearly distinguishes this case from the so-called "Turn Table Cases." None of the defendant's employees knew of this object or of his presence there at the time, or had reason to suspect it. Besides, it would be carrying the presumption of ignorance and innocence in childhood to an extravagant length to suppose that an ordinarily active and intelligent boy, in the twelfth year of his age, who lived in the city within sight of and a few hundred yards distant from the scene of the accident, and who was familiar with town life and happenings, did not know that he exposed himself to danger by standing on the cinder heap while the train was passing. And again, it would be carrying the doctrine of permissive license a long way to hold, under circumstances like these, that the company had impliedly consented to the obstruction of the regular operation of its trains for the purpose of converting, not its right of way alongside its tracks, but its very roadbed into a playground for children. The contrary presumption is so great that it requires to be overcome, if not by direct and positive evidence, at least by circumstances of more cogency than those disclosed by this record.

We are of the opinion that the instruction of the district court was right, and recommend that the judgment be affirmed.

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

AFFIRMED.

JOSEPH S. MCBRAYER ET AL., APPELLEES, V. EDWARD JORDAN, APPELLEE, ELIAS H. DOAN, APPELLANT.

FILED APRIL 5, 1905. No. 13,760.

1. **Review:** PARTIES. When there has been a trial and judgment in replevin after the death of the plaintiff and without revivor or suggestion of death upon the record, the sureties in the replevin bond have such an interest as entitles them to have the error corrected by direct proceedings under the statute.

2. **Replevin Bond:** SURETIES: DEFENSES. It is a complete defense to sureties sued upon a replevin bond that the court was without jurisdiction to render the judgment in replevin or that such judgment was obtained by fraud.

APPEAL from the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Reversed and dismissed.*

C. E. Eldred and *W. S. Morlan,* for appellant.

W. R. Starr and *F. I. Foss, contra.*

AMES, C.

Appellees are sureties upon a replevin bond in an action begun in justice's court by Charles F. Brewer against appellee Jordan, who held the property under a judicial writ issued at the suit of appellant Doan. There was an appeal to the district court from a judgment for the plaintiff. Shortly after filing a new petition in the latter court the plaintiff died. The death of the plaintiff was not suggested or made apparent of record, but the cause proceeded to trial and a judgment for the defendants, as though he had continued in life but failed to appear and participate. After the lapse of more than three years from the date of the rendition of the judgment this action was brought by the sureties to procure a perpetual injunction against its enforcement, on the ground that it was procured by fraud and imposition upon the court that rendered it and that the defendant Doan was about to bring suit against the

plaintiffs on the replevin bond. There was a judgment as prayed, and the defendants appeal. The fraud alleged, but of which there is no proof, is that the attorneys for the defendant in replevin represented to the court at the time of obtaining judgment therein that the plaintiff Brewer was alive, although they knew him to be dead. We do not understand that this point is now seriously urged, and if it were so, we should not, for reasons presently to be stated, deem it material. But it is insisted that the replevin judgment is absolutely void for failure to suggest the death of the plaintiff therein and procure a revivor. The judgment does not run against the plaintiffs (appellees) who were not parties to the suit, but merely sureties upon the replevin bond. They undertook by that instrument that their principal should duly prosecute the action and become bound for the consequences of his failure so to do. If the judgment is erroneous merely or impeachable for fraud or irregularity not apparent on the face of the record, they undoubtedly had such an interest as to entitle them, after the death of the plaintiff, to take such direct proceedings under sections 602-609 of the code, or otherwise, as were requisite for its reversal. If it is wholly void either for fraud or because the court for any reason lost jurisdiction of the suit, that fact is pleadable as a complete defense to any action on the bond. In any case the appellees have, or have had and have lost by neglect, an adequate remedy at law, and a court of equity is without jurisdiction; and we recommend that the judgment of the district court be reversed and the action dismissed.

LETTON 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 action dismissed.

REVERSED.

NEBRASKA LOAN & TRUST COMPANY ET AL., APPELLANTS, V. HERWARD W. CROOK ET AL., APPELLEES.

FILED APRIL 5, 1905. No. 13,761.

Equity: REMEDY AT LAW. If in the rendition of a decree of foreclosure of a mortgage the court errs in assessing a lien as prior thereto in favor of one of the parties, the mortgagee has a speedy and adequate remedy by appeal or error, and equity will not subsequently interpose.

APPEAL from the district court for Rock county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

John M. Ragan, for appellants.

J. A. Douglas, contra.

AMES, C.

The plaintiff and appellant trust company herein owned a mortgage on a tract of land in Rock county in this state upon which there were delinquent taxes. The county, without a previous administrative sale, began an action against the appellant and the land owner for the foreclosure of the tax lien. Appellant filed an answer and cross-petition praying a foreclosure of its mortgage. The action proceeded regularly to a decree adjudging a first lien in favor of the county for the amount of the delinquent taxes and a second lien in favor of appellant for the amount found due upon its mortgage, and directing a sale of the premises and distribution of the proceeds accordingly. All parties acquiesced in the decree, and pursuant to it the premises were sold by the sheriff for a sum insufficient to pay the tax lien and costs. After confirmation of the sale the premises were sold by the purchaser, and in due course came by mesne conveyances to the appellee Crook. This is an action to redeem brought by appellants after the lapse of more than three years from the date of the judicial sale and confirmation. The appeal is from a

judgment of the district court sustaining a general demurrer to the petition and dismissing the suit.

The decree of foreclosure, in the respect that it adjudged a lien in favor of the county for taxes and directed a distribution of the proceeds of the sale for its satisfaction, was erroneous, but it was otherwise valid, and the sale and confirmation pursuant to it were effectual to convey the premises free from all liens rightfully adjudicated. The proceedings therefore divested appellant of all interest in the land as mortgagee, or otherwise, and deprived it of the right to redeem from the tax lien. Granting, for the sake of argument, that the court was without jurisdiction of the action as it was begun by the county, which we do not decide, it acquired jurisdiction of the parties and of the subject matter upon the filing of the cross-petition by appellant. If in the rendition of its decree thereon it erred in assessing a lien as prior thereto in favor of the county, appellant had a speedy and adequate remedy by appeal or error as in other like cases. We are therefore of the opinion that the judgment of the district court in this case is right, and recommend that it be affirmed.

LETTON 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.

HENRY MCCAW ET AL. V. ELMER S. COX.

FILED APRIL 5, 1905. No. 13,763.

Lease: NEW TERM. An agreement between a landlord and his tenant from year to year by which the covenants of an existing lease are to some extent modified, but from which a complete contract of leasing cannot be inferred, and without a surrender or an agreement to surrender, the existing tenancy does not have that effect or create a new term.

ERROR to the district court for Pawnee county: JOHN S. STULL, JUDGE. *Affirmed.*

Story & Story, for plaintiffs in error.

L. I. Noble and *J. C. Dort, contra.*

AMES, C.

This is an action in forcible detainer to recover possession of a farm from a tenant alleged to be holding over after the expiration of his term. There was a judgment below for the defendant, and the plaintiffs prosecute error. There is no important dispute of facts. The defendant became a tenant of the grantor of the plaintiffs in 1893 under an oral contract for one year, the exact covenants of which are not disclosed by the evidence, and continued in possession thereunder by tacit agreement of the parties until after the premises were sold and conveyed to the plaintiffs in December, 1901. It is not disputed that the holding thus became converted into a tenancy from year to year, the annual period being on or about the first of March. The tenancy was continued under the purchasers, seemingly without objection, and without a new or definite agreement, during the season of 1902. Just what rentals the defendant had been accustomed to pay, whether in kind or in money or in both, we are not informed; but in the summer of 1902 a demand that rental for part of the land be paid in cash seems to have been complied with, and the plaintiffs complained that the premises had not been kept free from weeds and cultivated in a workmanlike manner, and demanded that the defendant enter into a formal written lease for the ensuing year, which he declined to do. In August, 1902, there was some talk between the defendant and an agent of the plaintiffs concerning the continued occupation of the premises by the former during the year 1903. Precisely what this conversation was the parties are not agreed, but it had to do with the cutting of weeds by the tenant, and the setting by him of

some fence posts, and the permission to him of the use of some crib room for corn, but both parties understood that it was agreed that the defendant was to remain in possession the ensuing year. The plaintiffs contend that the agreement amounted to an agreement for a new lease beginning on the first of the then following March, and that it was avoided by the statute of frauds, because not to be performed within one year from the date of the making thereof. The defendant, on the other hand, contends that such a lease was not avoided by the statute as it then existed, but that a lease for a term not exceeding a year was valid under the statute, although the term was to begin *in futuro*. This is the principal subject of controversy in the briefs and arguments, but we do not find its decision to be necessary, because we are convinced that the defendant is right in a preliminary contention that the above mentioned talk between the parties was not effectual to terminate the then existing tenancy from year to year. An intent so to do does not appear to have been definitely expressed, nor were all the terms of occupancy or the whole amount of rentals for the season of 1903 set forth or recapitulated in the conversation, so that from it alone it would be impossible to gather or infer a complete contract of leasing. The most that could be said is that the covenants of the existing lease, whatever they were, modified by the new stipulations, constituted the agreement of leasing for the ensuing year, but that is equivalent to saying that the existing tenancy, with some modifications as to cultivation and rentals, was extended or continued in being until March, 1904. There was no surrender or specific agreement to surrender or terminate the tenancy from year to year, and it was not and had not been terminated by notice or operation of law. If this conclusion is right, it disposes of the case, because counsel agree, as we understand them, and as the law undoubtedly is, that subsequent to this conversation, and before the beginning of this action, no steps were taken which were effectual to terminate a valid tenancy from year to year.

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

LETTON 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.

GEORGE HOLMES, JR., ADMINISTRATOR, V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED APRIL 5, 1905. No. 13,968.

1. **Contributory Negligence.** By negligently or voluntarily exposing himself to known dangers, one does not assume responsibility for others which are not known and by the exercise of ordinary prudence would not be discovered.

2. **Question for Jury.** From an examination of the record the court is of the opinion that the question of contributory negligence was improperly withdrawn from the jury.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed.*

George W. Cooper and *Martin Neilan,* for plaintiff in error.

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

AMES, C.

The facts out of which this case arose are stated fully and at length in a former opinion, *Chicago, R. I. & P. R. Co. v. Holmes,* 68 Neb. 826. The errors because of which the former judgment was reversed were avoided on the second trial, but there was additional evidence on the part of the company to the effect that, at and long prior to the time of the happening of the accident, it was and had been

customary in the yards, which were the scene of the casualty, for the persons performing the particular services in which the deceased lost his life to cause the cars to separate from 30 to 60 feet before going between them. It is argued that the deceased knew of this custom, the observance of which was essential to the exercise of reasonable care on his part, and that he had absolute command of the movements of the engine by which the cars might have been thus separated, but that nevertheless he went between them when, by his own direction, they were not separated more than four or six feet, knowing that the cars of the Union Pacific company were liable to be put in motion by a slight jar and to come together in consequence of their own gravity. Influenced by these considerations, the trial court instructed a verdict for the defendant on the sole ground that the deceased was guilty of contributory negligence. This instruction assumes, or rather is predicated upon, actionable negligence on the part of the defendant company, so that the sole question is whether the evidence discloses, without dispute, that the conduct of the deceased was such as to prove beyond reasonable controversy that he knew, or by the exercise of ordinary vigilance would have known, that the defendant was likely, negligently or otherwise, to give the cars of the Union Pacific such an impulse as would put them in motion, and, having that knowledge, was careless of his own safety from that danger.

In the present aspect of the case it is immaterial what risks the deceased incurred from the cars and appliances of the Union Pacific company and the forces connected therewith, with which alone he had immediately to deal. It is admitted by the present state of the record that he did not come to his death by reason of the uninfluenced movement or operation of any of these things, and it is entirely clear that if he had done so the defendant would not have been liable in damages on account thereof. So that, after all, the real and sole questions ultimately to be decided in the case are, was the defendant guilty of negli-

gence in "bumping" the cars of the Union Pacific company, and was the deceased, in view of his knowledge, if he had knowledge, of the greater or less probability of such "bumping," guilty of negligently contributing to its consequences? Now as to whether the defendant put the cars of the Union Pacific company in motion by the impact of its own train before or after the crushing of the deceased, and as to whether, if it did so, the act was negligent on its part, and as to whether the happening of such an event was, or should have been, within the reasonable anticipation of the deceased, and as to whether, therefore, he omitted with respect to it the precautions of a reasonably prudent man, are all questions of fact about which there is, in our opinion, sufficient conflict in the evidence to require them to be left to a jury. We are not called upon to investigate the relations of the deceased with his employer or his duty toward the latter, nor the risks he assumed, negligently or otherwise, in the conduct of its business. Yet, as its appears to us, these were the principal if not the only matters which the court had in mind in giving the instruction complained of, and to which the jury presumably supposed their attention was directed thereby.

We therefore recommend that the judgment of the district court be reversed and a new trial granted.

LETTON 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 a new trial granted.

REVERSED.

IN RE CLAPHAM'S ESTATE. JOHN H. CLAPHAM V. JASPER C. CLAPHAM ET AL.

FILED APRIL 5, 1905. No. 13,749.

1. **Will Contest:** INSANITY. An undue prejudice based on some reason is not an insane delusion.

2. **Action of the trial court in excluding evidence examined and approved.**

3. **Costs.** The discretion conferred on the courts by section 623 of the code in taxing costs is not arbitrary, but a legal one to be exercised within the limits of legal and equitable principles. *Wallace v. Sheldon*, 56 Neb. 55, followed and approved.

4. ———. *Held*, That in the instant case it was inequitable to tax the fees of the guardian *ad litem* of a minor beneficiary under the will against the contestant.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Judgment modified.*

John H. Barry, for plaintiff in error.

Courtright & Sidner, contra.

OLDHAM, C.

In May, 1903, Edward Clapham departed this life testate, at Cedar Bluffs, Saunders county, in this state, leaving surviving him his widow and seven children. A written will properly attested by two subscribing witnesses, and executed in July, 1900, by the deceased, was duly offered for probate in the county court of Saunders county. The estate disposed of by the will was of the value of about $40,000. One-half of the estate was devised absolutely to the widow, and the other half equally divided between six of his surviving children, to the exclusion of John H. Clapham, the eldest son. With reference to this son, one paragraph of the will reads as follows: "I do not desire that any portion of my property shall under any condition go to my son John H. Clapham, or to his issue, as I have al-

ready given him his share." When the will was offered for probate, John H. Clapham filed objections in the probate court, alleging, in substance, that at the time of the purported execution of the will the testator was not of sound and disposing mind, and also that the will was produced by undue influence of Mrs. Callaway, one of the daughters of the testator. After hearing the objections in the county court the will was admitted to probate, and the contestant appealed from the decision of the county judge to the district court for Saunders county, where, on a hearing to the court and jury, a verdict was directed for the proponents of the will. Contestant thereupon filed a motion to tax the costs of the proceeding against the estate, which motion was overruled, and all costs of the proceedings were taxed to the contestant. A motion for a new trial was also filed by contestant and overruled by the court, and judgment was entered upon the verdict, and to reverse this judgment contestant brings error to this court.

The first objection urged is that the court erred in directing a verdict for the proponent. The evidence touching on the mental condition of the testator is not seriously conflicting in the record. It may be said to be clearly established that the testator had been in poor physical health for several years prior to his death, and had suffered from a complication of catarrh of the stomach, bronchitis and consumption. But the evidence is equally certain that he retained his mental faculties up to the very close of his life. The testimony shows that deceased was very exacting in his business matters with anyone with whom he had dealings, and was very industrious and a man of strong prejudices; that prior to 1896 he had been on good terms with the contestant, but that about that time he made a contract with the son for the sale of 225 acres of land, and also claimed a contract for the feeding of stock on the place; that a difference arose between father and son concerning this contract, and the litigation followed and continued in the courts for some time, when it was finally settled and compromised; that after this litigation the father

became embittered against the son, and not long after the close of the litigation executed the will in controversy. It is also in evidence that the testator had executed a former will, in which he had also disinherited the son for the reason, as alleged in that will, that contestant had already had his full share of the estate. The only testimony in the record relied upon as tending to show insanity is that of the contestant and his wife, who each testified that they regarded their father as being generally sane, but as having an insane prejudice against the contestant. They base their opinion of insanity, however, on the ground that the father was always scolding about the son, claiming, without just reason and without just cause, that he was lazy, shiftless and reckless in the expenditure of money. This prejudice, however, manifested itself after the litigation between father and son and only, at most, tends to show an undue prejudice based on some reason rather than an insane delusion. Against this evidence is the testimony of numerous witnesses, both expert and non-expert, tending to show that the mental faculties of the testator were well preserved up to the time of his death. We think that in view of this testimony there was no evidence in the record from which reasonable minds might have drawn different conclusions on the question of the mental capacity of the testator, and that so far as this issue was concerned the trial court was fully justified in directing a verdict.

On the issue of the undue influence of Mrs. Callaway in the making of the will, the evidence admitted wholly fails. This is practically conceded in the brief of contestant, and error is predicated on the action of the trial court in excluding testimony offered in support of this issue. Contestant testified to a conversation with his father about the first will which he made, in which he says his father admitted Dorothy (Mrs. Callaway) importuned him to leave John (contestant) out. This evidence was stricken out by the trial court, and error is alleged against this ruling. It will be noted that this alleged conversation was not with reference to the will in controversy, but to a former one,

and that it is not followed by proof tending to show continued coercion over the testator by the daughter from t time of the making of the first will to the time of making the one in issue. Nor is there any evidence in the record that shows that Mrs. Callaway knew anything about the execution of the last will at the time it was made. It is conceded by plaintiff in error that this testimony would not be competent for the purpose of proving undue influence, but the claim is that it should have been admitted for the purpose of showing coercion. If it had, it would have been the only testimony in the record tending to show th fact and, standing alone, would certainly have been insufficient to establish it. We therefore conclude that the district court was fully justified in striking this testimony from the record, and that, as there was no competent evidence in the record tending to show undue influence, the instruction directing a verdict for proponents was properly given.

The next question urged is that the courts erred in taxing the entire costs, including the fee of the guardian *ad litem* of one of the minor beneficiaries, to the contestant. In *Wallace v. Sheldon,* 56 Neb. 55, the question of the taxation of costs in cases in which wills are contested was examined, and it was there held that the power to tax costs in cases of this character is contained in section 623 of the code, and that "the discretion conferred on the courts by section 623 of the code is not an arbitrary, but a legal, one, to be exercised within the limits of legal and equitable principles." While the contest in this case may, as observed by plaintiff in error, have been instituted in the utmost good faith, yet an examination of the record shows that it is based on very meager and indefinite suspicions, rather than competent testimony tending to establish the averments. We are therefore impressed with the idea that the learned district judge was fully justified in taxing the costs generally against the contestant, but, as the guardian *ad litem* of the minor appears to have been appointed by the county judge for the special and proper purpose of pro-

tecting the interest of the minor, we hardly think it equitable to tax this fee against the contestant.

We therefore recommend that the judgment of the district court be modified by taxing the fee of the guardian *ad litem* to the proponents, and that, as so modified, the judgment be affirmed.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified by taxing the fee of the guardian *ad litem* to the proponents, and, as so modified, the judgment is affirmed.

JUDGMENT ACCORDINGLY.

HOWARD B. RALEY, TRUSTEE, APPELLANT, V. RAYMOND BROTHERS CLARKE COMPANY ET AL., APPELLEES.

FILED APRIL 5, 1905. No. 13,756.

1. **Bankruptcy:** PREFERENCE. When an insolvent debtor within four months of the adjudication of his bankruptcy transfers to one of his creditors with notice of such insolvency sufficient property to satisfy the debt in full, a preference will be presumed, because such is the natural and logical result of the transaction.
2. **Void Transfers.** Under subdivision E, section 67 of the bankruptcy act of July 1, 1898 (U. S. St. at Large, vol. 30, p. 564, ch. 541), all conveyances, transfers or assignments of property of a bankrupt made within four months of the filing of the petition for an adjudication in bankruptcy for a past consideration and with the intent and purpose on the part of the bankrupt to hinder, delay and defraud any of his creditors, are void as against the creditors.
3. **Amendment.** An amendment is permissible which does not change the cause of action but merely sets forth a new assignment or breach springing from the original cause of action.
4. **Amendment after Appeal.** In an appeal in equity in this court an amended petition may be filed in conformity with the facts proved in the record.

APPEAL from the district court for Lancaster county: EDWARD P. HOLMES, JUDGE. *Reversed with directions.*

Robert Ryan and *George H. Hastings,* for appellant.

Wilson & Brown and *A. W. Field, contra.*

OLDHAM, C.

This was a creditors' suit instituted in the district court for Lancaster county, Nebraska, by Howard B. Raley, trustee of Walter P. Hanley, a bankrupt, against Raymond Brothers Clarke Co., a corporation, for the purpose of setting aside the transfer of the notes and book accounts of the estate of Walter P. Hanley, and for an accounting of the amount collected by the defendant corporation from such notes and accounts. The facts underlying the controversy, briefly summarized, are that in July, 1900, Walter P. Hanley was engaged in the mercantile business in Dorchester, Nebraska. He exchanged his stock of merchandise for some money and 160 acres of land in Butler county, Nebraska, and on July 18, 1900, he transferred to Harry A. Tebbitts, the collecting agent of the defendant, $580 in cash and all his accounts and promissory notes, amounting in gross to about $5,385.39, in the alleged payment and satisfaction of an account owed to defendant for merchandise of about $1,900. On August 21, 1900, Hanley was adjudged a bankrupt, and Howard B. Raley was duly appointed and qualified as trustee of his estate. The lands received by Hanley in exchange for his goods were seized by the trustee and sold, and from their proceeds a 17 per cent. dividend was paid on the debts of the bankrupt. The amount of indebtedness proved against his estate aggregates the sum of $10,097.95. Immediately after the transfer of the notes and book accounts to defendant's agent, Hanley absconded, leaving no property except the 160 acres of land in Butler county for the satisfaction of any of the claims against his estate. The petition filed in the

court below alleged, in substance, that Hanley, until about the middle of July, 1900, was doing a retail merchandise business in Dorchester; that about the date last mentioned, and in less than four months of the filing of the petition, on which he was adjudged a bankrupt, Hanley had disposed of all his real and personal property for the purpose of defrauding his creditors, and had absconded from the state of Nebraska; that he was duly adjudged a bankrupt, and that plaintiff was appointed and qualified as trustee of Hanley's estate; that Hanley is wholly insolvent (setting out the proximate amount of his indebtedness), and a dividend of only 17 per cent. had been declared, and that all assets of the estate except the claim sued on herein had been collected. The petition also alleged the order by the referee in bankruptcy for the prosecution of this suit. The petition further alleges as follows:

"That on or about July 14, 1900, and within four months before the filing of the petition as aforesaid for an adjudication of bankruptcy against Walter P. Hanley, the said Walter P. Hanley, by an agreement between himself and said Harry A. Tebbitts, for the purpose of defrauding the creditors of said Walter P. Hanley, transferred all his promissory notes, books, books of account and indebtedness due him for goods and merchandise to said Harry A. Tebbitts, but the exact nature of said notes, accounts and evidence of indebtedness, and by whom owing, your petitioner is unable to describe more fully than as above set forth. Your petitioner alleges that said transfer was made for the benefit of the said Raymond Brothers Clarke Company, and to enable said corporation to obtain the proceeds of the collection thereof to apply on the aforesaid indebtedness owing by said Walter P. Hanley to said Raymond Brothers Clarke Company, but whether said transfer and assignment purported to be to Harry A. Tebbitts or to Raymond Brothers Clarke Company your petitioner is unable to state, but your petitioner alleges that such books, promissory notes, accounts, books of account and other indebtedness owing to Walter P. Hanley were

on or about July 14, 1900, by him transferred for the use and benefit of said Raymond Brothers Clarke Company, and to be collected and credited on the indebtedness owing by said Walter P. Hanley to the said Raymond Brothers Clarke Company when so collected, and since about July 14, 1900, a large amount in the aggregate has been collected on said notes, book accounts, accounts and evidences of indebtedness, which prior to about July 14, 1900, had been owing to said Walter P. Hanley, the amount of which collections is to your petitioner unknown. Your petitioner respectfully represents that, though said collections for the benefit of Raymond Brothers Clarke Company have been made, they have not been reported and turned over to apply on the indebtedness proved or to be proved against the estate of said bankrupt, but have been kept concealed in fraud of the rights of creditors of Walter P. Hanley, and have been applied to the sole use and benefit of Raymond Brothers Clarke Company. Your petitioner further represents that the concealment of the nature of the transaction between Walter P. Hanley and Harry A. Tebbitts, and the concealment of the proceedings and acts of said Harry A. Tebbitts and Raymond Brothers Clarke Company and their agents and employees, render it impossible for your petitioner to state with sufficient definiteness the facts to entitle your petitioner to maintain an action at law, for which reasons your petitioner invokes the equitable powers of this court that your petitioner may have a discovery of the facts on which your petitioner is entitled to relief, and that thereupon this honorable court may grant fully such relief as the proofs shall show your petitioner entitled to." The prayer is that the transfer be declared null and void, and that the defendants be decreed trustees for their own wrong for Walter P. Hanley, bankrupt, and for an accounting.

The answer of defendants, after admitting its incorporation, that it was engaged in the wholesale mercantile business, and that Hanley had been engaged in the retail merchandising business, as charged in plaintiff's petition,

denied that it received the assignment of the accounts alleged against with any fraudulent intent, and, further answering, said:

"And this defendant, further answering, alleges that on the 14th day of July, 1900, the said Walter P. Hanley was indebted to this defendant in the sum of $1,318.51 for goods and merchandise theretofore sold and delivered to said Hanley by this defendant, and that on said date the said Walter P. Hanley, in full payment of said indebtedness, sold and delivered to this defendant the notes and accounts mentioned in plaintiff's petition, which notes and accounts did not exceed in value the amount then due and owing to this defendant from the said Hanley. And this defendant alleges that in all things connected with the purchase of said notes and accounts the defendant Harry A. Tebbitts acted as the agent of this defendant. Further answering, this defendant says that, all this time said notes and accounts were so sold and delivered by said Hanley to this defendant, neither this defendant nor his agent Harry A. Tebbitts knew or had reason to believe that the said Walter P. Hanley was insolvent, nor did they or either of them believe or have reasonable cause to believe that said notes and accounts were sold to this defendant by said Hanley with any intent to give this defendant a preference, nor did said Walter P. Hanley intend said sale and transfer of said notes and accounts so made to be a preference. Wherefore this defendant prays that it may go hence without day and recover its costs herein expended, but, if for any reason this court shall find that the said sale of said notes and accounts is invalid, then this defendant prays that its debt against said Hanley may be revived against the estate of said Hanley, and that this defendant may be adjudged entitled to its *pro rata* share of the assets of said estate, and that in any event the plaintiff's recovery may be restricted to the excess received by this defendant on and above its *pro rata* share of said estate." There was a reply in the nature of a general denial to this answer.

We have quoted from these pleadings at considerable length in view of the fact that on a proper construction of the issues tendered in the court below depends the correct conclusion to be reached from the facts clearly and plainly established by the evidence contained in the bill of exceptions.

It is proved in the testimony beyond the possibility of a cavil that, at the time these notes and accounts were assigned to defendant's agent, Hanley was hopelessly insolvent, and that this fact was known to the defendant when it received the assignment. It is also without dispute that the assignment was hurriedly made on a telegraph blank, and handed to defendant's agent when Hanley was in the act of absconding, and when other creditors were known by defendant to be pressing him for a settlement of their accounts. It is stipulated that there had been collected by defendant on these notes and accounts $2,653.38 at the time of the trial, but the remainder of the assets were not accounted for in the record. The court below found that defendant knew that Hanley was insolvent when it took the assignment of the claims, but also found that the assignment was taken in perfect good faith for the payment of an indebtedness actually existing, and without any fraudulent intent on defendant's part. At the close of the testimony and before judgment, plaintiff tendered an amended petition in conformity with the facts proved, which alleged specifically that a fraudulent preference was intended by this assignment, within the meaning of section 60 of the bankruptcy law of July 1, 1898. The court denied leave to plaintiff to file this amended petition on the ground that it was a departure from the issues originally pleaded, and entered a judgment in favor of defendant, and dismissed plaintiff's petition; and to reverse this judgment plaintiff appeals to this court.

At the outset of the discussion it is urged by counsel for appellees that as this is an equitable action brought to this court on appeal we cannot, under the rules of practice governing appeals, consider the error, if any, of the district

court in refusing leave to plaintiff to file its amended petition to conform to the facts proved; that such question could only be reviewed in error proceedings. Technically this contention is correct and supported by numerous former adjudications of this court, but, waiving all question as to the ruling of the district court on the filing of the amended petition, we think its judgment is clearly erroneous under the practically undisputed evidence in the record, which was admitted without objection, and which is supported by the general allegations of the petition on which the cause of action was tried in the court below. The gist of the petition plainly was the alleged fraudulent transfer of the notes and book accounts of the insolvent firm within four months of the adjudication of Hanley's bankruptcy. While there was no specific allegation of an intended fraudulent preference in the original petition, yet the petition was not assailed either by motion or demurrer, but on the contrary was pleaded to, and an answer filed denying specifically that defendant intended any fraudulent preference by reason of the transfer, or that it knew of the insolvency of Hanley when such transfer was made. On this question the particular allegations of the answer aided the general allegations of the petition, and fairly presented for adjudication to the court below the question of an intended fraudulent preference within the meaning of section 60 of the bankruptcy act, which provides as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting

therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

There seems to be one question on which the various holdings of the circuit courts of the United States are fairly uniform, and that is on the proposition that, where an insolvent debtor transfers to one of his creditors in payment of his debts personal property sufficient in value to satisfy the debt in full, a preference will be presumed, because such is the natural and logical result of the transaction. *Johnson v. Wald,* 93 Fed. 640; *Goldman v. Smith,* 93 Fed. 182; *In re Wolf,* 98 Fed. 84; *Shutts v. First Nat. Bank,* 98 Fed. 705; *In re Ft. Wayne Electric Corporation,* 96 Fed. 803. And again section 67, subdivision E of the bankruptcy act, declares all conveyances, transfers or assignments of property by a bankrupt, made within four months of the filing of the petition for an adjudication of bankruptcy, with the intent and purpose on the part of the bankrupt to hinder, delay and defraud his creditors or any of them, void as against the creditors of such debtor, except as to transfers in good faith for a present fair consideration. The evidence in this case shows that the transfer of the notes and accounts was not for a present, but for a past consideration, and consequently, when made, as the evidence clearly shows it was, with the intent on the part of the bankrupt to delay and hinder other creditors, it was void within the meaning of this act.

Because of the failure of the record to account for the uncollected claims in the hands of the defendant it is impossible to make an independent finding as to the amount plaintiff should recover, and for this reason it will be necessary to reverse the judgment of the district court, with directions to enter a judgment in favor of plaintiff, and require a full accounting from the defendant for all claims assigned to it on July 18, 1900.

Since the passage of section 681*a* of the code, which provides for a trial *de novo* in equity appeals in this court,

and for independent conclusions as to what "finding or findings are required under the pleadings and all the evidence," there is no reason why plaintiff's request to file the amended petition tendered in the court below should not be granted here. An amendment to correspond to the facts proved is permissible under our code, either before or after judgment, provided always that the amendment shall not state a new and different cause of action from that originally relied upon. The transaction complained of is the cause of action. As before stated, in the instant case it was the alleged illegal and fraudulent assignment of the notes and accounts to the defendant by the bankrupt. Consequently, the amended petition tendered is germane to the original cause of action. *Gosnell v. Webster,* 70 Neb. 705; *Epply v. Lovell,* 5 Neb. (Unof.) 251; *Gourley v. Prokop,* 71 Neb. 612. An amendment is permissible which does not change the cause of action, but merely sets forth a new assignment or breach springing from the original cause. *Perot v. Leeds,* 13 Phila. (Pa.) 185; *Kiser v. Dannenberg,* 88 Ga. 541; 15 S. E. 17; *Carrie v. Cloverdale Banking & Commercial Co.,* 90 Cal. 84. The practice seems to be approved in states having statutes governing proceedings on appeal similar to our own to either treat the amendment offered in the court below as having been filed or to permit it to be filed anew in the court of last resort. In *Toy v. McHugh,* 62 Neb. 820, an immaterial variance between the petition and the proof was disregarded, and SULLIVAN, C. J., speaking for the court says:

"Considered as a whole the evidence does not, it is true, respond to the averments of the petition; but the variance is not in an essential matter and should, at this stage of the litigation, be altogether disregarded, for it is evident that it did not mislead the defendant to his prejudice nor embarrass him in making his defense upon the merits."

In *McKinney v. Jones,* 55 Wis. 39, under a statute similar to our own, where a defective petition was considered, the court said:

"This proof supplied the omission in the complaint. Under a familiar rule often acted upon by this court, the complaint may be amended, as well after as before judgment, to correspond with the proofs, or the omission may be disregarded."

To the same effect has been the holding in *Wilcox & White Organ Co. v. Lasley,* 40 Kan. 521; *Case v. Wandel,* 16 Ind. 459. We think the practice in equity appeals permitting an amendment to be filed in this court in conformity with the facts proved preferable to treating it as having been filed in the court below.

We therefore recommend that the plaintiff be permitted to file his amended petition in this court, and that the judgment of the district court be reversed and the cause remanded, with directions to the court below to find the issues in favor of plaintiff, and to require a full accounting from the defendant of all the notes and accounts assigned to it by Hanley on July 18, 1900.

AMES and LETTON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the plaintiff is permitted to file his amended petition in this court, and the judgment of the district court is reversed and the cause remanded, with directions to the court below to find the issues in favor of plaintiff, and to require a full accounting from the defendant of all the notes and accounts assigned to it by Hanley on July 18, 1900.

REVERSED.

LOUP COUNTY ET AL. V. J. G. WIRSIG.

FILED APRIL 5, 1905. No. 13,759.

Appeals from the decision of a county board should be entered, tried and determined in the district court the same as appeals from justices of the peace. *Haskell v. Valley County,* 41 Neb. 234, followed and approved.

ERROR to the district court for Loup county: JOHN R. HANNA, JUDGE. *Affirmed.*

A. S. Moon and *H. E. Carter,* for plaintiffs in error.

Guy Laverty, contra.

OLDHAM, C.

On the 15th day of June, 1903, the board of county commissioners of Loup county allowed certain claims of one J. G. Wirsig against said county. On the 25th day of June A. S. Moon, a taxpayer of the county, filed a notice with the county clerk of an appeal from the allowance of such claims, and also filed a bond in conformity with the statute, which was approved by the county clerk. On the 28th day of August a transcript of the procedings was filed in the district court for said county, and on the 4th day of April, 1904, a motion was filed in the district court to dismiss the appeal. This motion was sustained, and the appeal dismissed, and appellant Moon brings error to this court to set aside the judgment of the district court in dismissing the appeal.

Section 39, article I, chapter 18, Compiled Statutes (Ann. St. 4457), which provides for appeals by taxpayers in cases of this character, directs, among other things, that "such appeal shall be entered, tried, and determined the same as appeals from justice courts." This section was construed by this court in *Haskell v. Valley County,* 41 Neb. 234, and we there held that "appeals from the decision of a county board should be entered, tried, and determined in the district court the same as appeals from justices of the peace." As the transcript was not filed until more than 30 days from the allowance of the claims, and as appellant offered no showing to excuse his delay in procuring and having the transcript filed, and as he made no effort to file a petition in the district court within the time prescribed by section 1010*a* of the code, we think the

judgment of the district court was the only one that could be properly rendered, and we recommend that such judgment be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

ELIZABETH E. SHANNON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.*

FILED APRIL 5, 1905. No. 13,597.

1. Cities: SEWERS. Where a city has in good faith adopted and carried out the plans for a sewerage system of a competent sanitary engineer of high standing in his profession, it is not chargeable with the cost of additional or substituted improvements made necessary by the growth of the city.

2. Evidence examined, and *held* to show that the inadequacy of the six-inch sewer between 12th street and 16th street in the city of Omaha was largely caused by the increased capacity required by reason of business buildings of large size having taken the place of residences at that locality.

3. Assessment. The power to make public improvements and to assess the cost thereof upon property specially benefited thereby conferred upon municipal corporations is a continuing power and may be exercised whenever the public need demands.

4. Notice: WAIVER. When a person files a protest against a special assessment with the board of equalization before the time fixed in the published notice for the meeting of the board, he thereby waives any defect in the notice.

5. Cities: POWERS: ASSESSMENT. A city, under certain circumstances, has power to create a new sewer district within the limits of a larger district and to assess the cost of a new sewer in said district upon the abutting property therein according to special benefits received.

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* Rehearing allowed. See opinion, p. 514, *post*.

6. **Assessment.** Under the evidence in this case, *held* that the special benefits were practically confined to the property within the new district, that each lot therein was specially benefited, and that the front-foot method was not inequitable under the circumstances.

APPEAL from the district court for Douglas county: GUY R. C. READ, JUDGE. *Affirmed.*

Franklin J. Griffin and *Richard S. Horton,* for appellants.

C. C. Wright, W. H. Herdman and *A. G. Ellick, contra.*

LETTON, C.

This action was brought to enjoin the collection of certain special assessments against the property of the plaintiffs levied for the purpose of defraying the cost of the construction of a sewer on Capitol avenue from 12th to 16th streets in the city of Omaha. In 1882 a sewer district was created by ordinance, known as sewer district No. 6, and comprising Capitol avenue from 9th street to 20th street, the sewer beginning at 9th street on the east and flowing to 12th street, and beginning at 20th street on the west and flowing thence to 12th street, in which street, both of these lateral sewers emptied into a main sewer running at right angles thereto. It appears that in 1882 the city authorities adopted a drainage plan for the city, known as the "Waring System." Colonel Waring was a sanitary engineer of wide reputation and high standing in the profession at that time, who had carried out successfully a plan of sanitary sewerage in the city of Memphis, in which he used for laterals six-inch pipes. When the city authorities of Omaha were about to install a sewerage system, they called in Colonel Waring and adopted a complete plan and system for the city, prepared by him. The then city engineer, Mr. Andrew Rosewater, was not in favor of the Waring system, and testifies that in his judgment it was not a practicable system

on account of the liability of the six-inch pipes to become blocked up by sticks and other obstructions; but the city council, evidently relying on the high reputation of Colonel Waring as a sanitary engineer, adopted his system in spite of Mr. Rosewater's objection. At the time the sewer was constructed, that portion of Capitol avenue between 12th and 16th streets was occupied mostly by small residences, but soon afterwards a number of business buildings were erected on this portion of the street, among them being the Dellone Hotel, a large five-story modern building, the W. R. Bennett store, the Presbyterian Hospital and the Exposition building. At least three hydraulic elevators were installed in these buildings, and water-closets with sewerage connections were put in place. The increased amount of water thus cast into the sewer was such that the six-inch pipe between 12th street and 16th street was not sufficient to carry it off, and the result was that the water from the sewer repeatedly backed up into the manholes and flooded the basement of the hotel, hospital and the Bennett store, rising high enough upon one occasion to put out the fires in the boiler room of the hotel, and requiring the use of the city fire-engine a number of times to pump out the basements.

The testimony showed that the use of hydraulic elevators throws at times large quantities of water into the sewer, and that the use of three elevators at the same time discharged into the six-inch sewer a larger quantity of water than it could carry away. From 20th street to 16th street there is a steep hill, and the rapid flow of that portion of the sewer seems to render a six-inch pipe sufficient to carry off the sewage upon that portion of the street, but a larger outlet was necessary on the comparatively level ground from 16th street to 12th street. In 1887, in order to remedy these defects, the city council created a new sewer district, known as district No. 211, comprising that portion of Capitol avenue from 16th street to 12th street, and constructed a sewer therein 24

inches in diameter instead of six inches as before, connecting with the six-inch pipe at the foot of the hill on 16th street. Since the construction of this sewer there has been no further trouble with the drainage of that portion of Capitol avenue. The plaintiffs paid the taxes assessed against their property for the construction of the six-inch sewer, but resist the collection of the taxes for the 24-inch sewer.

The plaintiffs contend, first, that the city engineer knew in 1882, when the first sewer was laid, that it was insufficient; that he was opposed to its construction, and that the city, regardless of this knowledge, accepted an imperfect plan and constructed a worthless sewer; that the city was negligent in so doing, and that to attempt to assess the cost of a second sewer under such circumstances upon the abutting property is unreasonable, oppressive and void. We think there is little merit in this contention. In fact, we are inclined to think that the defective construction of the sewer of which plaintiffs complain, was brought about by an excess of caution on the part of the city authorities. So careful were they to obtain the best obtainable system, that they disregarded the advice of their city engineer, and sought to obtain the benefit of the skill of one of the then most renowned sanitary engineers of the United States. They did what in their judgment was for the best interests of the city, when they employed a man with a reputation as an expert in that line. It is true that they might better have taken the advice of their own engineer, for the future defects of the system were not foreseen except by him. When the city council, misled by the glamour of a great name, employed Colonel Waring, they did what any prudent, cautious business man would have done under like circumstances, and the plaintiffs cannot complain if their judgment was erroneous. The authorities cited by the plaintiffs are to the effect that a city is liable for injuries caused to a property owner by reason of its negligence in devising a defective plan, and in constructing an improper drain,

creating a nuisance; but in this case, as we have seen, the city was not guilty of negligence. It exercised the highest care under the circumstances.

The plaintiffs further contend that, since that portion of the sewer between 16th street and 12th street received the accumulated sewage of the district between 16th street and 20th street, the city was without authority to assess the entire cost of the large sewer, made necessary by this discharge, upon the property between 12th street and 16th street; and it is argued that, since the property owners from 16th street west to 20th street derived some benefit from the enlargement of the sewer from 12th street to 16th street, they should pay a portion of the cost of the same. They urge that, since the construction of the first sewer, a number of boarding houses and other buildings have been erected between 16th street and 20th street; that consequently an increased amount of sewage has been cast into the six-inch pipe to the west of 16th street; that this has rendered a larger sewer necessary between 12th street and 16th street, and that therefore a part of the increased cost of the large sewer should be borne by the territory west of 16th street. The evidence shows, however, that the six-inch pipe between 12th street and 16th street was large enough to carry off the sewage coming down the hill until the business buildings were erected between 12th street and 16th street, and afterwards except during business hours when the hydraulic elevators and closets were being used; that for about seven hours each day the sewer was insufficient, but during the remainder of the time its capacity was enough, and there is no evidence of any clogging of the six-inch sewer west of 16th street at any time. The great fall at that portion of the sewer caused it to clear itself. It is apparent that the trouble largely arose from the increased use of the sewer within the new district. Under these circumstances we think there was nothing arbitrary, excessive or unjust in assessing the cost of the sewer to the abutting property between 12th street and 16th street, according to special

benefits. It is impossible to accurately ascertain and adjust with mathematical certainty the special benefits which any particular piece of property receives by virtue of the construction of an improvement such as a sewer. The most that can be done is to ascertain approximately the special benefits received by each particular tract, and unless the result of the assessment is excessive, arbitrary or unjust it will not be disturbed.

We think there is no force in the argument that when a city has once assessed the cost of a special improvement it cannot at a later period, when changing conditions and inceased growth have brought about a larger necessity, create a new improvement and assess the same against the property benefited, for the reason that the owners have already paid for one improvement. Such a holding might have the effect of continuing a condition which might suit a small town or city, and yet be totally inadequate to the requirements of a modern city of 100,000 inhabitants. The power is a continuing one and may be exercised whenever the public need demands it. *Koons v. Lucas,* 52 Ia. 177; *Sheley v. City of Detroit,* 45 Mich. 431; *Coates v. City of Dubuque,* 68 Ia. 550; *Broadway Baptist Church v. McAtee,* 71 Ky. 508; *Morley v. Carpenter,* 22 Mo. App. 640; Dillon, Municipal Corporations (3d ed.), sec. 686; Beach, Public Corporations, sec. 1168. With the growth of the city its need has grown. The improvement sufficient for 1882 was not sufficient for 1897. From the 1897 improvement the plaintiffs' property was benefited, and it should bear its just proportion of the burden, measured by the special benefits it received.

It is further objected that the notice of the meeting of the board of equalization is void, for the reason that the notice thereof was signed by "Beecher Higby, City Clerk." This was done by virtue of a resolution of the council directing him to prepare all notices thereafter publishing all meetings of the council as a board of equalization. This resolution was adopted prior to the

publication of notice of the meeting of the board to assess the tax in question. It appears that before the meeting a protest was filed with the board, signed as follows: "Caroline L. Poppleton and William S. Poppleton, executors and trustees of the estate of Andrew J. Poppleton, deceased, by William S. Poppleton." The property affected belonged to the estate of Andrew J. Poppleton, deceased, and was held in trust by Caroline L. Poppleton and William S. Poppleton as executors and trustees. The will creating the trust was construed by this court in *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50, so far as related to the control of the same under the charter provisions as to special assessments, and it was there held that the trustees were "owners" under such statutes. We think this appearance cured any defect in the notice, if any such there was, which we doubt.

As to the objection that the assessment was made by the front-foot rule and not by ascertaining the special benefits, the board of equalization adjudged and determined that the several lots and tracts of real estate had each been specially benefited to the amount of the tax levied against each tract respectively.

A portion of the cost, amounting to $1,700 was paid by the city as general benefits on account of the use of the sewer as a storm-water sewer, and the remainder was charged against the property as special benefits. As we have seen from a consideration of the evidence, it would seem that the benefits were practically confined to the new district, that each lot therein was specially benefited, and that the front-foot method was not inequitable under the circumstances.

We recommend 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

The following opinion on rehearing was filed February 8, 1906. *Judgment of affirmance adhered to:*

1. **Cities:** SEWERS: ASSESSMENT. All of the property in a sewer district which is benefited by the improvement should bear its fair proportion of the necessary expense of rebuilding and repairing the sewer, or a part of the sewer, in such district. The city council cannot determine in advance, and without a hearing, that a part only of the property in the district will be benefited, and for the purpose of making the improvement create a new sewer district embracing only such part of the property and assessing the cost to the property benefited.

2. **Assessment:** INJUNCTION. A party complaining of an unlawful division of a sewer district, and seeking on that ground to enjoin the collection of special assessments against his property in a new sewer district so formed, must show that he has been in some way affected to his substantial injury by such division.

SEDGWICK, C. J.

In the brief and oral argument upon the rehearing of this case, it was contended that the principle stated in the fifth paragraph of the syllabus is not applicable to the facts as disclosed by the record. It appears that the city council ascertained that it was necessary to rebuild a part of the main sewer extending along Capitol avenue through sewer district No. 6, as it then was, because the sewer was not of sufficient capacity. It was determined to rebuild and enlarge that part of the sewer from 16th street to 12th street. The council thereupon enacted an ordinance providing for the construction of a 24-inch sewer from 16th street to 12th street, and in the same ordinance created a new sewer district out of that part of the old sewer district No. 6, which lay between 16th and 12th streets. The objection of the plaintiffs is that, by creating this new sewer district, in which only that part of the sewer lay which was to be rebuilt, the council, in effect, determined in advance that no part of the sewer district No. 6 would be benefited by the improvement, except that part embraced in the new sewer

district. By this action of the council the plaintiffs were deprived of a hearing as to whether property in sewer district No. 6, and not included in district No. 211, was especially benefited by the improvement, and as to what proportion of the cost of the improvement should be assessed against that property. When expense is to be incurred in rebuilding or enlarging a part of a sewer in a given sewer district, such expense should be borne by the property in that district especially benefited thereby to the extent and in the proportion of such special benefits. It may well be doubted whether the council could determine in advance, and without a hearing, that a certain part of the property in the sewer district would be benefited and the remainder of the property would not be benefited, and create a new sewer district composed of the property to be benefited by the improvement, and so relieve the remaining property of the sewer district as it formerly was from any part of the expense of the improvement. The question is whether these parties are in a position to complain, and have just grounds to complain, of this action of the city council. These plaintiffs have brought an action in equity to cancel the special assessments against their property. This suit was begun about three years after the action of the city council in creating this sewer district. In the meantime the improvement was completed, and these plaintiffs have received the benefits arising from the improvement. The action of the council in creating the new sewer district, if it rendered their proceedings in assessing the special benefits against this property irregular and erroneous, would not deprive the council of jurisdiction to make such assessment. It seems very clear that the plaintiffs, in order to maintain an action of this nature, after so great a lapse of time, must, in any view of the case, make it affirmatively appear that they have been substantially injured by this erroneous proceeding on the part of the council. It appears from the petition that only a part of the cost of the improvement was assessed against the

abutting property. The total cost of the improvement was $4,252.65, and $1,700 of this was paid out of the general fund of the city. There is no allegation in the petition that the amount assessed against the property of the plaintiffs was greater than the benefits conferred upon the plaintiffs' property by the improvement; and it does not appear from the allegations of the petition that the property embraced in sewer district No. 6, as it was before the creation of the present sewer district number 211, and not included in that district, was benefited by the improvement, or could have been assessed in any amount so as to have reduced the assessment against the property of the plaintiffs, or in any way have benefited the plaintiffs. The plaintiffs have not shown that they have been in any way injured by the action of the city council complained of.

Our former opinion in this case is adhered to.

AFFIRMED.

ANTHONY E. LANGDON V. JAMES E. CLARKE.

FILED APRIL 5, 1905. No. 13,731.

1. **Trial:** WAIVER. Where, in an action for personal injuries, counsel for plaintiff invites the jury to return a verdict for the defendant if they find that the plaintiff is only entitled to nominal damages, and such verdict is returned, plaintiff cannot complain if the evidence would support a verdict for such damages.

2. **Damages.** Under section 315 of the code, which provides, in substance, that a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person, a verdict for nominal damages should not be set aside for that reason in such an action, even though in the opinion of the court the damages are inadequate.

3. **Assault:** INSTRUCTION. Where there is no evidence of provocative words, it is error to instruct the jury that mere words of provocation are not sufficient to justify a person in committing an assault and battery upon another, but the words may be considered in mitigation of damages.

ERROR to the district court for Sarpy county. GEORGE A. DAY, JUDGE. *Reversed.*

T. J. Mahoney and *A. E. Langdon,* for plaintiff in error.

W. R. Patrick, contra.

LETTON, C.

This was an action to recover damages for assault and battery which it is alleged was committed upon the plaintiff in error, who was the plaintiff below, by the defendant Clarke on the 23d day of May, 1902. The answer admits the assault, alleges that the blows were struck in self-defense, and denies that the plaintiff received the injuries described in the petition. The reply denies the allegations of the answer, admits that the plaintiff struck one blow, and alleges that he did so in self-defense after he had been assaulted. The jury returned a verdict in favor of the defendant, upon which judgment was rendered dismissing the case.

The plaintiff Langdon is an attorney at law engaged in the practice of his profession at Papillion, in Sarpy county, and the defendant James Edward Clarke is a resident of that vicinity. On the day the altercation took place the plaintiff was proceeding to his place of business, when the defendant, who was standing on the street corner, near a number of other persons, called to him and asked him to release a certain judgment which the plaintiff had obtained against him a short time previous. Some words passed between them with reference to the judgment, when the defendant struck the plaintiff a blow in the face and knocked him down on the sidewalk, in a sitting posture. The evidence as to what follows is somewhat contradictory, but it would appear that the plaintiff arose and struck at the defendant, and that something of a struggle took place thereafter. The defendant ad-

mitted that he struck the plaintiff before the plaintiff had made any attempt to strike him or had threatened him in any way. The plaintiff testified to physical injuries consisting of bruises, strains and disturbances of the functions of certain organs, but the corroborative testimony as to these matters was not very strong, and the evidence fails to show that any of them resulted directly from the first assault by Clarke; and it is probable that the injuries resulted from the subsequent melee after Langdon had arisen and, as some witnesses testify, became the aggressor. It is undisputed, however, that the plaintiff was the victim of an unprovoked and unjustified assault in the first place. The district court instructed the jury as follows: "The undisputed evidence in the case shows that on the 23d day of May, 1902, the defendant and the plaintiff met upon the streets in the village of Papillion, Nebraska, and, after engaging in some words, the defendant assaulted the plaintiff and struck the plaintiff in the face before the plaintiff had offered any violence to the defendant. Under the law mere words of provocation are not sufficient to justify a person in committing an assault and battery upon another, but the words may be considered by you in mitigation of damages. Your verdict will therefore be for the plaintiff, in any event, for such damages as you find him entitled to, under the evidence and these instructions, for whatever injury was inflicted by the first blow." The jury disregarded this instruction and brought in a verdict finding for the defendant. When the verdict was read it was promptly set aside by the trial judge as being in disregard of this instruction. Afterwards, upon a motion being made to reinstate the verdict, a number of affidavits were filed on behalf of the defendant to the effect that when Mr. Mahoney, the plaintiff's counsel, was making his closing argument to the jury he used substantially the following words: "Gentlemen, Mr. Patrick has asked you to return a verdict in favor of the plaintiff for nominal damages. Such a verdict would at once brand every person

on this jury as dishonest and unworthy of the confidence reposed in you. If you do not find the plaintiff entitled to a verdict for substantial damages, I ask you to return a verdict for the defendant." Mr. Mahoney in an affidavit denies this exact language, but says that what he did say was, in substance, that the plaintiff was entitled to substantial damages, and that, if the jury should find he was not entitled to recover, they ought not to return a verdict of nominal damages, but should give a clear verdict for the defendant. There is little difference in these statements, and it would seem therefore that the jury were invited by the plaintiff's attorney to return a verdict for the defendant if they found that the plaintiff was only entitled to nominal damages. If the evidence in the case warranted the jury in returning a verdict for nominal damages only, we are inclined to think that the action of the jury in taking the plaintiff's counsel at his word was something of which he was not entitled to complain. During the progress of the trial the control of his client's interests was in counsel's hands, and he might have, with his client's consent, explained to the jury that the actual damages were much less than the amount sought in the petition, and thus voluntarily reduced the amount of recovery, or he might dismiss the case altogether. We think it was entirely within his power to say to them that, if they found the plaintiff was not entitled to a verdict for substantial damages, he would prefer that they should find for the defendant. But the question arises whether a verdict for nominal damages could be supported under the uncontradicted evidence in this case. We are decidedly of the opinion that such an assault as defendant admits to have occurred, perpetrated upon a professional man on the public street, in the presence of bystanders, with such violence as to knock him to the sidewalk, cannot be properly compensated by nominal damages.

We have in this state, however, a statute, the justice of which may perhaps be questioned, which provides that

"a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person." Sec. 315 of the code. This statute has been upheld by this court and construed to mean exactly what it says. *City of Omaha v. Crocker, ante,* p. 240; *O'Reilly v. Hoover,* 70 Neb. 357. If therefore a verdict for nominal damages had been returned, the court would not have granted a new trial. Since therefore a verdict for nominal damages could have been sustained, we are of the opinion that when the jury took plaintiff's counsel at his word he was not prejudiced; that, by reason of the invitation given to the jury to return a verdict for the defendant instead of nominal damages, the plaintiff was not entitled to a new trial on account of the violation of the instruction.

Complaint is made of that portion of this instruction which stated that words of provocation may be considered in mitigation of damages, and it is contended that in this jurisdiction the only damages ever allowed are compensatory, and therefore that actual damages sustained cannot be reduced or mitigated by reason of any words which the plaintiff may have used before he was assaulted. It is further urged that there is no evidence of provocative words to warrant the giving of the instruction. The doctrine which permits mitigation of damages by reason of provocative words is proper in those states which allow punitive damages to be recovered, but its propriety is open to question where no recovery of damages by way of punishment is permitted. In this case, however, this question is merely academic and will not be discussed, since there is no testimony which shows the use of any words on the part of the plaintiff which were reasonably calculated to provoke an assault. The only testimony of anything said by him prior to the striking was that he said he was not a liar, that he was not afraid and that the plaintiff could not make him run. There was no evidence of any words used by the plaintiff which the jury were entitled to take into consideration in mitigation of

damages. Hence, this portion of the instruction was not warranted by the evidence and was, we think, prejudicially erroneous. The jury may well have thought the words used were proper to consider in mitigation of damages, and in consideration thereof reduced the recovery to nominal damages, and by reason of the request of counsel hereinbefore discussed rendered a verdict for the defendant instead of for reduced damages.

For this error, we think the judgment of the district court should be reversed and the cause remanded.

AMES and OLDHAM, CC., concur.

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

REVERSED.

R. O. HARWOOD ET AL. V. WILLIAM BREESE.

FILED APRIL 5, 1905. No. 13,746.

1. **Verdict:** HARMLESS ERROR. Where in an action upon a promissory note the defendant denies liability and also sets up a counterclaim, the fact that the jury finds for him on his defense to the note, but fails to allow his counterclaim, affords no reason for setting aside the verdict at the plaintiffs' request, since as to him this is error without prejudice.
2. **Evidence** examined, and *held* sufficient to support the verdict.

ERROR to the district court for Clay county: GEORGE W. STUBBS, JUDGE. *Affirmed.*

John C. Stevens, for plaintiffs in error.

Thomas H. Matters, contra.

LETTON, C.

This action was brought by the plaintiffs Harwood and Lewis against the defendant Breese upon a promissory

note. The defendant claims that the note was given in part payment for a horse; that the purchase price of the horse was $100, $40 of which was paid by sale and delivery of a pony at that price to the plaintiffs, the remaining $60 being evidenced by the note. He asserts that the plaintiffs warranted and represented the horse to be sound, kind and true and in perfect condition as a farm horse, and alleged a breach of warranty in that the horse was unsound, and wholly unfit for farm purposes, and that, as soon as he discovered the unsound condition of the horse and within 24 hours after the purchase of the same, he rescinded the contract, returned the horse and demanded the return of his note and pony, which the plaintiffs refused. He asks judgment dismissing plaintiffs' cause of action and for $40 the value of the pony.

The plaintiffs are agricultural implement dealers doing business in Stockham, Hamilton county, Nebraska, and the defendant is a farmer residing in Clay county, near that place. It appears that in September, 1902, he made some inquiry of one of the plaintiffs as to where he could procure a good farm horse; that he was told the plaintiffs had one that was out in the country a few miles, and that Lewis and he went out to look at the animal which was in the pasture of one Druby, near Stockham. The defendant testifies that they did not get close to the animal on this occasion, but had some conversation with Mr. Druby in regard to it, in which conversation Druby told him the animal had had distemper in the spring, but Lewis at the same time asserted that she was then sound and all right. He further testifies that on the Monday afterwards they again went to see the horse and another conversation was had, at which time Lewis stated that he had driven the mare 25 miles the previous day and that he knew she was all right. After this conversation, the defendant having a pony that he desired to sell, Lewis went to the defendant's farm to look at the pony, and while there had another conversation in regard to the

horse, repeating the warranty. This testimony in the main is corroborated by other witnesses. The negotiations were completed by the delivery of the pony to Lewis that evening, the execution of the note sued upon, and the delivery of the horse to the defendant the next morning. The defendant took the horse to his farm, when he soon discovered that it was unsound, that it had a discharge from the nose, and a cough apparently caused by the distemper or some other disease of the respiratory organs. The next morning he returned the horse to the plaintiffs, and demanded the return of his note and pony, which was refused. He left the horse in the town subject to the plaintiffs' order, and has exercised no control or dominion over it since that time. There was a direct conflict in the testimony with regard to whether or not the plaintiffs warranted the horse to the defendant, and also as to whether or not the defects in, and disease of, the horse were so open and obvious that the defendant must have been aware of them at the time that he closed the transaction. This evidence was submitted to the jury under fair and proper instructions, and the jury found for the defendant, but failed to award him the value of the pony.

Plaintiffs urge that the defendant was fully advised as to the condition of the animal, and that he knew as much about it as the plaintiffs did; that there was no deceit practiced by the plaintiffs, and that defendant, knowing the horse had distemper, could not rely on a warranty of soundness. These facts were disputed. The jury passed upon them, finding them in favor of the defendant, and the verdict is supported by the evidence. Plaintiffs in error further argue that, since the plaintiffs should have recovered $60, interest and costs, or, the defendant should have recovered $40, interest and costs, there is no evidence to support the verdict; that the jury disregarded instructions given of this tenor and effect, and contend that, because the verdict did not give the defendant all he asks for, it is contrary to the evidence, and therefore

the plaintiffs should have a new trial. If this objection was urged by the defendant it might perhaps have some merit, but it would hardly be worth while for the court to send the case back for a new trial at the plaintiffs' request, to allow the defendant the opportunity to mulct them in increased damages.

It is urged that the verdict is contrary to the fifth instruction given by the court, wherein the jury are told that, if the defendant was advised, or knew, or from the exercise of his sense of sight might have discovered that the horse was then suffering from distemper or from the effects of distemper, and that otherwise the horse was sound, the defendant cannot be heard to say that he relied upon any representations made by the plaintiffs as to the soundness of the horse. The evidence was conflicting as to whether these facts existed. The jury found for the defendant upon that issue, hence, the verdict is not contrary to this instruction. The evidence would have supported a verdict against the plaintiffs for the value of the pony, but since the defendant is not complaining as to this the verdict should stand.

We recommend 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.

HENRY ROHLFF V. ESTATE OF WILLIAM SNYDER, DECEASED ET AL.

FILED APRIL 5, 1905. No. 13,762.

Administrator's Sale: VACATING. In an administrator's sale the property sold for $3,625. After sale, and before confirmation, $4,000 was offered for the property by a responsible bidder, and the evidence showed that it would sell for that amount at a resale.

The district court set the sale aside on the motion of the administrator and ordered a resale. *Held*, That the order setting the sale aside and ordering resale was proper.

ERROR to the district court for Sarpy county: GEORGE A. DAY, JUDGE. *Affirmed.*

G. W. Shields, for plaintiff in error.

H. Z. Wedgwood, contra.

LETTON, C.

At an administrator's sale of real estate in Sarpy county, a certain lot in the village of Papillion was sold to Henry Rohlff for the sum of $3,625. Upon the report of sale being filed with the district court, the administrator moved to set aside the sale to Rohlff on the ground that the lot was sold for an inadequate price; that since the sale he had been offered an advance for the same over and above the selling price of more than 10 per cent., and has a written agreement with one Megal, a responsible person, who agrees to bid and to pay $4,000 for the premises upon a resale, and that Megal has deposited $500 with him as a forfeit if he fails to make the bid of $4,000. At the hearing, upon the report of sale, the court found that the sale was conducted in conformity with law; that since the sale a *bona fide* offer had been made to the administrator of a sum equal to 10 per cent. more than the premises sold for, with amount sufficient to cover the amount of probable costs of a resale, and found further that there were certain minor heirs who have interests in the estate, and that these heirs by their guardian *ad litem* are objecting to the confirmation. The court then set aside the sale to Rohlff and ordered a resale. From this order refusing confirmation Rohlff has appealed to this court.

Testimony was taken at the hearing in regard to the value of the property, which shows, in substance, that at

the administrator's sale William Krug, Wendell Megal and Henry Rohlff were bidders. That Krug bid $3,600, and no more, and Megal $2,600, and no more; that after Megal had bid $2,600, he and Krug had a private conversation, after which Megal bid no further. Rohlff and Krug are rivals in the wholesale and retail beer business, and desired to obtain the property for engaging in that business. Rohlff testifies that the property is not worth to exceed $3,000, and brought $3,625 because of the business rivalry existing betwen him and Krug. Megal's testimony tends to show that Krug is the real party in interest in the new offer of purchase at $4,000 which has been made.

On appeal Rohlff argues that the property was not worth more than the bid; that the application to set aside the sale was made for Krug's benefit; that the proceedings at the sale were fair, and the bid was not disproportionate to the value of the property sold, and that the evidence does not show that an increase of 10 per cent. over the price at the sale, exclusive of the expenses of a new sale, has been offered. We think it unnecessary to enter into an abstract discussion as to what was the actual or "intrinsic" value of the property aside from the competition of Rohlff and Krug. Its value in this instance to the owners is what it would sell for. The evidence shows it will sell for $4,000 at a resale, hence, for the purpose of this controversy, that sum is its actual value. The provisions of the statute with respect to administrators' sales are such as to apprise every bidder of the contingency that the sale may be set aside if a sum greater by 10 per cent. than the amount of his bid, together with the expenses of resale, is offered for the property before confirmation. He buys subject to this contingency.

It was the duty of the court to protect the estate of the minor heirs who were interested in the property. The court will not inquire into the motives of the person making the offer.

We think the district court was fully justified in order-

ing a resale, and recommend that its judgment be affirmed.

OLDHAM and AMES, CC., concur.

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

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. CITY OF OMAHA ET AL.

FILED APRIL 5, 1905. No. 14,077.

1. **Taxation:** FRANCHISE. The word "franchise" as used in section 78, article I, chapter 77, Compiled Statutes, 1903, is a generic term and includes all rights and privileges granted to or exercised by a person, association, copartnership, joint stock company or corporation, engaged in the express, telegraph or telephone business in the state of Nebraska.

2. **Post Roads Act.** The act of congress of July 24, 1866 (14 St. at Large, p. 221, ch. 230), known as the "Post Roads Act," does not confer upon telegraph companies accepting its provisions any immunity from taxation of their property in this state, whether such property be tangible or intangible.

3. **Taxation** of franchises in this state must be by valuation and in proportion to value.

4. **Assessment.** Under the first subdivision of section 1, article IX of the constitution, the legislature has the power to direct the manner of arriving at the value of property and franchises for the purpose of taxation. Any rule or method of ascertaining the value of property or franchise adopted by the legislature that is reasonably fair and just in its operation and fairly well adapted to the attainment of the end required is sufficient, but the legislature has no power to establish an arbitrary rule or standard which has no relation to the ascertainment of value.

5. ———. The legislature may direct the manner of ascertaining the value of property and franchises, but it cannot prescribe rules that prevent the assessment of the property and franchise of a corporation on an equality with property in general in proportion to value. *State v. Karr*, 64 Neb. 514, 520.

6. **Constitutional Law.** The amount of gross receipts taken in by express, telephone and telegraph companies during the year prior to the time of assessment, taken alone, is not a reasonable and proper method of ascertaining the value of the franchises possessed by such corporations. The provision of section 78, which fixes the gross receipts as the value of the franchise, fixes an arbitrary rule not founded upon any definite relation between such receipts and the value of the franchises, and violates the constitutional requirement that franchises shall be taxed by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises.

7. **"Gross receipts"** may properly be considered as an item in estimating the value of a franchise, but such receipts standing alone are not a proper measure of such franchise value.

8. **Occupation Tax.** The legislature has power to tax the gross receipts of such corporations under the second subdivision of section 1, article IX of the constitution, providing that "it shall have power to tax * * * telegraph and express interests or business * * * in such manner as it shall direct by general law, uniform as to class upon which it operates." Such taxation however is not by valuation but is a tax upon the business of such corporations.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed with directions.*

F. A. Brogan and *W. W. Morsman,* for plaintiff in error.

C. C. Wright, W. H. Herdman and *A. G. Ellick, contra.*

LETTON, C.

This action was brought by the Western Union Telegraph Company, a New York corporation, against the city of Omaha and the city treasurer thereof, to enjoin the collection of a city tax levied upon the gross receipts of said corporation for the year preceding April 1 as representing the franchise of said corporation. The petition alleges, in substance, that the plaintiff is a New York corporation; that its business is the transmission of messages by electricity over telegraph lines in, from

and to each of the states and territories of the United States, and to and from foreign countries, and that it maintains offices in the city of Omaha for the purpose of carrying on its business; that it does not own or exercise any franchise of any character derived from the state of Nebraska or from the city of Omaha; that by and under the provisions of the act of congress known as the "Post Roads Act" of July 24, 1866, the provisions of which it accepted in writing, it had the right to construct, maintain and operate its lines over any portion of the public domain, and over and along any of the military and post roads of the United States, and that since said time it has carried on its business in Omaha and in the state of Nebraska under and by virtue of the franchise, rights and privileges granted by said act; that it duly returned for taxation to the taxing officer of said city all its personal property consisting of pole lines, wire lines, telegraph instruments and other property, for assessment, but did not include in its return any franchise; that it was afterwards assessed the sum of $15,594, being the amount of its gross receipts in said city for Nebraska business in the preceding year ending April 1, 1903, as a franchise tax; that a levy of 14 mills tax on the dollar was made, thereby charging plaintiff with a tax of $218.33 on its franchise, and that defendant Hennings, treasurer of said city, is now threatening to collect said tax; that the law which fixes the value of the franchise of telegraph companies at a sum equal to the gross receipts of such companies for each current year ending April 1 in the year in which such assessment is made is a mere legislative assessment, and is in violation of section 1, article IX of the constitution of the state of Nebraska. To this petition a general demurrer was filed, which was sustained. Plaintiff elected to stand upon its petition, and the action was dismissed, from which judgment it has prosecuted error to this court.

In its brief and argument the plaintiff maintains: (1) the franchises granted to the plaintiff by the state of

New York to be and to do business as a corporation or artificial person do not have any situs as independent or distinct proprietary entities, and are not within the jurisdiction of, or subject to taxation in, this state. (2) The tax assailed falls within the first provision of section 1, article IX of the constitution of the state, and is void unless it be a tax "by valuation" in the sense of that provision, which it is not. (3) Sections 77 and 78 of the revenue law (art. I, ch. 77, Comp. St. 1903; Ann. St. 10476, 10477), deprive the plaintiff of its property "without due process of law" and violate the 14th amendment of the constitution of the United States.

Conceding for the sake of the argument that the franchise granted by the state of New York is not subject to assessment in this state as a distinct proprietary entity disassociated from the tangible property owned by the plaintiff, the question remains, is this franchise to be a corporation the "franchise" which is to be valued by the provisions of the act under consideration? Is it the "corporate franchise," the right granted by the state to individuals to form and be a corporate body, which is intended to be the subject of the tax?

The statutory provisions relating to the taxation of express, telephone and telegraph companies are as follows, the sections being given as in the original revenue act of 1903:

"Sec. 76. Each and every person, association, copartnership, joint stock company or corporation, engaged in the express, telegraph or telephone business in the state of Nebraska, shall be deemed and taken to be a company engaged in such respective business for the purpose of this act."

"Sec. 77. It shall be the duty of each express, telephone and telegraph company to furnish to the local assessor on his demand made of any officer or a managing agent, a true, and verified statement of its personal property, and of the gross receipts of its business in said local assessing district for the year ending April 1 of the current year,

which verification shall be by one of the general officers of said company or by the local managing agent. Said assessor may also inspect said company's books of account for his district. For each day's neglect or refusal to so furnish said statement, the company shall forfeit the sum of twenty-five dollars and for each day's refusal to furnish its books for inspection after such demand by said assessor, the company shall forfeit the sum of twenty-five dollars, to be recovered in an action in the name of the state. In case the local assessor shall not be able to come at the amount and value of said personal property and gross receipts as herein provided by reason of such company's neglect and refusal, he shall come as near such value and amount as his information shall admit of, and to such value and amount he shall add fifty per cent., and such total shall be the assessed value of the property of such company.

"Sec. 78. Each and every express, telegraph and telephone company shall be locally assessed on its tangible property wherever it shall have any such property, in this state in like manner as other personal property is assessed, and in addition thereto on the amount of the gross receipts for the year next preceding the first day of April of the current year, such gross receipts to be taken and considered in their total as an item of property and be so listed and levied against the same as other property. Such gross receipts shall represent the franchise valuation which shall not be otherwise assessed."

It requires no argument to show that the "franchise valuation" mentioned in section 78 cannot be construed to mean a "corporate franchise," the franchise to be a corporation, whether granted by this state or by the state of New York or any other state. Under the provisions of section 76, if any *individual, association* or *copartnership* engages in the express, telegraph or telephone business within the state of Nebraska, he or it incurs the same liability to pay the tax prescribed as does a corporation, hence, the "franchise," the value of which is sought to be

reached for the purpose of taxation by these sections, is not the franchise to be a corporation, but it is the right to do and transact express, telegraph or telephone business within the state, and it is immaterial whether this right is derived by virtue of an act of congress, an act of the legislature or by the ordinances of a municipal corporation. The thing which is sought to be reached is the intangible right to transact business by means of the usual visible and tangible agencies with which the operations of such business are carried on, independent of the value of the instrumentalities themselves. While the legislature has termed this intangible property "a franchise," the concept, the idea, might as well have been expressed by some other name. It is this intangible right, which possesses value, which is intended to be reached and valued for taxation by these provisions, independent of the tangible property which is otherwise assessed. It is no doubt true that if the word "franchise" were used in the more restricted sense it would not embrace these privileges and rights, but as has often been said, the word "franchise" is sometimes used as a generic term which may include not only the right granted by the crown in England, or by the state in this country, to be a corporation, but the right to exercise certain rights or privileges of a public nature which properly and in the first instance belonged to the royal prerogative.

There is a clear distinction between "corporate franchise" and franchises or privileges which a corporation or individual may exercise, and it is the latter which is made the subject of taxation by these provisions. Such rights as the right to take tolls upon a public highway, the right to charge fixed rates for carrying telephone or telegraphic messages, the business carried on by street railway corporations, water works companies and like public service corporations, are often loosely denominated franchises. As was said by Justice Field:

"Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined

meaning to the term 'franchises.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like." *Morgan v. Louisiana,* 93 U. S. 217.

A like use of the term franchise is shown in the following quotation: The franchise made taxable by tax law, "section 2, subdivision 3, as amended by laws 1899, chapter 712, * * * does not mean the right to exercise corporate functions, but the right to use the public streets, highways, or public places (for the purpose of laying pipes or mains), either as an individual or a corporation. The right to so use the public streets, highways or public places is a property right, and it is because such property has value that the right exists to assess it. The 'franchise, right, authority or permission' (thus made taxable) * * * must mean some special privilege derived from some governmental body or some political body having authority to grant the property right sought to be taxed. It is this species of property, intangible in its nature, which the law was enacted to reach." *People v. Priest,* 77 N. Y. Supp. 382, 75 App. Div. 131.

This court held in *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, 129, that the right granted to a street railway company to enter upon the streets of a city to carry on its business is only a privilege, license, or permission. That its corporate franchise emanates from the state, but that the grant by ordinance from the city is a mere license and not a franchise. Here the word fran-

chise is used in the narrower and stricter sense, but this holding does in nowise limit the authority of the legislature to use the word franchise as a generic term to include all rights and privileges granted to or exercised by an individual or a corporation engaged in a public service.

The argument that the state may not tax the intangible property of the plaintiff, on account of its right to use the public highways being derived from the post roads act, was considered in *Western Union Telegraph Co. v. Massachusetts,* 125 U. S. 530. The laws of the state of Massachusetts provided that telegraph companies should be taxed on such proportion of the value of the entire capital stock as the number of miles of line within the state of Massachusetts bore to the total number of miles in all the states and territories, after deducting the value of any property subject to local taxation in the cities and towns of the state. The state treasurer made an estimate of $750,952 as the taxable value of the shares of the corporation apportioned to that state, the tax upon which apportionment the telegraph company refused to pay. The telegraph company contended in that case, as in the instant case, that by the post roads act it had been given by congress the right to exercise its functions without being subject to taxation therefor by the state authorities. In the opinion it is said by Justice Miller:

"The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a state, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporations. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its

limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the state of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the state under which it is organized. But the privilege of running the lines of its wires 'through and over any portion of the public domain of the United States, * * * and over, under, or across the navigable streams or waters of the United States,' is granted to it by the act of congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the federal government, carries with it any exemption from the ordinary burdens of taxation. While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support." Citing *Telegraph Co. v. Texas,* 105 U. S. 460; *Railroad Co. v. Peniston,* 18 Wall. (U. S.) 5; *Thomson v. Pacific R. Co.*, 9 Wall. (U. S.) 579. See also *Attorney General v. Western Union Telegraph Co.,* 141 U. S. 40, 11 Sup. Ct. Rep. 889.

The post roads act does not confer any rights of eminent

domain upon a telegraph company, but merely withdraws from state interference interstate commerce by telegraph. If the telegraph company does business in this state, it stands upon the same footing as all other corporations, except that it is protected from state interference in its business by the post roads act. *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 25 Sup. Ct. Rep. 133.

These cases we think dispose of the contention that the right to do business over the post roads of the state of Nebraska is not taxable as property within the state The plaintiff contends, however, that, even if this be so, this intangible right cannot be taxed unless in connection with and as a part of the value of the tangible property with which it is associated, and upon the existence of which it depends. The scheme of taxation in Massachusetts, however, deducted from the proportion of the capital stock the value of property locally taxed, and thus reached the intangible property of the corporation. *Western Union Telegraph Co. v. Massachusetts, supra.*

The same contention, in substance, was made in the case of *Adams Express Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. Rep. 527. This case was brought in the circuit court of the United States for the district of Kentucky on behalf of the Adams Express Company to enjoin to the collection of certain taxes. A demurrer to the bill was sustained and the case appealed to the United States supreme court. The constitution of Kentucky provides that all property shall be taxed in proportion to its value; that the taxes shall be uniform, and shall be levied and collected by general laws; that corporate property shall pay the same rate of taxation paid by individual property, and allows the general assembly to provide for taxation based upon income, licenses or franchises. The statutes provided for a tax upon franchises, and for certain returns to be made by the officers of corporations with reference to the kind of business, the amount of capital stock, the number of shares, the amount of surplus, of undivided profits, of indebted-

ness, of gross earnings and other information considered to be of value in ascertaining the value of a franchise. Chief Justice Fuller writing the opinion said: "It is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the state, that their intangible property should be assessed on the basis of the mileage of their lines within and without the state. * * * The property, tangible and intangible, owned by corporations is subjected to like taxation, and so is the tangible and intangible property of individuals associated together in companies, and while the provisions of sections 4077 and 4078 do not apply to all individual taxpayers, yet reference to section 4020 and the schedule which must be returned by each taxpayer, as required by section 4058, demonstrates that individual taxpayers are also subjected to taxation on all their intangible property, whatever that may be, as well as on all their tangible property." See also *Henderson Bridge Co. v. Kentucky,* 166 U. S. 150, 17 Sup. Ct. Rep. 532.

The question of the taxation of intangible property as a distinct subject of taxation has been so clearly stated and discussed in an opinion on rehearing by Judge Brewer as to merit an extended quotation. He says: "The burden of the contention of the express companies is that they have within the limits of the state certain tangible property, such as horses, wagons, etc.; that that tangible property is their only property within the state; that it must be valued as other like property, and upon such valuation alone can taxes be assessed and levied against them. But this contention practically ignores the existence of in-

tangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the federal constitution which restrains a state from taxing at its real value such intangible property. * * * It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts or obligations. It is enough that it is property which though intangible exists, which has value, produces income and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now, whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. Upon what theory of substantial right can it be adjudged that the value of this intangible property must be excluded from the tax lists, and the only property placed thereon be the separate pieces of tangible property? * * * Now, it is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for the purposes of taxation. * * * Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and for the purpose of transacting that business purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does

substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation." *Adams Express Co. v. Ohio State Auditor,* 166 U. S. 185, 218, 17 Sup. Ct. Rep. 604. See also *Richmond & D. R. Co. v. Brogdan,* 74 N. Car. 707; *Richmond & D. R. Co. v. Commissioners,* 74 N. Car. 506; *State v Savage,* 65 Neb. 714.

Considering and construing together these sections of our statute, it seems clear that the object of the law is to reach the intangible value which may appertain to the use by individuals or corporations of the usual tangible agencies and instrumentalities employed in the telegraph, telephone and express business, and that the words "franchise value" as used in section 78, *supra,* are used in a broad sense and really mean the value of the intangible property. This may or may not include "corporate franchise," since it may be either an individual or a copartnership or a corporation which conducts the business and the "corporate franchise," if included, is only an incident and not the subject matter which it was intended to tax. This intangible property possesses value and is capable of valuation for the purposes of taxation. Its value is largely derived in the case of telegraph and telephone companies from the license or grant by the state to such companies to use the public highways, and in the case of express companies more indirectly by reason of the exercise of powers and privileges granted to and used by the railroad companies over whose lines the greater part of the business of express companies is carried on.

We conclude therefore as to this branch of the case that it is immaterial whether the franchise granted to the plaintiff by the state of New York is taxable in this state or not, since this franchise is not the subject of the tax imposed by said section 78.

Taxation of franchises in this state, however, must be "by valuation" and "in proportion to value." Section 1, article IX of the constitution of Nebraska, is as follows:

"The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises the value to be ascertained in such manner as the legislature shall direct, and it shall have power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

This section is a substantial copy of section 1, article IX of the constitution of Illinois of 1870, except that a very material and vital change is made with reference to the taxation of franchises. In the Illinois constitution, the second provision of this section classifies persons using and exercising "franchises and privileges" with "peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, * * * insurance, telegraph and express interests or business," and they are taxable "in such manner as it (the legislature) shall from time to time direct by general law, uniform as to the class upon which it operates." In Illinois, therefore, the constitutional command that franchises shall be taxed by valuation does not exist. An examination of the constitutions of most of the states shows that, in the great majority of instances, no such limitation is found upon the power to tax franchises as is found in the constitution of this state. The different methods of subjecting franchises to taxation in other states are almost as numerous as the states. For instance, franchises have been taxed by the number of tons of coal mined, by the amount of capital stock employed within a state, by the net earnings of a corporation, by the average amount of deposits in banks, by the dividends paid, and

by the gross receipts of railway and other corporations. None of these methods of taxation however are based upon the value of the franchise, and the taxes are assessed without regard to any valuation. *Society v. Coite,* 6 Wall. (U. S.) 594; *Home Ins. Co. v. New York,* 134 U. S. 594, 10 Sup. Ct. Rep. 593; *Provident Institution v. Massachusetts,* 6 Wall. (U. S.) 611.

Since in this state franchises must be treated for the purpose of taxation the same as all other property, the question arises, can the legislature itself assess their value without the intervention of any other officer? In *Aachen & Munich Fire Ins. Co. v. City of Omaha,* 72 Neb. 518, we held that the power of the legislature over taxation was unlimited, except where the constitution has imposed restraints or limitations thereupon. There is no limitation in the constitution in regard to the method or manner in which values may be ascertained by the legislature. But if the legislature assumes the burden or duty of fixing a rule or method of ascertaining the value of property or franchises, it is strictly governed by the constitutional provisions that the assessment shall be by valuation and in proportion to value. An arbitrary, capricious and unjust rule for assessment by value made in disregard of the plain provisions of the constitution, whether by the assessor or the legislature, cannot be upheld. If the rule or manner prescribed by the legislature is reasonably fair and just in its operation, and is measurably proper and fairly well adapted to the attainment of the end required, it will not be interfered with, since exactness is well nigh unattainable in such matters, but if it is a rule or criterion by which an arbitrary standard is established which has no relation to the object sought to be attained, to wit, the ascertainment of value, it cannot be upheld as a proper exercise of legislative direction of the taxing power. As was said by Judge SEDGWICK in *State v. Karr,* 64 Neb. 514:

"The legislature may direct the manner of ascertaining the value of property and franchises; but it cannot pre-

scribe rules that prevent the assessment of the property and franchises of corporations on an equality with property in general in proportion to value."

There is nothing in the constitution which prevents different classes of property from being listed and valued for taxation by different modes and agencies. The property which is the subject of taxation is so various and different in its characteristics and conditions that a fixed and unvarying rule for ascertaining its value would be ineffective, and might easily produce a more unjust valuation than different methods and agencies created expressly for the purpose of adaptation to the different classes of property sought to be valued. The legislature is left with unlimited discretion as to the manner and method of ascertaining the value of property for taxation, that is, the instruments and agencies which it may use such as the requirement of schedules, returns, lists and so forth, and the creation of assessors, assessing boards, boards of equalization, boards of review and like bodies. All these matters are committed to the legislative discretion, but in all its acts and through all its proceedings in this behalf, the end in view must be to ascertain as nearly as may be the true value of property, so that each person or corporation may pay a tax in proportion to value.

It is said in *State v. Savage,* 65 Neb. 714: "The subject relating to the rule of uniformity has heretofore received consideration by this court in the case of *State v. Osborn,* 60 Neb. 415. It is there held that the valuation of property for taxation must be uniform. Say the court in the opinion, at page 419: 'There is another cardinal rule of taxation, and that is that "every person and corporation shall pay a tax in proportion to the value of his, her or its property and franchises." Constitution, art. IX, sec. 1. And this rule of uniformity applies not only to the rate of taxation, but as well to the valuation of property for the purposes of raising revenue. *High School District No. 137 v. Lancaster County,* 60 Neb. 147. The constitution forbids any discrimination whatever among taxpay-

ers. *State v. Graham,* 17 Neb. 43; *State v. Poynter,* 59 Neb. 417.' "

Are the gross receipts of a telegraph, telephone or express company a reasonable measure of the value of the franchise of such corporation? It is difficult to see that there is any necessary connection between the amount of money taken in by such a company and the value of the right to carry on its business. The value of a business depends in great measure upon the matter of profit or loss. If the business is conducted at a large profit, its value is enhanced. If at actual cost or at a loss, it is practically of no value. In the case of telegraph, telephone and express companies, the profits of the business, and consequently the value of a franchise, depend very largely upon the rates which they are authorized to charge for the service performed. It is a well known fact that in some instances the franchises conferred upon such corporations limit the rates which may be charged, while in others no such restriction is placed upon them, and the value of the business may often depend upon the nature and extent of such regulations. The costs and expenses of carrying on the business may be enhanced by the nature of the locality in which it is conducted, or by other conditions arising by reason of the circumstances surrounding each company so engaged. To say that the value of a business which yields large profits, and that of one from which no profits result, and in which the stockholders are called upon for assessments, is the same, is absurd and contrary to common sense. The gross receipts in the case of a company doing business at a loss may well be as great or greater than that of one which pays substantial profits, and the tax assessed under the rule of the statute would be as high in one case as in the other. Can this be said to be a tax in proportion to value, or is it not rather the application of an arbitrary standard not justified by the existence of any general relation between gross receipts and actual value?

In *Minces v. Schoenig,* 72 Minn. 528, 75 N. W. 711, the facts were that an ordinance of the city of Winona pro-

vided for licensing the conductors of "gift, fire and bankrupt sales," and for taxing them two per cent. of the amount of the gross receipts of their sales. The two per cent. tax was complained of. The court say:

"The ordinance contains two sets of provisions—one relating to licensing the conductors of gift, fire, and bankrupt sales, and the other providing for payment by them of a tax of two per cent. of the amount of the gross receipts of their sales. This mode of taxation is so palpably in violation of section 1 of article IX of the constitution, which requires that 'all property on which taxes are to be levied shall have a cash valuation,' that it cannot stand for a moment. The legislature itself has no power to adopt any such system of taxation, or to grant authority to a municipality to do so. But the provisions relating to licensing are severable from and independent of those relating to taxation, so that the invalidity of the latter does not render the former invalid."

"It is not competent for the legislature to declare that any species of property is of a particular value, because of its income, or to declare that the income alone shall be considered in determining its value." *Board of Assessment v. Alabama Central R. Co.*, 59 Ala. 551.

In *Crescent City R. Co. v. City of New Orleans*, 44 La. Ann. 1057, it was held that the earning capacity of a street railway company is the true basis of assessment, but the facts were that the board of assessors capitalized the property on the basis of the dividend paid at six per cent., then deducted the value of the tangible property and returned the difference as the value of the franchise. A very different rule from that fixed in this state and one which bore a clear relation to the actual value. So, also, it was held in *St. Charles Street R. Co. v. Board of Assessors*, 51 La. Ann. 459. See, also, *Inhabitants of Cheshire v. County Commissioners*, 118 Mass. 386; *City of Brookfield v. Tooey*, 141 Mo. 619; *Livingston v. City of Paducah*, 80 Ky. 656; *State v. Lakeside Land Co.*, 71 Minn. 283, 73 N. W. 970; *Doster v. Sterling*, 33 Kan. 381, 6 Pac. 556; *State v. Jones*, 51 Ohio St. 492.

Under our former constitution, where no restriction is imposed such as in section 1, article IX of the present one, this tax would be valid. A land road tax of $4 a quarter section was imposed on all lands in the state, under that constitution, and held valid (*Burlington & M. R. R. Co. v. York County,* 7 Neb. 487), but was repealed by the adoption of the present constitution. *McCann v. Merriam,* 11 Neb. 241.

We are of the opinion that the amount of gross receipts taken in by express, telephone and telegraph companies during the year prior to the time of assessment, taken alone, is not a reasonable and just method of ascertaining the value of the franchise possessed by such corporations; that it fixes an arbitrary rule, not founded upon justice nor upon any definite relation between receipts and value, and is in violation of the rule laid down by the first subdivision of section 1, article IX of the constitution.

The amount of gross receipts is beyond question one of the items which enters into the value of a business. It is entirely proper to consider the same in estimating value, and in fact it would be difficult to attain to a proper judgment of actual value without a knowledge of what such receipts might be. But there are other facts which are equally necessary to know in order to form any just or fair conception of the value of the privileges and rights exercised by such corporations, and none of these are allowed to be considered by the statute. So far as section 78 seeks arbitrarily to fix the value of a franchise at the sum of the gross receipts of such corporation for the previous year, it contravenes the constitutional limitation of taxation by valuation, and is void.

In order that there may be no misapprehension in regard to the point decided in this case, we deem it advisable to say that, while the legislature may not arbitrarily set up an unvarying rule or standard by which to determine the value of a franchise we have already upheld a tax upon gross receipts imposed under the new revenue law. A tax levied upon the gross receipts of insurance companies dur-

ing the year preceding April 1 of the year in which the tax is assessed may properly be levied and assessed in this state under the provisions of the second subdivision of section 1, article IX of the constitution. *Aachen & Munich Fire Ins. Co. v. City of Omaha,* 72 Neb. 518. And so likewise with express, telegraph and telephone interests or business, there is no restriction upon the power of taxation of such interests or business, except that it must be by general law, uniform as to the class. The tax which may be levied under this provision is a business tax and is not required to be levied by valuation, and if the power is desired to be exercised by municipalities, it must be done under their own local ordinances and not by general law. *Aachen & Munich Fire Ins. Co. v. City of Omaha, supra.* Unless intangible property is reached by the exercise of the legislative power to tax granted under the second subdivision of section 1, a large amount of value subject to taxation within this state will fail to bear its just share of the public burden. While perhaps some method may be found by which the value of these intangible rights or franchises may be equitably valued for taxation, still it is within the power of the legislature to reach such property for taxation by a more direct manner and without requiring any valuation. There is nothing to prevent provisions of law similar to those affecting insurance companies from being applied to companies engaged in the express, telegraph or telephone business, so far as levying a tax upon their business as measured by the gross receipts is concerned. The only fault to be found with the sections applying to these occupations as they now stand is that the legislature said too much when it provided that the franchises should be valued, and the gross receipts taken as the measure of the value. The gross receipts may be taken as a proper measure of the amount of business tax to be levied upon such business, but may not be arbitrarily taken as a measure of the value of the franchise.

Under the view taken of the second contention of the plaintiff, it is unnecessary to consider whether the exac-

tion of such tax is the taking of the plaintiff's property without due process of law.

We recommend that the judgment of the district court be reversed and the cause remanded, with directions to grant the relief prayed in plaintiff's petition.

AMES 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 remanded, with directions to grant the relief prayed in plaintiff's petition.

JUDGMENT ACCORDINGLY.

HENRY GUND, APPELLEE, V. ELIAS BALLARD ET AL., APPELLANTS.

FILED APRIL 19, 1905. No. 13,305.

1. **Equity:** JUDGMENT: FRAUD. In a suit in equity between the stockholders of a banking corporation, in process of voluntary liquidation, over the distribution of funds derived from its assets, a judgment rendered in another action brought by the corporation against a stockholder who was at the time the president, a director and one of the trustees selected to wind up the affairs of the bank by which the amount due from such stockholder to the corporation was adjudicated, which is relied upon by such stockholder in the equity action as a final adjudication of the amount due on such indebtedness, may be impeached by the other stockholders as having been obtained fraudulently or collusively.

2. **Assignment:** ASSUMPTION OF DEBT. In the action at bar, plaintiff, the president and one of the directors of the banking corporation, was a creditor of a firm who were also debtors to the bank and who became insolvent. In an adjustment of the matters between the officer of the bank in his individual right and the bank on the one hand, as creditors, and the debtor firm on the other, the president, acting for himself and the bank, secured an assignment and transfer of all the property of the debtors in his own name, and obligated himself to pay the indebtedness to the bank

by signing a note in its favor with one of the debtors, such indebtedness being carried for some time by renewals of the note thus executed. *Held*, Under the evidence as disclosed by the record, that his liability to the bank was not restricted to that of a mere surety, but as between him and the bank his obligation to pay the indebtedness was primary in its character.

3. **Fiduciary Relations:** FRAUD. Where a person occupies a fiduciary relation to a bank and its stockholders, and engages in litigation in which his individual interests are in conflict with those he represents in a fiduciary capacity, actual fraud is not essential in order to avoid the proceedings thus had and entered into.

4. **Trustee:** JUDGMENT: CONCLUSIVENESS. While the affairs of a bank were in process of liquidation, the president, who was also a director acting as one of the trustees for the purpose of winding up its affairs, was made a defendant in an action brought by the corporation against himself and one other on a note in favor of the bank on which both were obligated, in which it was adjudged that the liability of the president was that of surety only, and that the contract evidenced by the note was usurious in its character at its inception, and that no interest could be recovered thereon, and that all payments should be credited on the principal sum borrowed. *Held*, Under the evidence, that as the issues were made up and the case tried, the other stockholders were not concluded by such judgment, and could in the action at bar inquire into and determine the true amount of the indebtedness owing by such officer to the banking corporation.

5. **Contract:** USURY. The president and director of a bank cannot enter into a contract with the corporation in which he is such an officer to pay a usurious rate of interest on money owing by him to such corporation, and thereby escape the payment of all interest on such indebtedness under the statute denouncing usurious contracts.

5*a*. **Equity.** In such a case, a court of equity will not enforce the unlawful usurious contract, but will require the debtor to do equity by paying the legal rate of interest on the principal sum for which he is indebted to the corporation.

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

Roscoe Pound and *Frank H. Woods*, for appellants.

Tibbets & Anderson and *W. G. Hastings*, *contra.*

HOLCOMB, C. J.

This is a suit in equity, the real controversy being between stockholders of a banking corporation in process of voluntary liquidation. The disputed questions are with reference to the distribution among the stockholders of moneys derived from the assets of the corporation while its affairs were being closed up. The plaintiff sues for the purpose of having applied on his stock a certain per cent. of the moneys belonging to the corporation, which is alleged to be due him under the terms of an agreement entered into between the stockholders for the purpose of disbursing among those entitled thereto the funds which had accumulated prior thereto. The following is a copy of the agreement on which the suit is grounded and which is set out in the petition of the plaintiff: "It is agreed between the stockholders of the Blue Valley Bank that a dividend of 70 per cent. shall be paid to the stockholders at once on presentation of stock certificates to Elias Ballard for indorsement, and out of said dividends shall be charged any note held by the bank against such stockholders * * * and no money shall be paid any shareholder till his indebtedness to the bank is paid." The plaintiff alleges that by the terms of said agreement he as a stockholder of the bank is entitled to the sum of $6,930. He alleges that he has paid all of his indebtedness due to the bank and thereby has become entitled, under the terms of the agreement, to his proportionate share of the funds held for distribution among the stockholders. It is alleged in the petition:

"That under such agreement all of the stockholders of said bank excepting this plaintiff have been paid the full 70 per cent. dividend upon the face value of the stock held by each stockholder; that the amount due under said agreement to this plaintiff was held by the said trustees and by the said Elias Ballard, as treasurer, awaiting the determination of a liability of this plaintiff upon a certain note due to the said Blue Valley Bank upon which this plaintiff was surety.

"6. Plaintiff further alleges that the liability of this plaintiff upon said note has been fully determined by a judgment in the district court for Thayer county, state of Nebraska, and that he has fully paid, satisfied and discharged the said note and the obligation evidenced thereby, and is entitled to receive from the trustee of said bank and from Elias Ballard, as treasurer, upon said 70 per cent. distribution, the sum of $6,930."

The appellants, who also are stockholders, take issue with the plaintiff regarding the question of his indebtedness to the bank and its satisfaction, and by their answer allege that the plaintiff is indebted to the bank in the sum of $4,841.15, with interest thereon at 6 per cent. per annum from January 7, 1896, as evidenced by a promissory note in favor of the bank for the principal sum stated, dated April 19, 1899, and executed by the plaintiff and one George H. Hayes. It is further alleged in the answer that the judgment mentioned in the petition, the satisfaction of which the plaintiff pleads as a satisfaction of the indebtedness owing by him to the bank, was procured to be obtained fraudulently and collusively, and that such judgment is not binding and conclusive upon the stockholders as an adjudication of the amount due from the plaintiff to the banking corporation. These answering stockholders ask for an accounting and an ascertainment of the amount due to the bank from the plaintiff, and pray for a distribution of the proceeds, after the amount found to be due from the plaintiff is determined and deducted from his pro rata share of the fund for distribution, which would otherwise be coming to him as one of the stockholders.

The substance of the controversy, therefore, it will be seen, is in respect of the liability of the plaintiff to the corporation on the indebtedness mentioned and the conclusiveness of the judgment rendered in Thayer county district court, in an action on the note in which the bank was the plaintiff and one Hayes and the plaintiff herein were the defendants. The plaintiff relies on the adjudi-

cation in that action as a final determination of his indebtedness to the bank, and this is controverted by the defendants who contend that, notwithstanding the judgment, they are entitled in this action to recover for the full amount due according to the face of the note evidencing the indebtedness. In the action begun in Thayer county, it was adjudged by the district court that there was due the bank only the sum of $1,464.28. This judgment resulted from findings in favor of the defendant George Hayes, one of the makers of the note, who interposed as a defense the plea of usury, and, upon this issue, the trial court found in his favor and held the plaintiff in this action, the other defendant in that, liable only as a surety. An intelligent disposition of the questions now presented require of us a consideration of the force and effect of the judgment rendered by the district court for Thayer county upon the parties to the present action, and whether or not they are concluded by it. If the defendants are not bound by the judgment, then the nature of the liability incurred by the plaintiff when he became obligated on the note evidencing the indebtedness, and whether or not the contract is usurious in its character, and, if so, what is its legal effect upon the plaintiff in this action as to his liability thereon, are all matters for consideration and determination.

1. It is earnestly contended by the plaintiff, the appellee herein, that the Thayer county judgment is conclusive on the parties to this action as to the amount of his indebtedness to the bank. This seems to have been the view entertained by the trial court in the case at bar as to the principle of law applicable to the facts, the trial resulting in a decree in the plaintiff's favor. It is argued that this judgment can be attacked only in a direct proceeding, and must, for the purposes of this case, be accepted as a final adjudication, binding alike on the banking corporation, its stockholders and all in privity with them. The stockholders, it is contended, are parts of the corporation, represented by it in the litigation terminating

in the judgment rendered in the district court for Thayer county, which is as binding on the individual members as it is upon the corporation itself. It may be admitted that the rule contended for is of general application respecting parties and privies to a judgment, the important question being whether or not there are exceptions to the rule which will permit stockholders to impeach a judgment obtained in a proceeding by or against a corporation, upon the ground that the same was obtained fraudulently or collusively. In 3 Thompson, Corporations, sec. 3400, it is observed by the author:

"Under the modern American codes of procedure, where *equitable defenses* are allowed in actions at law, no reason is perceived why a defendant, sued upon a judgment, who was not in strictness a party to the record in which the judgment was rendered, should not be allowed to set up, as a reason why it should not be enforced against him, that it was procured to be rendered by collusion and fraud."

In an action purely equitable in character, such as the case at bar, the reasons for permitting the defendants to attack the judgment relied on as an adjudication of the amount due the corporation from the plaintiff are as persuasive, or more so, than those underlying the rule mentioned in the text. It is obvious from an inspection of the plaintiff's petition that his right to the relief prayed for is dependent upon the satisfaction and discharge of his indebtedness to the bank. For the purpose of showing himself entitled to the dividend sued for, and as a basis for a decretal order in his favor, he pleads affirmatively that the amount by him owing to the corporation has been regularly determined and adjudicated by a court of competent jurisdiction, and that the sum found and adjudged to be due has been paid and the debt thereby discharged. Coming into a court of equity and relying upon the adjudication as a determination of the amount justly owing by him, it surely ought not to be said that, if the judgment was procured fraudulently or collusively, the defendants cannot be heard to raise the question and be relieved from

an unconscionable advantage gained through no fault of their own.

In Clarke and Marshall, Private Corporations, sec. 800, the author speaking to the same point says:

"It is a well settled rule that a judgment rendered by a court of competent jurisdiction is conclusive, in the absence of fraud or collusion, against the parties to the suit, and against all persons represented by the parties; and it is also well settled that a corporation represents its stockholders in all matters within the scope of its corporate powers transacted in good faith by its officers. In an action against a corporation by a creditor, the stockholders are represented by the corporation, within this principle; and it follows that the judgment rendered against the corporation therein, if the court has jurisidction, is conclusive upon the stockholders, in the absence of fraud or collusion, in any collateral suits or proceedings against them, in equity or at law, to compel payment of the balance due on their stock. * * * The judgment may be attacked by stockholders for want of jurisdiction, or for fraud or collusion between the officers of the corporation and the creditor."

The adjudicated cases, and especially those of more recent date, seem to fully sanction the rule as thus stated by the text writer. The right to impeach a judgment as having been obtained by fraud or collusion is by some of the authorities held to be a right to be availed of to the same extent as lack of jurisdiction as affecting the validity of a judgment and its conclusive character as against the stockholders of the corporation. A recent authority may be cited which is regarded as directly in point, and which in principle is controlling in the case at bar as to the proposition being considered, unless the rule it enunciates is repudiated as unsound. In *Wilson v. Kiesel,* 9 Utah, 397, 35 Pac. 488, the president of the corporation acquired an interest in a claim against it, and by his consent a judgment at law was obtained against the corporation for an amount largely in excess of the plaintiff's just

demand. In a suit against the stockholders to enforce their liability for unpaid subscriptions, the court held the judgment not conclusive as to them, and the validity of the claim which was the basis for the judgment was permitted to be inquired into in the collateral suit. Say the court:

"It appears that Henderson was interested in obtaining this judgment against the power company and yet as president of the company he consented to its entry or rather directed the company's attorneys to consent, which they did. Is such a judgment, so entered, conclusive on the stockholders? We think not. In the language of Judge Baxter in *Bissit v. Kentucky River Navigation Co.*, 15 Fed. 353, 'we are satisfied that the complainant's judgment, to put it mildly, was unfairly obtained, and for an amount greatly in excess of the sum due.' Now, in this suit is the first opportunity the stockholders have had to inquire into the validity of plaintiff's claim against the corporation, and, all other matters aside, the judgment in plaintiff's favor would have to be reversed in order to afford the stockholders an opportunity to contest this claim before a master or the court below. This was the course taken in the *Bissit* case above referred to, and seems to be abundantly supported by authority. In the absence of fraud or mistake in obtaining judgment against the corporation, of course, the judgment is conclusive on the stockholders. *Henry v. Vermillion & A. R. Co.*, 17 Ohio, 187; *Donworth & Behan v. Coolbaugh*, 5 Ia. 300; *Came v. Brigham*, 39 Me. 35. But if the judgment against the corporation was obtained by fraud or through collusion with the company's agents, the stockholders may obtain relief through equitable proceedings 2 Morawetz, Private Corporations, sec. 619. And the judgment may be impeached for fraud or collusion by cross-bill in the action upon it. *Conway v. Duncan*, 28 Ohio St. 102; *Bank of Wooster v. Stevens*, 1 Ohio St. 233."

Another case fully supporting the doctrine announced in the text is *McBryan v. Universal Elevator Co.*, 130

Mich. 111, 89 N. W. 683. In that case the corporation became obligated for the payment of a bill for certain machinery purchased, which the vendor retook under certain provisions of the contract of sale, and thereafter, by an arrangement with the president, collusive in its nature, procured a judgment against the corporation for the purchase price of the machinery. In a suit against the stockholders for the purpose of procuring satisfaction of the judgment, the question of its conclusiveness as against them arose, and the court disposed of this question in the following language:

"Is the judgment conclusive against a stockholder? While it is the general rule that judgments against corporations are conclusive upon the stockholders, an exception is equally well established in cases where judgments are rendered through fraud or collusion, or without jurisdiction. 3 Thompson, Corporations, secs. 3392, 3400; 2 Morawetz, Private Corporations, sec. 865; 1 Cook, Corporations, sec. 209; *Bohn v. Brown,* 33 Mich. 257, 263. In *Bohn v. Brown,* this court said: 'If the proceedings against the corporation should appear to be tainted by fraud or collusion between the claimant and the corporation, the judgment would not be good as inducement, or as an adjudication to fix the liability of the stockholder through it, or to fix the amount, and the suit against the stockholder would fail inevitably.' This exception is approved in the following cases: *Irons v. Manufacturers Nat. Bank,* 36 Fed. 843; *Schrader v. Manufacturers Nat. Bank,* 133 U. S. 67, 10 Sup. Ct. Rep. 238, 33 L. ed. 561; *Slee v. Bloom,* 20 Johns. (N. Y.) 668; *Warrington v. Ball,* 33 C. C. A. 609, 90 Fed. 464; *Saylor v. Commonwealth Banking Co.,* 38 Ore. 204, 62 Pac. 652; *Ward v. Joslin,* 44 C. C. A. 456, 105 Fed. 224. In *Schrader v. Manufacturers Nat. Bank,* judgment was rendered against the bank on a contract of guaranty. In a suit against the stockholders to enforce their liability as such, it was held that they could go behind the record of the judgment and show that the guaranty of the bank had been released by

the release of the prinicpal debtor before judgment was taken against the bank. In *Slee v. Bloom* it was said that a judgment 'is not of itself, as *res judicata*, binding on the stockholders, if it was procured by fraud, or is founded in error.' In *Warrington v. Ball*, the defense set up was that the judgment was obtained by collusion between the plaintiff and the representatives of the bank, and that the certificate of deposit, on which the judgment was based, was issued for money furnished to the cashier personally. The judgment was held not to be conclusive upon the stockholders. The opinion says: 'To bind one by a judgment to which he is not a party, as provided for by the statute, is barely tolerable. To bind him by such a judgment obtained by fraudulent collusion (as here averred) would be intolerable.'"

In *Warrington v. Ball*, 90 Fed. 464, in discussing a like question, the court very pertinently observes: "The defendant cannot, indeed, impeach the judgment in any other way than collaterally. She is not a party to it, and it is valid as between the plaintiff and the bank so long as the latter acquiesces. She could not therefore be heard in an application to open it. A proceeding in equity to declare it void as to her, would be as clearly a collateral impeachment as that here proposed."

The following cases also support the rule announced in the authorities cited: *Bissit v. Kentucky River Navigation Co.*, 15 Fed. 353; *Town of Hinckley v. Kettle River R. Co.*, 80 Minn. 32, 82 N. W. 1088; *Skillern v. May*, 4 Cranch (U. S.), 136.

We are of the opinion that upon principle and under the authorities cited the defendants in this action may, upon the grounds and for the reasons stated, attack the judgment relied upon by the plaintiff as an adjudication of the amount of the indebtedness owing by him to the bank, and that the rule invoked by him as to its conclusive character is not applicable in its full sweep to the stockholders of a corporation who are not in the fullest and strictest sense of the word parties to the action in which

the judgment is rendered. They are represented in the action by the corporation and its officers who are charged with the conduct of its affairs, and are undoubtedly bound in all respects as a party to the action, unless the proceedings may be avoided on the ground of fraud or collusion or for lack of jurisdiction.

2. If the Thayer county judgment be held not final and conclusive in all respects as against the stockholders, as we are inclined to hold that it is not, then it becomes material to inquire as to the nature of the plaintiff's liability to the bank and whether or not that liability has been satisfied. If his obligation were secondary, if he were a surety only for the other signer, Hayes, who was the principal debtor, and the contract was tainted with the vice of usury at its inception, as it unmistakably was, then the measure of the plaintiff's legal liability has been discharged and satisfied by the payment of the judgment rendered in the district court, regardless of the question of whether it is binding and conclusive on the stockholders. If, however, plaintiff's liability were other and different from that of surety, if he became a principal, then his obligation to the bank has not been met by the payment of the judgment rendered against him in which his relation to the indebtedness was held to be that of surety only. It is disclosed by the record that the plaintiff was one of the principal stockholders, the president and one of the directors of the bank, devoting, however, but a small portion of his time to its affairs, being himself engaged in the grain business. The actual management of the affairs of the bank and of its business was entrusted largely to the cashier and others subordinate to him. One George Hayes, it appears, was a debtor to the bank in the sum of $2,000 for money borrowed to put into the firm business of Hayes Bros., a partnership dealing in grain, of which he and his brother were the individual partners. Both partners were obligated on the note given for the borrowed money. By the giving of renewal notes the indebtedness was permitted to run for a considerable period

of time, and existed as originally incurred when the plaintiff became obligated for its payment. It also appears that the firm of Hayes Bros. was indebted to the plaintiff individually, and that he was obligated on other indebtedness owing by them. George Hayes was during all the time mentioned, it seems, and had been for a long time, in the employment of the plaintiff. The firm of Hayes Bros. becoming financially embarrassed, the plaintiff, for the purpose of protecting himself, took steps to obtain such property or security as he could from the insolvent firm. Before taking action he consulted with one McGintie, who was at the time the vice-president and attorney for the bank, with a view of enlisting the latter's services in protecting the plaintiff in his dealings with the Hayes Bros. When thus approached, McGintie called the plaintiff's attention to the fact that the bank held the note of Hayes Bros. for $2,000, and that he (McGintie) would have to take care of that note for the bank, and to look out for it also. To this the plaintiff assented and replied, in substance, that that would be all right. In adjusting matters with Hayes Bros., in which McGintie assisted, presumably acting on the prior conversation with the plaintiff as to the bank's claim being looked after, and advising as to the best course to pursue, the plaintiff secured an assignment and transfer of the property of both debtors, and as contended by the appellant, among other things, assumed responsibility for the payment of the note held by the bank, for which the Hayes Bros. were liable. It is quite apparent to our minds that this indebtedness entered into the negotiations then consummated and was a part of the consideration for the transfer of the property which the plaintiff secured. McGintie testifies that there was an arrangement made whereby the plaintiff was to sign the note of Hayes Bros. to the bank and that he did thereafter sign it. It is fairly inferable from the evidence in the record that in the transaction had between the plaintiff and Hayes Bros. he obtained all their property, and that this was accomplished

by reason of their liability to him and to the bank, and for the purpose of satisfying such liability in so far as they were able to do so. The bank, it is true, held as collateral security a contract for the sale of some land situated in Kansas, but this was deemed insufficient, and the necessity of further security or satisfaction of the indebtedness was obvious. It is in evidence that after returning from Hebron, where the Hayes Bros.' transaction took place, to Wilbur, where the bank is located, McGintie suggested to the plaintiff, in view of the fact that he (the plaintiff) had obtained in his own name all of the property of the Hayes Bros. and which had been turned over to him, that he ought to give his note to the bank in lieu of the one held against the insolvent firm, and stated that the bank ought to have its indebtedness made safe in that manner. To this the plaintiff demurred; but he agreed to and said he would sign and indorse a note with George Hayes for the amount of the indebtedness then owing to the bank by the Hayes Bros. The suggestion was acted on and a new note executed by George Hayes, who was in the employment of the plaintiff, which was taken by the bank in place of the note which it then held. The note as thus executed was renewed from time to time, interest and other items of indebtedness being added and included therein until it had increased to the amount hereinbefore stated. While these renewal notes were generally signed by Hayes, it is not clear that all of them were. It appears that some of them were not. It is obvious that Hayes' obligation was regarded as nominal only, and that the plaintiff's signature on the note was the one relied upon by the bank during the time the indebtedness was extended and until the present controversy arose. The bank treated the plaintiff as the principal debtor. He was in a large measure dealing with himself on the one hand as an officer of the bank and on the other as its debtor. His directions as to how the indebtedness should be carried were followed by those holding subordinate positions. The debt was regarded as his obligation and his sugges-

tions in regard thereto were acted upon without question. There were paid on the collateral land contract, and included in the note from time to time, items of interest, taxes on the land, and payments as they fell due on the purchase price named in the contract. There also appears to be included in the note a disputed item, which it is contended by defendants was the individual indebtedness of the plaintiff. The plaintiff made some payments of interest on the note, which he states were for the benefit of Hayes, who he contends is the principal maker. Hayes, from the time the plaintiff signed the note forward, took no further interest except to sign the notes when presented to him, and made no attempt to discharge the indebtedness, nor was any effort made to collect it from him. He was insolvent, and was so regarded by all the parties to the transaction. The other officers of the bank, it is evident, relied on the plaintiff's responsibility as the maker of the paper, and accepted the renewals, and entered into other transactions in relation to the continuation of the indebtedness with the plaintiff as the one primarily liable, and the one to whom it must and did look for its satisfaction. There was included in one renewal note an item of $336, which is obviously the individual indebtedness of the plaintiff, or its inclusion in the note was wholly without consideration and an inexcusable error, which it is hardly believed would be committed by men of business ability and intelligence, such as we assume were the parties to these several transactions. We think from the evidence before us that the item must be regarded as a debt owing by the plaintiff to the bank, and included in the note in order to consolidate the whole indebtedness then owing by him. It is altogether clear that no transaction between the bank and Hayes was had during the time the plaintiff was obligated on the note, which added to or decreased the indebtedness in the slightest degree, except the increase caused by the accrual of interest. We are altogether satisfied that as between him and the bank the plaintiff was not obligated on the indebtedness simply

as a surety. His fiduciary relations to the bank and its stockholders, his adjustment of the bank's and his own claims against Hayes Bros., his assumption of liability to the bank on the Hayes Bros.' indebtedness in the manner narrated, must, we are convinced, be regarded as the assumption of a primary liability, and that it was he to whom the credit was extended and for whom the indebtedness was carried during the entire time of its existence after he became liable thereon. In truth, the plaintiff, as we view the record, undertook, when he secured the property of the Hayes Bros. as part consideration therefor, to protect the bank and pay its indebtedness for which both members were at the time liable. He was advised this must be done by the bank's attorney at the time his services were enlisted.

That the bank acted and relied upon his agreement in this respect, and for that reason took no action on its own initiation to collect its indebtedness against those who were then liable thereon, is no doubt true. The conclusion is reached that the plaintiff's rights are to be measured and determined from the standpoint of primary liability to the bank for the payment of the original indebtedness of $2,000 on which the Hayes Bros. were obligated.

3. The plaintiff's status being that of a principal debtor to the bank for the amount owing on the Hays Bros.' note, and he being also the president, a director and one of its principal stockholders, and a trustee selected to wind up its affairs, the question naturally arises as to the legal effect of the action taken in regard to such indebtedness, and of the litigation resulting in the judgment relied on as an adjudication of the amount due. During the time of these transactions, the plaintiff sustained a fiduciary relation to the stockholders of the bank, which required of him the utmost good faith in all his actions affecting their interests, and especially so where his individual interests came in conflict with those of the corporation. His authority as president and director regarding the business transactions of the bank was supreme, except as limited

and restricted by the board of directors. In winding up the affairs of the corporation and the distribution of the funds derived from the assets among the stockholders entitled thereto, he was one of three trustees especially selected for that particular purpose. The note was an asset of the bank, and the collection of the amount due thereon according to its face added materially to the fund for distribution among the stockholders. It is fairly inferable from the record that his voice and influence as to the conduct of the business in closing up the affairs of the bank were of great weight, and not infrequently his attitude was a controlling factor as to the proper course to pursue. One of the trustees during the latter stages of the liquidation acted, if at all, almost wholly in a perfunctory manner, leaving the business to the other two, one of whom was the plaintiff. It was from considerations of this character, and because the plaintiff was a debtor to the bank in a large sum on the note mentioned, which was regarded as a valuable asset which should be converted into money, that an effort was made by other stockholders to remove the then acting trustees and have others appointed in their places. Obviously, it was the duty of the plaintiff to execute the trust with an eye single to the interests committed to his care, and when a conflict arose between these interests and those belonging to him individually, it was his especial duty to guard the rights of the stockholders thus confided to his care as a trustee, director and officer of the bank, or to vacate his position, sever his relations as trustee and permit another not so situated to assume the duty and responsibility of conducting the business of the bank so that the interests of the stockholders would not be jeopardized by lack of effort to preserve and collect its assets for the benefit of those entitled thereto. *McDowell v. First Nat. Bank of Sutton, ante*, p. 307. In a determination of the question as to whether the proceedings had in the district court resulting in the judgment which the stockholders are seeking to be relieved of is binding and conclusive as against them, it is not necessary that there

should have been actual fraud in the transactions leading up to a rendition of such judgment. The doctrine forbidding proceedings of this character rests upon the broader principles of public policy, which preclude persons occupying fiduciary relations from representing conflicting interests which may tempt them to disregard duties, and by their action contribute to an injury on the one side or the other of the interests thus found to be in conflict. The rule finds abundant support in authority, and rests upon reasons contributing substantially to the promotion of justice, and is most sound and salutary in principle. *Gooch v. Peebles*, 105 N. Car. 411; *Baker v. Humphrey*, 101 U. S. 494, 502; *Arrington v. Arrington*, 116 N. Car. 170; *Spinks v. Davis*, 32 Miss. 152.

4. At the time the process of voluntary liquidation was entered upon, the item of indebtedness in favor of the bank, for which the plaintiff was obligated, and out of which this controversy has arisen, had grown from the original sum of $2,000 borrowed money until it amounted, according to the face of the note, to the sum of $4,841.15, with interest from January 7, 1896. For the purpose of closing up the affairs of the corporation, the plaintiff, the cashier of the bank, and one other stockholder, all of whom were directors, were by mutual consent selected as trustees for the stockholders to convert the assets into cash and distribute the same among those entitled thereto. Afterwards dissatisfaction arose among certain of the stockholders by reason of the inaction of the trustees, more especially with reference to this one item of indebtedness, which resulted in the institution of a suit against the trustees, having for its object their removal and others selected who would press the collection of the indebtedness against the plaintiff, and, as alleged, the better thereby conserve the interests of all stockholders. This litigation resulted adversely to the plaintiffs in the suit. *Sands v. Gund*, 3 Neb. (Unof.) 316. After this dissension arose, and after attempt had been made to have the trustees enforce the collection of the note, on which the plaintiff was liable, in

favor of the bank, and soon after the commencement of the litigation brought for the purpose of removing the trustees, they, or some of them, acting for the bank and its stockholders, caused to be begun proceedings in the district court for Thayer county, where Hayes resided, with the avowed object of enforcing collection of the note. Both Hayes and the plaintiff herein were made defendants. Hayes was notoriously insolvent. After issues were made up, a trial was had which resulted in a judgment holding that Hayes was liable on the note as the principal maker, and the plaintiff's liability was that of surety only. It was also held that the contract as originally made between Hayes or Hayes Bros. and the bank was usurious. After the allowance of credits by payments as interest and otherwise, the amount then found legally due amounted to the sum of $1,464.29 only, which the bank was permitted to recover at its own costs. The collection of this indebtedness, it is clear, had for some time been a lively subject of controversy, and it was known by the trustees that usury would be pleaded as a defense should an action be instituted against Hayes thereon. In fact, it is in evidence it was upon plaintiff's urgent solicitation that the plea of usury was interposed, the plaintiff telling Hayes that he could not afford to have a large judgment hanging over him, as he was yet a young man, and that, if the plaintiff was required to pay the full amount of the debt as evidenced by the note, he would keep the obligation against Hayes for contribution alive as long as he lived. We can hardly escape the conclusion that the plaintiff was by this method of procedure attempting to escape liability for this large item of indebtedness, which he could not hope to successfully defend against himself. We are hardly warranted in drawing the inference that his co-trustees made any special effort to fasten liability on him as one primarily obligated for the debt, and one who could not, because of his relations to the bank and its stockholders and the manner of assuming the indebtedness, successfully avail himself of the plea of usury. It was the

plaintiff that retained counsel for the defense and compensated them for their services. It is doubtless true that the situation was a delicate one for his co-trustees, and their duties in the premises, it is quite probable, were not altogether free from difficulty. It is argued that the institution of this action was the only practical and available method of procedure by which could be determined the legal liability of the parties to the paper sued on, and that no unfavorable inferences should be drawn because of the action taken. It can hardly be doubted that an action, such as the one we are now considering, and to which the plaintiff was ultimately compelled to resort, would have been a very proper one to have instituted in the first instance, and was one that would have afforded a most appropriate way of fairly and fully determining his liability on the indebtedness, as well as the rights of those with whom he was associated as stockholders having interests adverse to his own. In the enforcement of such liability his own interests were in irreconcilable conflict with those of the bank and its other stockholders. The situation was such that, if recourse must be had to the courts, the corporation and the other stockholders should be left free to pursue him as an adversary or defend against his contentions. The plaintiff, we are constrained to say, was in a measure representing both sides of the controversy. His influence as one of the trustees was not exerted in a marked degree against his individual interests. He was at the time one of the two active trustees who were charged with the duty of collecting the bank's dues and conserving its assets for the benefit of its stockholders. In framing the issues in the suit at law begun in Thayer county, they were so made up as to present no substantial question as to the primary liability of the plaintiff for such indebtedness. The petition declared on the note in the usual form. The plaintiff, by his answer, admitted that he signed the note, but only as surety for his codefendant Hayes, and for no other consideration, and prayed that his obligation as surety be fixed in the judgment. To this

answer no reply was filed. The other defendant, by his answer, admitted the execution of the note, pleaded usury in the transaction, and alleged certain payments which he prayed to have deducted from the principal sum borrowed. The reply to this answer was, in substance, a general denial. The triable issue in the case, as made, and the only substantial controversy, was in respect of the question of usury and the amount of the payments which had been made as interest upon the principal sum borrowed. There appears to be no substantial ground for any real controversy regarding this issue. That the note first given for borrowed money was tainted with usury is established beyond peradventure of doubt. It is hardly believable that those representing the bank, and who were interesting themselves in the enforcement of the obligation, had they been acquainted with the facts, could have entertained any serious doubts as to this defense being absolutely good. It was wholly a waste of time and money to attempt to controvert this defense with any sanguine expectation of obtaining a judgment on the theory that the original contract was free from the taint of usury. By the evidence of the bank itself and out of its own mouth it was condemned in respect of this defense. Such being the situation, we are of the opinion that there was under the pleadings no serious disputed question of fact nor of law to be adjudicated by the district court for Thayer county, and we can hardly escape the conviction that the apparent contest over the question of usury, which indubitably existed, had the effect only of obscuring more substantial matters of controversy which might have been presented in the trial of the case. It is said that the objecting stockholders were notified of the proceedings had in the trial of the case in Thayer county and of the different steps taken therein. They were in no way recognized, nor had they any voice as to how the issues should be made up, or what questions should be presented for trial in the case then pending, nor as to the manner of conducting the case. These matters were all controlled by the trustees acting

for the stockholders, who at the time were resisting the efforts of the objecting stockholders to have the bank's affairs placed in any other hands. It is true, they were notified of the time and place of taking depositions which were taken in the case to establish the issues relating to the question of usury and the fact of the payments made on the indebtedness, and that they declined to take any part in the examination of such witnesses. Otherwise, the case was conducted exclusively by those representing the trustees and the attorneys employed by them for that purpose. On the whole, we are disposed to the view that the question of the primary liability of the plaintiff on the note sued on and his right to avail himself, as against the bank and other stockholders, of the plea of usury were neither fully presented nor fairly tried in that suit, and that the judgment therein rendered is not conclusive and binding on the other stockholders, so as to preclude them from raising these questions and having a determination thereon in the suit at bar.

5. The plaintiff, when he undertook the payment of the obligation of Hayes Bros. in favor of the bank, at the time of the adjustment of the matters pending between him and the bank on the one part and the firm of Hayes Bros. on the other, and signed the note which the bank held against those parties, became, as we have seen, as between him and the bank, primarily liable thereon. The question presents itself as to the availability to him of the defense of usury in the determination of the amount legally due thereon. He having by this transaction become obligated to pay the debt, there can be no serious controversy, we apprehend, as to his undertaking to satisfy the note being a new and different contract than the one then existing between the bank and Hayes Bros., and that the usurious character of the contract existing prior to such time in relation to such indebtedness was eliminated from the new contract, and, the old contract being terminated, the new was purged of the taint of usury theretofore existing. *Building & Loan Association of Dakota v. Walker,* 59 Neb. 456; Webb,

Usury, sec. 452; *Culver v. Wilbern*, 48 Ia. 26. We find no evidence of usury entering into the original contract whereby the plaintiff became obligated to pay the debt contracted by Hayes Bros. It is clear from the evidence that not only did usury enter into the first contract between the bank and Hayes Bros., but it is equally clear that, subsequent to the time the plaintiff became obligated to pay the debt, usurious interest was contracted for, reserved and paid at different times upon the renewals of the note first evidencing the indebtedness, during the time the indebtedness was carried, and continued by such renewals from time to time until the execution of the note now in controversy. It is satisfactorily proved that interest was charged at the rate of 12 per cent. per annum on the indebtedness according to the terms of the renewal of the note of February 19, 1895, and on other renewal notes thereafter executed. It is also clearly established, we think, that the item of $328.24, carried into the note as an indebtedness occurring by reason of payments on the principal, interest and taxes due on the contract for the sale of land held as collateral security, was reckoned upon interest charges thereon from time of payment until incorporated into the note at a greater rate of interest than that allowed by law. In other words, usury was charged and contracted for by the bank upon the payment made by it in preserving its collateral security, and making the payments required by the terms of the land contract in order to obtain title to the land described therein. It becomes necessary, therefore, to determine the liability of the plaintiff for the indebtedness sued for, in view of the fact that the contract entered into between him and the bank is tainted with usury by reason of the transaction heretofore narrated. We are of the opinion that the law will not permit him, acting in the dual capacity in which he was, and in a sense the agent of his principal, the bank, to enter into a usurious contract with himself and his principal, and thereby escape all liability for the payment of interest on the principal sum of the indebtedness for

which he thus became obligated. It must be accepted, we think, as fundamentally correct that he could not be permitted to profit by his own wrongful action, nor by the action of the bank on the one part and himself on the other, to the prejudice of the stockholders, he holding, as he did, the fiduciary relations then existing between him and the corporation and those it represented. *Sternberg v. Callanan,* 14 Ia. 251; *Oliver v. Lansing,* 48 Neb. 338. On the other hand, a court of equity will not enforce a usurious contract prohibited by law. A court of equity, it seems to us, should require him to do equity, and this demands of the plaintiff that in order to discharge his liability to the bank, he must pay the principal indebtedness, together with the legal rate of interest accruing thereon during the time of the running of the debt. *Eiseman v. Gallagher,* 24 Neb. 79; *Frenzer v. Richards,* 60 Neb. 131.

We do not undertake in this action and at this time to determine the amount justly due from the plaintiff to the corporation, and expressly refrain from adjudicating the amounts or validity of any of the items which seem to have entered into the consideration for the last note executed by the plaintiff to the bank, which forms the basis for the recovery sought to be enforced in this action. We are of the opinion that the amount justly due can better be ascertained upon an accounting after the legal status and rights of the parties with reference to the character of the indebtedness are here determined.

The decree of the district court is vacated and set aside and the cause is remanded, with directions to ascertain the amount justly due from the plaintiff, according to the views herein expressed, and to make such further and other orders in the premises as seem to be just and equitable, not inconsistent with this opinion, to the end that all of the rights of all parties to the litigation may be fully and finally adjudicated and determined.

REVERSED.

THOMAS L. HARNETT, TRUSTEE, V. GEORGE W. HOLDREGE ET AL.

FILED APRIL 19, 1905. No. 13,122.

1. **Promissory Notes:** INDORSERS. Persons who write their names in blank on the back of a promissory note payable to the order of the maker, which is indorsed by such maker and afterwards delivered to a third person, in the absence of any special agreement to the contrary, become liable thereon as indorsers and not as joint makers, and their liability cannot be varied by parol evidence.

2. **Parol evidence of a custom or course of dealing previously pursued by the maker with regard to other notes of a like character is not admissible for the purpose of showing, inferentially, that the indorsers were joint makers, and thus change and enlarge their liability.**

3. Former opinion herein, 5 Neb. (Unof.) 114, adhered to.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Judgment of affirmance adhered to.*

James H. McIntosh, John J. Sullivan and *Francis A. Brogan,* for plaintiff in error.

J. E. Kelby, R. D. Brown, J. W. Deweese and *F. I. Foss, contra.*

BARNES, J.

When this case was before us the first time it was heard by Department No. 2 of the Commission, and an opinion was written, and approved by the court, affirming the judgment below. 5 Neb. (Unof.) 114. A rehearing was allowed and a reargument had before the court. On such rehearing some fault was found with the statement of facts contained in our former opinion. However, the principal criticism was that the indorsement, "For value received we hereby guarantee the payment of the within note, and waive presentment for payment, demand and notice of

protest," was stamped twice on the $2,000 note in suit, and only once on the one for $5,000; yet such indorsement appeared twice on the copy of the $5,000 note which is set out in the opinion. While the point appears to be well taken, a reexamination of the notes shows us that the indorsement appears on both notes under the name of the maker, the payee, and above the signatures of the defendants F. I. Foss, G. W. Holdrege and J. W. Deweese, who are the only ones sought to be held liable in this action. It would therefore seem that the variance is not only immaterial, but is extremely trifling. This explanation, taken with the full and complete statement contained in our former opinion, to which reference is hereby made, renders any further statement unnecessary for a proper understanding of the present decision.

Counsel for the plaintiff in error vigorously assail that part of our former opinion which holds that the defendants above named were liable only as indorsers of the notes in question, for the reason that the liability incurred by them is the pivotal question in this action. It is conceded that if they are to be treated as indorsers, then our former opinion should be adhered to, and the judgment of the district court must be affirmed. Plaintiff insists, however, that they are not indorsers, but are joint makers of the notes, and should be held liable as such. To sustain this contention counsel point to the statement contained in the amended petition, "that the defendants borrowed the money (sought to be recovered herein) from the plaintiff's intestate on said notes." No other facts are alleged in the amended petition from which such a liability can be inferred, and it may be stated in passing that the evidence not only fails to sustain the allegation, but it would seem that the corporation, the maker of the notes, borrowed the money and received the proceeds of the transaction. In fact it is alleged in the original and amended petitions that the South Fork Irrigation & Improvement Company made the notes, and the defendants Foss, Holdrege and Deweese wrote their names on the back of those instruments; and

both petitions charge them with the liability of indorsers in clear and explicit terms, even to the proper allegation of demand, protest and notice of protest. So we will again consider the question as to what was the liability assumed by the defendants, by writing their names on the back of these notes. It must be remembered that they were made by the South Fork Irrigation & Improvement Company (a corporation), payable two years after date to its own order, and indorsed as follows: "The South Fork Irrigation & Improvement Co., By G. W. Holdrege, *Pt.*, By A. L. Emerson, *Sec'y & Tr.*" Then followed: "For value received, we hereby guarantee the payment of the within note and waive presentment for payment, demand and notice of protest. F. I. Foss, G. W. Holdrege, C. H. Peck, W. L. Matson, A. L. Emerson, J. W. Deweese."

It is claimed by the defendants that the waiver above quoted was not on the notes when they indorsed them, and that such waiver was placed there after they signed their names thereon, without their knowledge or consent; that the notes and their liability thereon were thus materially altered and changed, and were not the contracts signed or indorsed by them. After an examination of the evidence we are unable to say that it is insufficient to support this claim. No evidence was offered by the plaintiff tending to prove his allegations of demand, protest and notice of protest, and as we are required to hold that no waiver was established, the case must turn on the nature of the liability of the defendants under the facts above stated. It is perhaps well to state that while the South Fork Irrigation & Improvement Company, Fayette I. Foss, W. L. Matson, George W. Holdrege, A. L. Emerson, C. H. Peck and Joel W. Deweese, were all alleged against in the petition, yet the case proceeded against the defendants Foss, Holdrege and Deweese alone. One of the earliest cases in which the question of the liability of one who signs his name on the back of a promissory note, made payable to the order of the maker, indorsed by him and delivered to a third person, arose, was *Lake v.*

Stetson, decided by the supreme judicial court of Massachusetts (13 Gray (Mass.), 310, note). In that case it appeared that one Stetson made a note payable to his own order, on which one Bates had written his name, after which Stetson indorsed it and delivered it to the plaintiff Blake. The trial court rejected the evidence offered by the plaintiff that the note was given by the defendants Stetson and Bates as a part of the consideration of a joint purchase by them, and that the note and all of the signatures thereon were made at one interview, and before the delivery of the note, in order to charge both defendants as joint makers. A verdict was given for the defendant Bates, and the plaintiff prosecuted his exceptions, which were overruled by the supreme court.

The question next came before that learned court in the case of *Bigelow v. Colton,* 13 Gray (Mass.), 309. The following is a copy of the note sued on:

"GREAT BARRINGTON, July 18, 1857.

"Two months after date I promise to pay to the order of myself, two hundred and fifty dollars at the Mahaiwe Bank, for value received. EDWIN HURLBUT."

Upon the back of the note was the signature of Hurlbut, and under it that of Colton. At the trial it appeared that both names were signed before the delivery of the note to the plaintiff, the signature of Hurlbut being made first. At the trial the judge ruled that the defendant could not be held as a maker, and directed a verdict for him, which was returned, and the plaintiff alleged exceptions. The supreme court affirmed the judgment, and held that one who puts his name, before delivery, on the back of a promissory note, payable to the maker or order, and indorsed by the maker, is an indorser and not a joint maker, and his liability cannot be varied by parol evidence. We quote from the opinion as follows:

"A promissory note payable to the order of the maker, and by him indorsed, is in legal effect a note payable to bearer. By placing his name on the back of the note, the

maker agrees to pay it to whomsoever may be the holder thereof. Story, Notes, secs. 16, 36*a*. Although a note payable to bearer is transferable by delivery, it may also be transferred by the indorsement of any holder. In such case, the indorser incurs the same obligations and liabilities as an indorser of a note payable to order, and is entitled to demand and notice. Story, Notes, sec. 132."

In *Clapp v. Rice,* 13 Gray (Mass.), 403, *Lake v. Stetson* and *Bigelow v. Colton, supra,* were followed, and it was held that parties who indorse their names on a promissory note before its delivery, for the benefit of the maker, are not liable as joint makers, if the payee afterwards indorses his name above theirs before the note is delivered, and other parol evidence is inadmissible to show that they were joint makers. We append the following quotation from the body of the opinion in that case:

"When this note was first passed to any holder for value, so as to make it a valid contract, it was indorsed by W. T. Davis, treasurer, to whose order it was payable. It was therefore never a contract by which the plaintiffs were holden to Davis or to the railroad company. Their names were put upon it, with the obvious understanding and expectation that it would be indorsed by Davis before it should be negotiated. By his indorsement above their names, it was made, in form and effect, an indorsed note, with successive indorsements following. The bank took it in this form, complete and effectual, when it first had any validity; and it has been settled in the recent case of *Prescott Bank v. Caverly,* 7 Gray (Mass.), 217, that under such circumstances it is not competent for the person whose name appears upon the note as an indorser, to show, by parol evidence, that his contract was different from that which such a signature ordinarily imports."

About the same time the question was before the supreme court of Maine, where the same rule was announced. *Smalley v. Wight,* 44 Me. 442. The question was again before the supreme court of Massachusetts in *Dubois v. Mason,* 127 Mass. 37. The court followed the

cases above cited, and held: By the law of this commonwealth, one who puts his name on the back of a promissory note, payable to the maker or order, before it is negotiated, and before it is indorsed by the maker, is an indorser, and not a joint maker if, when negotiated, the maker's name appears first on the back of the note. We quote from the opinion:

"The liability of a party whose name appears on the back of a negotiable note is determined by the position of his signature with reference to other parties, at the time when the note first takes effect by delivery. When a note is payable to the maker's own order it can take effect only when indorsed and delivered by him. The fact that the defendant put his name on the back of the note before it was indorsed by Shurtleff does not make him a joint promissor, because he then knew that it must be indorsed by the maker before it could be negotiated, and the implication is that he intended to be liable only as indorser."

The question came before the supreme court of Illinois in *Bogue v. Melick,* 25 Ill. 91, where it was held that a promissory note, payable to one of the makers, while in the hands of the payee, is a nullity, and can never become operative except by indorsement of the payee, and that the position of the names of the parties on the back of the note will be notice to any one purchasing the same of the extent of their rights and liabilities. It was further held that one who writes his name on the back of such a note incurs the liability of a second indorser.

In *Blatchford v. Milliken,* 35 Ill. 434, we find the following:

"It is the settled law of this state, that a person who is not a party to a promissory note which is to become a valid obligation against the maker upon its delivery to the payee, by writing his name in blank upon the back of the note, is presumed to assent to the obligation of a guarantor. But where the note creates no valid obligation against the maker, and can create none, until it is

indorsed and transferred by the payee, the presumption is that a person writing his name in blank upon the back of the note assumes the obligation of an indorser. Inasmuch as the note can never have any validity until the name of the payee appears upon it as an indorser, the person writing his name in blank upon the note understands that, when the note takes effect, his name will appear upon it as a second indorser, and it is reasonable to conclude that such was the position which he intended to occupy. All persons receiving a note thus payable and so indorsed are apprised of the apparent obligations of the indorsers, and if they rely upon any other obligation, it is their duty to ascertain whether it exists. Any other obligation is *dehors* the instrument. An authority to fill out an undertaking over a signature is to be exercised consistently with the nature of the instrument and the intention of the parties. From the nature of a note payable to the maker's own order, it is known what the law will presume was the intention of the parties in indorsing it in blank; and if any agreement is written over the signature inconsistent with such presumption, it is the duty of the persons receiving the note to ascertain how and by what authority, it was written there."

In *Kayser v. Hall,* 85 Ill. 511, it was held:

"Where a promissory note, made payable to the maker, is indorsed by him, and another person indorses his name just below the first, and the note is then negotiated, the person last indorsing will assume the liability of second indorser, and not that of guarantor. A promissory note payable to the order of the maker has no validity until it is indorsed and transferred by him."

In *Heidenheimer Bros. v. Blumenkron,* 56 Tex. 308, it appeared that a promissory note was made by Blumenkron, payable to the order of himself, and indorsed by one Hirsch and others, and it was held that on the face of the note, as indorsed and delivered, Blumenkron was the maker and Hirsch and the other were indorsers. It was said:

"The fact that Hirsch became a party to the note in its inception and for the accommodation of Blumenkron did not make him liable otherwise than as an indorser; nor is parol evidence admissible to show the intention with which he signed."

The question was again before the supreme court of Texas in *Williams v. Merchants Nat. Bank*, 67 Tex. 606. It appears that Williams made a promissory note for $12,500, payable to the order of himself, at the office of the Gainesville National Bank, with interest from maturity until paid, at the rate of 12 per cent. per annum. The note was signed by Williams, indorsed by him, and delivered to the Gainesville National Bank, after it had been indorsed by one Washington. In a suit in which it was sought to hold all the parties as joint makers, it was held:

"Their names appearing after the payee, it must be presumed that the indorsers signed after the payee had indorsed, and parol evidence cannot be admitted to vary the plain terms of such a contract."

In our former opinion, the case of *First Nat. Bank v. Payne,* 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520, was made the leading case for comment, and that decision has been vigorously assailed by the plaintiff. A reexamination of the opinion in that case impresses us with the learning and ability of the supreme court of that state. The decision is in line with the other decisions of that court on the same question, and follows the early Massachusetts cases, and others from which we have so liberally quoted. This rule has also been recognized in *Little v. Rogers,* 1 Met. (Mass.) 108, and in *Claflin Co. v. Feibelman & Co.,* 44 La. Ann. 518, and seems to be the rule adopted by the English courts. *Hooper v. Williams,* 2 Exch. Rep. 13. Indeed, this rule is so well established that it is stated without qualification in Daniels, Negotiable Instruments, secs. 130, 707*a;* in Tiedeman, Commercial Paper, sec. 20, and in 2 Parsons, Notes and Bills (2d ed.), 122. It is approved in *Burton v. Hans-*

ford, 10 W. Va. 470, 486, and by the supreme court of the United States in *Rey v. Simpson,* 22 How. (U. S.) 341, 350.

Plaintiff has failed to call our attention to a single case in which any court has held that one who signs his name in blank on the back of a promissory note, made payable to the order of the maker, and which is afterwards indorsed by the payee and delivered to a third person, is liable as a joint maker. And after the most thorough research we have been unable to find but one such case, to wit, *Ewan v. Brooks-Waterfield Co.,* 55 Ohio St. 596, 35 L. R. A. 786, which seems to support plaintiff's contention. As opposed to the authorities above cited and quoted from, plaintiff cites *Salisbury v. First Nat. Bank,* 37 Neb. 872, and insists that that case, with a long line of decisions from other states, together with *Good v. Martin,* 95 U. S. 90, hold a contrary doctrine. An examination of *Salisbury v. First Nat. Bank* discloses that the note there sued on was as follows:

"$2,500. OMAHA, Neb., Feb. 15, 1889.

Ninety days after date, we, or either of us, promise to pay to the bank of Omaha, or order, Twenty-five hundred and no-100 dollars, for value received, payable at the Bank of Omaha, Omaha, Neb. with interest at the rate of 10 per cent. per annum from maturity until paid.

"C. H. SLOMAN."

Across the back of this note was written the names of J. G. Salisbury and S. A. Sloman, and before maturity it was indorsed and transferred by the bank of Omaha to the bank of Cambridge. In a suit against the maker and the indorsers it was held that they were liable as joint makers. It is only necessary to compare the notes in question in this case with the one just quoted to show that *Salisbury v. First Nat. Bank, supra,* is not authority in this case. A careful examination of *Good v. Martin, supra,* and the whole list of twenty odd cases cited by counsel, shows that the notes in question therein were

made payable to third persons, indorsed in blank, and afterwards indorsed and negotiated by such third persons; and in none of the cases, so far as we have been able to ascertain, was the note in suit made payable to the order of the maker himself.

So we conclude, not alone from the weight of authority, but from all of the authorities on the question in this country, that the defendants Foss, Holdredge and Deweese must be held to have assumed the liability of indorsers only, and that under the issues in this case, and according to the principles above discussed, parol evidence cannot be received to charge them with any other, or an enlarged liability. It follows, then, that the district court did not err in excluding the evidence by which it was sought to show, inferentially, by a custom or course of business on the part of the maker in regard to other transactions that the defendants were not indorsers but were joint makers of the notes.

A reexamination of the pleadings convinces us that our former holding as to their legal effect, and the issues raised thereby, is correct; and we decline to give that matter any further consideration.

It is again urged that, in any event, judgment should have been rendered against the defendant Holdrege. And this contention is based on the fact that he was not present at the trial in person, and did not testify in his own behalf. This point does not merit our serious consideration. It is sufficient to say that the evidence of his codefendants made at least a *prima facie* defense for him, which was not assailed or overthrown by the plaintiff.

For the foregoing reasons, our former opinion is adhered to, and the judgment of the district court is

AFFIRMED.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY V. JAMES B. MCMANIGAL ET AL.*

FILED APRIL 19, 1905. No. 13,691.

1. **Contradictory Verdicts:** REVIEW. When contradictory verdicts are returned in favor, respectively, of two several parties, it is the duty of the court to ascertain whether there is any other error, and, if not, which of them, if either, is such only as could be upheld by the evidence, and if either of them is such, to render a judgment of affirmance thereon, disposing of the other as the law and the relations of the parties may require.

2. ———: JUDGMENT. When, in a joint action against a principal and his agent to recover damages for alleged negligence of the agent in conduct strictly within the performance of his duty, there is a verdict in favor of the latter that is free from error and is such as could alone be supported by the evidence, there should be a judgment for the principal also, although upon the same record and in the same case there may be a verdict against him.

ERROR to the district court for Douglas county: GUY R. C. READ, JUDGE. *Reversed as to railway company.*

B. T. White and *J. B. Sheean,* for plaintiff in error.

T. J. Mahoney, John D. Ware and *H. C. Brome, contra.*

AMES, C.

A bare outline of the facts will suffice for an understanding of the problems presented for solution in this case.

William Rogers was engaged as foreman of a company of laborers, one of whom was the plaintiff, in the demolition of a building belonging to the defendant railway company and standing on its right of way. It is alleged that in the construction of the building, fourteen years previously, there was a defect of a character affecting its stability to such a degree as to render it more easily destructible than it would otherwise have been, but it is not

* Rehearing allowed. See opinion, p. 585, *post.*

claimed that such alleged weakness was concealed or rendered the building unsafe for the purposes for which it was erected, or diminished its durability under ordinary circumstances, or that it was constructed with a view to its future destruction, or that, if it had been so, the company would have been under any duty or obligation to its employees or the public to render the work of demolition unnecessarily difficult. But it is alleged that Rogers negligently commanded the plaintiff to engage in the work of wrecking at a place rendered dangerous by means of such weakness, and that as a consequence thereof the building, while the plaintiff was so employed, unexpectedly gave way, precipitating him to the ground and inflicting injuries upon his person.

This is an action for damages brought against the company and Rogers jointly. There were separate answers which for the purposes of the present discussion may be treated as consisting severally of a general denial accompanied by a plea of contributory negligence.

The court instructed the jury that they were at liberty to find in favor of either party and against the other, and they accordingly returned a verdict in favor of Rogers and against the plaintiff, but in favor of the plaintiff and against the company for substantial damages. The instruction was excepted to, and the plaintiff and the company prosecute separate petitions in error. Before filing its motion for a new trial, the latter filed a motion for a judgment in its favor on the ground that the verdict in favor of Rogers is equivalent to a special finding in its favor that there was no actionable negligence, and is inconsistent with the general verdict against it, which it therefore overrides, entitling the company to judgment under the statute governing such cases. The motion was overruled. The plaintiff excepted to the instruction and assigns it for error in his petition in error and brief, but he was not prejudiced by it unless by reason of it he was deprived of a verdict to which otherwise he was or would have been entitled and, therefore, presumably, would have

obtained. He also assigned in his brief that the court erred in refusing to give three instructions requested by him, but he presented no argument in support of the assignment either in his brief or orally. Under such circumstances we do not feel obligated to enter upon a critical examination of them, and it may suffice to say that after reading them we are of opinion that the court did not err in their refusal in the form in which they were drawn, and that so much of them as appears to us to be pertinent to the issues involved seems to us to have been brought to the attention of the jury by instructions which were given by the court upon his own motion.

The only other complaint in his petition in error is by way of quotation from the opinion of this court in *Gerner v. Yates,* 61 Neb. 100: "The verdict is an anomaly; it is in irreconcilable conflict with itself. It is in effect a declaration by the jury that the material allegations of the petition are both true and false"; but no specific assignment to this effect is to be found in the motion for a new trial, or in the petition in error, and the opinion cited does not hold that such an apparent absurdity is necessarily fatal to both verdicts, except in instances where both are based upon the same conflicting evidence, and in that case the verdict in favor of one only of the defendants was set aside because, as the opinion says, its correctness was not conclusively established by the evidence. But in the case at bar it is not contended that there is not sufficient evidence to support the verdict in favor of the defendant Rogers. All that is urged is that there is some slight contradiction upon a not vitally material point. Why then should he be deprived of the fruits of his just victory because the jury absurdly condemned another whom, upon the same evidence, they might with equal propriety have exonerated? But counsel says that the court erred in expressly advising the jury that they were at liberty to commit such an absurdity and that but for this error the plaintiff might have recovered a verdict against both defendants. True, but it is at least

equally probable that in such a case he would not have recovered against either, and neither supposition goes any distance at all toward an answer to the question whether the error was prejudicial. That question can only be answered, as it seems to us, by ascertaining, as in other cases, whether there is any other prejudicial error and, if none, whether either verdict is alone sustained by the evidence.

In a case like the one at bar, and in most cases of like kind, sufficiency of evidence as to one verdict is at the expense of insufficiency as to the other, and *vice versa*, and the true rule, we think, is, when the evidence is not conflicting or substantially so, to uphold the verdict having adequate support and to set aside the other, and so the court may avoid supplementing the absurdity of the jury with one of its own. And this is what the court in fact did in *Gerner v. Yates, supra,* although the opinion does not express the matter quite clearly to that effect. In the present instance it is not contended, nor could it successfully be, that if Rogers was the sole defendant the verdict in his favor would fall to the ground for lack of support by the evidence, and it is quite clear that a verdict against him would lack sufficient such support, nor can we understand why it should suffer that fate solely because of the joinder of his codefendant. His conduct, which was confined strictly to the line of his duty and employment, was the sole subject of investigation. He was not merely an agent, in a loose or general sense, but for all practical purposes he was the company, representing it, as respected the matter in hand, as fully and completely as, and doubtless more efficiently than, would the president and board of directors or the assembled stockholders have done if present. If the company was guilty of negligence it was his guilt, if it was innocent it was because he was free from blame. The law is firmly established that, if under such circumstances a suit against the agent alone had resulted in a judgment in his favor, it would have been a bar to a subsequent action against

his principal upon the same cause of action. *Doremus v. Root,* 23 Wash. 710, 54 L. R. A. 649, and cases cited in elaborate note. In the case named, which was in many respects similar to this, the supreme court of Washington set aside the judgment against the principal and rendered a judgment absolute in its favor, solely because there was no appeal from that in favor of the agent, saying that if there had been such an appeal there would have been no hesitancy in reversing both judgments and remanding the cause for a new trial. But as we have already said, we can see no justice or expediency in such a course. Although the instruction was erroneous because inapplicable to the character of the case at bar, it did not preclude the plaintiff from a full and fair investigation of, and unprejudiced verdict upon, all the issues involved. If he had succeeded upon sufficient evidence against the agent, his verdict would, we think, have established the liability of the principal as well as that of the agent, notwithstanding a verdict, had there been one, in favor of the former, because the former was a party to the suit and participated in the investigation of the transaction out of which the liability would have arisen. The company and Rogers were privies in a sense other and different from that in which that term is used in ordinary cases of alleged joint tort-feasors. If the principal had been sued alone, it might have bound the agent by the result by notifying him to appear and participate in the defense (*Doremus v. Root, supra*), and a corresponding obligation must, as we think, arise out of the participation of the principal as a party in a suit against the agent. And, reciprocally, a verdict and judgment in favor of the agent, free from error, and such as the evidence alone supports, must exonerate the principal.

We recommend, therefore, that the judgment against the railway company be vacated and set aside and the action as to it be dismissed, and that the judgment in favor of Rogers be affirmed.

LETTON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment against the railway company be vacated and set aside and the action as to it be dismissed, and that the judgment in favor of Rogers be affirmed.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed March 22, 1906. *Judgment modified*:

1. **Inconsistent Findings:** REVIEW. Two inconsistent findings of a jury upon the same issue, if based upon conflicting evidence, nullify each other. Such findings will not support a judgment. If one is the only finding possible under the evidence, a judgment thereon in favor of one of two joint defendants will be sustained, and a finding upon the same issue against the other defendant, being wholly unsupported by the evidence, will be reversed.

2. **Reversal:** PRACTICE. It is not the practice of this court to dismiss a law action upon reversing a judgment of the district court for want of evidence to sustain it. The cause is remanded to the district court for further proceedings.

SEDGWICK, C. J.

The opinion of the commissioner upon the former hearing was approved by the court upon the theory that the evidence was not sufficient to support a verdict against either the defendant Rogers or the defendant railroad company. Upon the reargument of the case and a further examination of the evidence as contained in the record, we are satisfied that the conclusion was for this reason correct.

The plaintiff, with several other men of whom the defendant Rogers was foreman, was engaged in removing the platform about the station house or depot building of the defendant company. This depot building and platform had been constructed and in use for about fourteen years. They were rebuilding the platform with new material, rejecting the old, and were raising the depot building. They had been engaged in this work for several days. The plat-

form extended entirely around the building. The plaintiff had been a part of the time engaged in sawing blocks "and blocking up." During the day when the accident occurred, he had been engaged in "tearing down," that is, in breaking up the platform and in assisting in removing it. A considerable portion of the platform had been removed and rebuilt with new material. They had reached the northwest corner of the building, and were attempting to remove the sills at the northwest corner of the platform, at the time of the accident. Directly under the northwest corner of the building a piling had been driven, and on this piling one end of each of three separate sills rested. These sills were 12 by 12 or 14 inches in size. One of these sills, which was supported at one end by the piling under the corner of the building, extended directly west to the west side of the platform; another one, the end of which rested upon the same piling, extended directly north to the north side of the platform; and the third one, the end of which was also supported by the same piling, extended to the northwest corner of the platform. The evidence is conflicting as to whether there was one of these sills running east and west along the north edge of the platform. The plaintiff testifies that there was, and that one end of the plank upon which he was standing was resting upon this sill, and, according to his testimony, when he loosened the sill extending directly north from the corner of the depot building that sill fell and also the sill on the north edge of the platform, which seems to have been connected with the sill which he was attempting to remove. The plank on which he was standing fell with these sills, and this was the cause of the accident. In the construction of the platform, joists were laid upon these sills and upon the joists the planks, which were described as "two-inch stuff," were laid. The planks and the joists had been removed from these sills. The foreman Rogers and the plaintiff were standing upon one of these sills. The plaintiff testifies that the foreman "picked up one of the joists that we had taken off, and just threw it right across the sills,

and says, 'Pinch the sill off.'" The plaintiff then stepped upon the plank, and began with a crowbar or "pinch-bar" to loosen the end of one of the sills from the piling which was the joint support of the three sills. It is contended that it was customary in the construction of such a platform to fasten the sills to the piling with "drift bolts." These are half-inch bolts, eighteen inches or more in length, driven down through the end of the sill into the piling. The contention is that, if this sill which accidently fell had been fastened with a drift bolt, the accident would not have occurred; and since the railroad company was bound to know the original construction of this platform, and therefore knew that this piling was not securely fastened with a drift bolt, it was negligent in allowing the plaintiff to undertake the work of removing these sills from the piling without informing him that they were not fastened to the piling with drift bolts. Of course, the plaintiff, in undertaking the work of breaking up and removing an old platform, would assume the ordinary risks incident to such employment. This is conceded, but the contention appears to be that he did not assume the extraordinary risk which resulted from the imperfect and unusual fastening of the sill to the piling. There does not appear to be any basis whatever in the evidence for this contention. These drift bolts, it appears from the evidence, are ordinarily used in the construction of bridges, and not in the construction of depot platforms. There is however some evidence in the record that drift bolts were used in the construction of such platforms; but, however this may be, it is shown by uncontradicted evidence that in removing sills from piling, if the sills had been fastened to the piling with these drift bolts, the first thing to be done is to draw the drift bolts with tools especially constructed for that purpose. The plaintiff himself testified that, if the sills were fastened with drift bolts, they had "a bar on purpose for that"—"a claw bar"—and that none of the men were using such bars in removing these sills, and that he could not have removed these sills

with such a bar as he was using, if they were fastened with drift bolts; that he would in that case "have had to use a claw bar to take the pin out," before he could have thrown the sill off; and that, if there had been a drift bolt there, he could have seen it where he was working. So that he knew that at least some of the sills were not fastened with drift bolts, and could easily see whether any particular sill was so fastened, if he cared to know. When the plaintiff undertook to remove sills from the piling, the first thing that would challenge his attention was the manner in which the sills were fastened to the piling. Considering the situation he was in, and the work which he had undertaken to perform, it would clearly be negligence on his part to fail to observe that the sills which supported him could be as easily removed from the piling as the one he was undertaking to remove. If he had supposed that these sills were fastened with drift bolts, his first duty would have been to withdraw those bolts, and by the order to "pinch off" the sills, he was notified that they were not fastened with drift bolts. Where drift bolts are not used, the sills are fastened to the piling by nailing the sills. The sills and the pilings were somewhat decayed. This condition was to be presumed. It was because of this condition that the work was made necessary. The parties engaged in it had notice of this fact. Indeed, the plaintiff testified that he had observed it. There is no support whatever for the proposition that the plaintiff had reason to suppose that these sills were firmly attached to the piling, and that in loosening one he might not probably loosen another also. There being no other evidence of negligence on the part of the employer, the verdict against the company was wholly unsupported. For like reason the verdict in favor of the defendant Rogers was justified. No verdict against him could be sustained by the evidence.

2. The judgment, then, against the defendant company was properly reversed upon the former hearing. It is contended that the judgment in favor of the defendant Rogers should also be reversed. The company brought

the case here upon petition in error to reverse the judgment rendered upon the verdict against it. The plaintiff has also filed a petition in error to reverse the judgment in favor of the defendant Rogers. The whole case is before this court for review. The defendants were sued jointly. The whole issue was presented to the jury together. The defendant company acted only through its agent Rogers. The negligence of Rogers would of course be the negligence of the company.

In *Gerner v. Yates,* 61 Neb. 100, similar conditions existed. In that case several defendants were sued jointly, as officers of a national bank, for damages resulting from false statements made by them as to the financial condition of the bank. A verdict was rendered in favor of one of the defendants, and against the other defendants. Judgment having been rendered upon these two verdicts, the case was brought to this court in the same manner as was the case at bar. The court said:

"The verdict is an anomaly; it is in irreconcilable conflict with itself. It is in effect a declaration by the jury that the material allegations of the petition are both true and false."

The court, then, having thus determined that the judgment against some of the defendants could not stand, proceeded to examine the question whether the verdict and judgment in favor of the other defendant could be supported. The contention there was that the proof failed to support a verdict against any of the defendants, and that, therefore, the judgment in favor of one of the defendants should be affirmed, and the judgment against the other defendant should be reversed. The court appears to have assumed that, if the evidence entirely failed to support a verdict against any of the defendants, the above contention was meritorious, and that judgment in favor of one of the defendants should be affirmed. The court then discussed at length the evidence, and concluded that there was some evidence upon which a judgment might be supported against the defendants, and expressly for that

reason reversed the judgment as to all of the defendants. The reasoning and conclusion of the court in that case is in harmony with a proposition advanced in the former opinion herein which has been much criticised. In the former opinion it was said:

"But, in the case at bar, it is not contended that there is not sufficient evidence to support the verdict in favor of the defendant Rogers. All that is urged is that there is some slight contradiction upon a not vitally material point. Why then should he be deprived of the fruits of his just victory because the jury absurdly condemned another whom, upon the same evidence, they might with equal propriety have exonerated."

That is, there being no sufficient evidence against any of the defendants to sustain a verdict against them, a verdict finding in favor of one of the defendants ought not to be disturbed. Unless this proposition is correct, the whole reasoning of the opinion in *Gerner v. Yates* was uncalled for.

It is not the practice of this court to dismiss a law action upon reversing the judgment of the district court. In this respect the former judgment of this court is modified so as to remand the cause against the defendant railroad company to the district court; in all other respects it is adhered to.

JUDGMENT MODIFIED.

JOHN KUPKE ET AL., APPELLEES. V. CARY S. POLK ET AL., APPELLANTS.*

FILED APRIL 19, 1905. No. 13,697.

1. A joint assignment of error in a petition made by two or more persons which is not good as to all who joined therein will be overruled as to all.

* Rehearing allowed. See opinion, p. 596, *post*.

2. **Review.** Upon an appeal in an equity case in which there have been special findings of fact, but in which no bill of exceptions has been preserved, only such findings will be considered as are embraced within the issues; and the decree, if supported by the pleadings, will be upheld if, and in so far as, it is not in irreconcilable conflict with such findings.

3. **Cross-Appeal.** An appellee may, by complaint in the nature of a cross-appeal, be relieved from erroneous or unjust conditions imposed upon him by the decree appealed from.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed in part.*

Jesse L. Root and *Byron Clark*, for appellants.

Brown & Sidles, Matthew Gering and *Robert Ryan, contra.*

AMES, C.

Ernest Kupke died in Cass county in this state after having executed an instrument purporting to be his last will and testament, and leaving the plaintiffs and appellees herein, Johanna Sayre and John Kupke, his sole heirs at law. After his decease the heirs conveyed their entire interest and title in his estate to the defendant and appellant Cary S. Polk, by whose means probate of the will was contested and denied. Subsequently this action was begun by the heirs for the purpose of setting aside their conveyance to Polk as having been obtained by fraudulent concealment and misrepresentation. These matters having been duly put in issue by answer and reply, the action was tried and resulted in a decree in conformity with the prayer of the petition. From this decree the defendant appealed to this court. The evidence was not preserved in the form of a bill of exceptions, but the district court made a series of special findings of fact, and appellant asks to have the decree reversed because of alleged inconsistency with these findings, and to have a decree entered in this court in conformity with them. These findings are not

models of self-consistency, but in so far as they are responsive to the issues raised upon the petition we think they are sufficient for the support of the decree. The findings negative certain allegations of fraud contained in the petition, but on the other hand they find in effect that the defendant was guilty, while negotiating the purchase of the estate, of suppressing from the knowledge of his vendors certain facts relative to the validity of the will of the deceased and affecting the value of the estate, which it was his duty to make known to them, and that through or by reason of such suppression he obtained an unjust and inequitable advantage over them in the transaction, in consequence of which they are entitled to have the conveyances set aside. By precisely what means such suppression was effected, or what were the particular circumstances that made it the duty of the defendant to disclose his knowledge of the matter, we do not know, and in the absence of a bill of exceptions have no means of ascertaining, but we are bound to presume that the evidence was sufficient to support the findings and to justify the decree rendered consistently therewith. The decree in this respect being supported by the pleadings would, in the absence of both a bill of exceptions and special findings, have been affirmed in accordance with an established rule of this court. *Pettibone v. Fitzgerald,* 62 Neb. 869; *Stansbury v. Storer,* 70 Neb. 603.

It follows of logical necessity that, in the absence of a bill of exceptions, a decree supported by the pleadings will not be set aside, because of the presence of special findings, if the latter can by any fair interpretation be seen to support it also. So here, although the defendant may have been innocent of all those acts of which the court has acquitted him, yet he must be held guilty of a wrongful suppression of facts amounting to mispresentation or deceit, of which he stands convicted as well by the findings as by the decree itself. In other words, upon an appeal in equity, when the evidence is not preserved, every presumption will be indulged in favor of special findings in

support of the decree that obtains in such cases in support of the decree itself, and the former can overcome the latter, if at all, only when the conflict between them is sharp and irreconcilable.

It follows from the foregoing, as a matter of course, that special findings of facts not put in issue by the pleadings will be wholly disregarded, and the decree, if and in so far as it is dependent upon such facts, will be vacated and set aside, and the judgment will, when possible, be modified so as to conform to the issues and the facts pertinent thereto.

If there were nothing more in the record, the case might be disposed of by affirmance without further comment, but there is another matter.

After Polk obtained his conveyance from the heirs, he procured himself to be appointed administrator of the estate of the decedent, and in that capacity contested and defeated the probate of the alleged will, and the decree appealed from adjudicates, among other things, as follows: "It is further ordered and adjudged that the defendant Cary S. Polk holds all personal property of the estate of Ernest Kupke, other than the two notes mentioned above, in trust for the plaintiffs herein, John Kupke and Johanna Sayre, subject to the final order of distribution by the county court in said estate: that for the service rendered by the said Cary S. Polk in and about the contest of the will of Ernest Kupke, deceased, and the management and care of said estate since his appointment as administrator thereof, the said Cary S. Polk is entitled to, and is hereby allowed, a fee of $2,500, which said amount is to be retained by him from any money or personal property now in his hands belonging to said estate, and to which plaintiffs or their assignor are entitled, together with what money the said Polk has expended of his own in the care and management of said estate and taxes paid thereon." The matter thus adjudged is not embraced in the issues made by the pleadings and is foreign to the subject of the action, as much so as if Polk himself had not

been a party to the suit, and its inclusion in the decree was plainly erroneous. Robert M. Sayre, husband of the daughter of the deceased, was joined as plaintiff because a part of the inheritance was a tract of land in which it was supposed that he had an interest as a tenant by the courtesy initiate. But it turned out on the trial that, before the action was begun, one Herman Schmidt had purchased the land and received a conveyance of it from Polk for value and in good faith, so that his title thereto was unassailable, and was confirmed in him by the decree without objection. Robert had, therefore, never at any time any legal or actual interest in the subject matter of the litigation, and was a mere nominal party thereto, as he was and is to a motion for a new trial and to a petition in error in this court, complaining of the award of attorney's fees to Polk. It is objected that because of his joinder, and because he is not prejudiced by the judgment complained of, his coplaintiffs who are all, and the only, real parties in interest can be granted no relief, because of the familiar rule of this court that joint plaintiffs in error can obtain no advantage because of an error in the record that is not prejudicial to both or all of them. The rule relied upon is announced in *Gordon v. Little,* 41 Neb. 250, as follows: "A joint assignment of error in a petition in error made by two or more persons which is not good as to all who joined therein will be overruled as to all." The rule invoked is an extremely technical one, and for that very reason should be observed in all cases to which it is literally applicable. The fact that in any instance it may be productive of an absurdity or injustice will not introduce an exception, for the plain reason that it was not designed for the avoidance of the former, or the prevention of the latter, but for the facilitation of judicial business in compliance with prescribed formalities.

Appellees, who are also plaintiffs in error but not cross-appellants, further invoke the rule, above cited, that when upon an appeal the evidence is not preserved this court will conform the decree to the case made by the pleadings,

and also cite the statute of 1903 (code, sec. 681*a*), which requires this court, in equity appeals, "to retry the issue or issues of fact involved in the finding or findings of fact complained of and * * * reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court." That the case at bar falls within the literal provisions of this statute seems to us to be free from doubt. And it seems to us equally clear that when obedience to the statute comes in conflict with the rule announced by this court, before its passage, in *Hamilton v. Whitney,* 19 Neb. 303, that an appellee neglecting to take steps to review a decree will not, on affirmance, be entitled to any greater relief than was awarded him in the court below, the former and not the latter must prevail. However, the case does not fall strictly within the rule of the decision last cited. In the latter instance the appellees had obtained affirmative relief to the extent of a lien adjudicated in their favor for the sum of $300, which they desired to have increased, on affirmance, to $400. In this case they ask no affirmative relief additional to that awarded them by the court below, namely, the cancelation of a fraudulent conveyance, and the restoration of their estate by their fraudulent vendee. What they do object to is the burdening of their property with a lien or charge to which no reference is made in the pleadings, and the existence or validity of which they have been afforded no opportunity to litigate. In our opinion, even if the rule in *Hamilton v. Whitney, supra,* is still in force, it does not deny them this right, nor do we see how the command of the statute can be obeyed without awarding it to them. Neither, in our opinion, will the exercise of more restricted powers be adequate, in many cases, for the adjustment of the rights and equities of the parties and the administration of complete justice in equity appeals.

It is therefore recommended that the judgment of the district court, in so far as it awards affirmative relief to

the appellant, Cary S. Polk, be reversed, vacated and set aside, but that in all other respects it be affirmed.

LETTON 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, in so far as it awards affirmative relief to the appellant, Cary S. Polk, be reversed, vacated and set aside, but that in all other respects it be affirmed.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed January 3, 1906. *Reversed:*

Appeal: REVIEW. When the trial court, in an action in equity, makes special findings of fact, and no general finding, and the evidence is not preserved, the sole question for this court on appeal is whether the judgment is supported by the pleadings and the special findings. If in such case there is no finding upon a material issue, that issue must upon appeal be determined against the party on whom the burden of establishing such issue rested.

SEDGWICK, J.

A general outline of many of the leading facts in the case may be found in the former opinion, *ante,* p. 590. The argument upon the motion for rehearing was for the most part directed to the question whether the special findings of fact by the trial court are sufficient to support the decree. The rule is settled in this state that where "special findings of fact are made, a reviewing court can look only to those findings, taking them as absolute verity, to ascertain whether the judgment rendered is in conformity therewith." *Gaffey v. Northwestern Mutual Life Ins. Co.,* 71 Neb. 304, and also: "When the court makes special findings of fact, and they are silent as to a material issue, such omissions will be construed against the party on whom rested the burden of establishing such issues." *Farrell v. Bouck,* 61 Neb. 874. The

rule of this latter case is of course applicable, as in the case at bar there is no general finding.

Among the findings of the court is the following: "That at the time of procuring the said deeds and assignment from plaintiffs the defendant, Cary S. Polk, was acting for himself, and also for his codefendant, John Stroy." The allegation of the petition that Stroy was the uncle of these plaintiffs, and that he resided near where the property involved was situated, and that he had employed the defendant Polk as his attorney in the matter of this estate are denied in the answer, and there is no finding of the court upon these matters, and no finding that a confidential relation existed between the plaintiff and the defendant Stroy, which would be binding upon the defendant Polk as the attorney and associate of Stroy in this matter. It is found by the court, "that in obtaining said deeds and assignment from the plaintiffs herein the defendant Polk made no false statement concerning the matters in controversy." There is no finding that the plaintiffs did not have independent knowledge from other sources in regard to the value of the property, or the circumstances surrounding the execution of the will, nor that the plaintiffs relied upon the representations of Polk, or were induced to do so by any confidential relations existing between themselves and Stroy. The conclusions of the court must be supported by its findings of fact, and the conclusion, "that through the suppression of facts connected with and surrounding the execution of the will of Ernest Kupke, which facts were in the possession of and known by the defendant Polk at the time he negotiated for and received the deeds and written assignment from the plaintiffs herein," would not be supported by the findings of fact.

We are not entirely satisfied with the correctness of the discussion in the former opinion as to the effect of the statute of 1903, quoted therein, or the effect given to *Hamilton v. Whitney,* 19 Neb. 303. Under the above views that discussion is unnecessary to a determination

of this appeal, and we therefore do not desire to be committed to the propositions there advanced.

The decree of the district court is not supported by the findings, and our former judgment herein is vacated, and the judgment of the district court reversed. The issues presented not being all disposed of by the findings, the cause is remanded for a new trial.

REVERSED.

NEBRASKA WESLEYAN UNIVERSITY v. ANDREW BOWEN, ADMINISTRATOR.

FILED APRIL 19, 1905. No. 13,732.

Decedent's Estate: FILING CLAIMS. Even if *Fitzgerald v. First Nat. Bank*, 64 Neb. 260, shall not be adhered to, a county court ought not to permit a claim to be filed against the estate of a deceased person which is not presented until more than eight months have elapsed since the expiration of the time fixed by an order of the court for that purpose, in the absence of a showing of diligence and of unavoidable mistake or accident, or of fraud of a nature analogous to that which warrants the interposition of a court of equity to grant a new trial in ordinary cases.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

W. Bert Clark & L. E. Gruver, for plaintiff in error.

Simpson & Good, contra.

AMES, C.

The facts in this case are thus recited in the brief of plaintiff in error:

"This is an action for permission to file a belated claim against the estate of Wm. Bowen, deceased, by the Nebraska Wesleyan University of University Place, Nebraska. William Bowen died intestate in Saunders county, Nebraska, on the 16th day of February, 1900. De-

cember 23, 1901, Andrew Bowen was appointed administrator of his estate by the county court of Saunders county, Nebraska, and on the same day an order was made fixing July 22, 1902, as the time for hearing claims against said estate, and the time for filing claims was limited within that time; that on the 22d day of July, 1902, said court made a finding that no claims were filed against said estate. Thereafter, on February 10, 1903, the administrator filed his petition for final settlement of said estate, which was set for hearing March 16, 1903. On March 14, 1903, two days prior to the date set for final hearing, the plaintiff filed its application for leave to file its claim against said estate, and have a day set for the hearing of the same. Later an amended petition and an answer were filed, and hearing was had before the county court, and said application to file claim was denied. Whereupon plaintiff appealed to the district court, which court, upon hearing, also denied the application of plaintiff, and thereupon plaintiff filed a motion for a new trial, which was overruled, and the cause removed here on error proceedings. The issues were tried in the district court on the same pleadings as were filed in county court."

It will be observed that at the time application was made to file this claim more than eight months had elapsed since the expiration of the time allowed for filing claims against the estate of the decedent. As a reason for granting the leave prayed, the petition sets forth lack of the statutory orders and notices which, however, the records of the county court recite to have been regularly made and given; and also avers lack of actual notice, because of ignorance of the death of the intestate and of his place of residence at the time of his decease. If these facts, standing alone, are sufficient to justify an order extending the time for proving debts, which we do not decide, they must at least be accompanied by some proof of diligence and of unavoidable mistake or accident, or of fraud of a nature analogous to that which warrants the interposition of a court of equity to grant a new trial in ordinary

cases. The record of evidence preserved in the bill of exceptions falls far short of this requirement, and we are of opinion that the judgment of the trial court is fully sustained thereby. We therefore find it unnecessary to review *Fitzgerald v. First Nat. Bank,* 64 Neb. 260, which holds, by a divided court, that, in cases like the present, the county court is without jurisdiction to enlarge the time for filing claims in any circumstances. Even if after further consideration that decision should not be adhered to, it would by no means follow that the county court would be compelled, or even permitted, to set aside its orders barring claims upon mere application and as a matter of right. The most that could be held would be that the court should exercise a judicial discretion upon such occasions, which will not be interfered with on error or appeal except in cases of manifest error or abuse.

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

LETTON 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.

HENRY RIECK V. CITY OF OMAHA.

FILED APRIL 19, 1905. No. 13,738.

Eminent Domain: MORTGAGE. When a city by the power of eminent domain acquires a strip of mortgaged land for street purposes without making the mortgagee a party to the proceedings, and pays the condemnation money to the mortgagor, in good faith and without objection, it is discharged from its obligation, but takes the land subject to the lien of the mortgage, if of record.

ERROR to the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

Charles Battelle, for plaintiff in error.

C. C. Wright, W. H. Herdman and *A. G. Ellick, contra.*

AMES, C.

This case comes here without a bill of exceptions and upon the pleadings and decree alone. There is no dispute with reference to interpretation or about the facts. The plaintiff was the owner of mortgage liens upon a tract of land in the city of Omaha. The city by legal proceedings, in the exercise of the power of eminent domain, appropriated a strip out of the tract for highway purposes, without making the plaintiff or his assignor, the mortgagee, a party. Damages in the sum of $1,000 were awarded and paid to the mortgagor. The plaintiff foreclosed his mortgages upon the residue of the tract, and the proceeds of a sale under the decree were deficient of the sum requisite to satisfy the mortgage debt by something like $2,000. After confirmation and deed, the plaintiff begun this action against both the mortgagor and the city, reciting the foregoing facts at length in his petition and praying, in the alternative, that he have a judgment against the city for $1,000, the amount of the award, or a decree of foreclosure and sale for the amount of his deficiency against the strip of land. The court awarded him the latter relief, and he brings the cause here by a petition in error, alleging that the court erred "in rendering a decree of foreclosure against the real estate instead of rendering a money judgment."

We are of opinion that the trial court did not err. The plaintiff was not a party to the condemnation proceedings and the lien of his mortgage was not affected thereby. There is authority for holding that if he had intervened in that proceeding, or had sought by any appropriate means to impound the fund before its payment to the mortgagor, he might have succeeded in so doing, but although it may be true that he had an equitable lien on

the award, it was not of such a nature as, in the absence of such proceedings, to impose upon the city the character of a trustee bound to see to the application of the condemnation money. We do not see that under these circumstances the city is in a different situation than the ordinary vendee of the equity of redemption of mortgaged lands, which it would have been competent for it to have become with respect to the strip in suit. But such a vendee, in the absence of insolvency or fraud, neither of which is alleged here, is discharged of his obligation by payment to his vendor. In such a case, of course, he takes the property subject to the lien of the mortgage, and so we think did the city in the present instance. For these reasons, we recommend that the judgment of the district court be affirmed.

LETTON 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.

MCCAGUE BROTHERS ET AL. V. HORACE B. IREY.

FILED APRIL 19, 1905. No. 13,767.

Contract: CONSTRUCTION. A contract set forth in the petition *held* to be a guaranty of payment and not of collection merely of the sum of money mentioned therein.

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

Charles Battelle, for plaintiffs in error.

C. W. De Lamatre, contra.

AMES, C.

This is a suit upon a written contract of which the following is a copy.

"Whereas the McCague Savings Bank has this 10th day of October, A. D. 1895, for a consideration of Fifteen thousand one hundred and eleven 92-100 Dollars ($15,111.92) transferred and conveyed to J. A. Morris for H. B. Irey the following property. (Here follows long description of property.) And said conveyance has been made and accepted with the understanding and in consideration of the execution of this guarantee. Now therefore, we, jointly and severally, guarantee to the said H. B. Irey that within two years from this date he will realize out of said property the said sum of $15,111.92, with interest thereon from date at 8 per cent. per annum, payable semi-annually. If said H. B. Irey has not realized within said period said sum, with interest, as aforesaid, then at the expiration of said period we will pay him whatever deficiency may exist, with interest, as aforesaid. Meanwhile we will use our best efforts to enable said Irey to realize on said property. During said period said Irey may dispose of said property at any time, at any price, giving us the first opportunity to take it at such price. In witness," etc.

It is alleged in the petition and admitted by the answer that with the exception of a certain town lot, and a decree of foreclosure and sale upon certain property in the city of Kearney, Nebraska, all the property mentioned in the contract has been sold by the plaintiff, and the proceeds of the sales, amounting in the aggregate to $7,866.50, and no more, credited thereon. It does not appear that any attempt has been made to sell the lot or to enforce the decree of foreclosure, but the plaintiff testified without dispute that he had repeatedly requested of the defendants payment of the residue of the money stipulated for in the contract, or assistance to realize the same from the lot and decree, with which requests they had failed to comply. There was a judgment for the plaintiff for the unpaid residue, and the defendants prosecute error.

The only contention of the defendants which we deem worthy of specific notice is that the agreement is a contract of guaranty, not of payment, but of collection, and that

the plaintiff is not entitled to recover against the guarantors in the absence of proof that he has unsuccessfully exhausted all reasonable means of collection. The contention seems to be of but little practical importance. With respect to the lot there was no means of realization except from its sale, of which it does not appear that the plaintiff has neglected an opportunity, and a literal guaranty of collection would have had no applicability to it. The decree of foreclosure does not appear to have been lost or impaired by failure to procure its execution, which the defendants will, upon satisfaction of the judgment, succeed to the right to do, if, indeed, they have not at all times possessed that right.

The instrument in suit, however, recites, in substance, that it was executed in consideration of a contemporaneous loan or advance of a sum of money which the makers guaranteed should be repaid to the plaintiff at all events within two years from its date, and sooner if it could sooner be realized from the property; and the defendants covenanted to assist with their own "best efforts" in bringing about such earlier realization. It does not appear that they have been in any way impeded by the plaintiff, and any dilatoriness or negelect that may have been indulged may be imputed to themselves with at least equal propriety as to him. Defendants suggest that interest should have been computed from and after the expiration of six months from the date of the last instalment realized from the property, but we think that the transaction has none of the features of a mutual account, and that such a computation would be in plain violation of the terms of the contract. We recommend therefore that the judgment of the district court be affirmed.

LETTON 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.

WILLIAM W. BINGHAM, APPELLANT, V. FRANK A. BROADWELL, APPELLEE.

FILED APRIL 19, 1905. No. 14,014.

1. **Elections:** BALLOTS. A voter who has complied with the statute by obtaining from the election board a ballot indorsed in writing with the names of two members of the board, both of whom are ostensibly and, as he honestly supposes, are really judges, will not be deprived of his vote by the mere fact that one of such names is that of a clerk of the election.

2. **Minor irregularities** by members of an election board, voters and bystanders at a polling place, unaccompanied by fraud or conduct affecting the integrity of the ballot, will not operate to quash the election.

3. **Marking Ballots.** Irregular and defective or unauthorized markings of a ballot, apparently the result of innocent awkwardness, inattention or ignorance, and apparently not intended or made use of for the purpose of subsequent identification, will not justify the rejection of such ballots, if the intent of the voter can be ascertained therefrom.

APPEAL from the district court for Douglas county: GEORGE A. DAY, WILLIS G. SEARS and WILLIAM A. REDICK, JUDGES. *Affirmed.*

B. G. Burbank and *Jefferis, Howell & Shotwell,* for appellant.

Smyth & Smith, contra.

AMES, C.

This is an appeal from a decision by the district court of a contest of an election to the office of clerk of the district court for Douglas county. The first ground of contest is the claim that in the first precinct of the fifth ward of the city of South Omaha the ballots were indorsed by a judge and clerk of election instead of by two judges. It was held by this court in *Orr v. Bailey,* 59 Neb. 128, and again in *Mauck v. Brown,* 59 Neb. 382, and is generally

held in other jurisdictions, that the statutory requirement of indorsement is mandatory, and the subject is not regarded as open for discussion here, but there is opportunity for inquiry whether it was not substantially obeyed. The evidence is not in conflict in any important respect and is to the following effect: An entire board of election officials, five judges and two clerks, had been regularly appointed, but on the morning of the election one of the judges and one of the clerks failed to appear, and a bystander was called in to take the place, and who did take the place, of the absent judge. At about the same time one Frank Madura, who had been appointed as one of the judges, moved that T. T. O'Connor, who had been appointed as one of the clerks, act as "chairman and judge" of the election. Some one suggested that it would be more proper, or at least sufficient, to elect him simply as chairman; and in some way, it is not quite clear how, the motion was put and adopted, according to the weight of the testimony, in the form in which it was first made. Madura remained with the board, taking an oath of office, performing the functions of clerk and subscribing the returns in that character. O'Connor likewise subscribed the returns as clerk and late in the day took oath of office as such, but he also served throughout the day in the capacity of judge, performing in addition some of the duties of clerk. Another bystander named Mader was called in, evidently to take the place of the absent clerk. He does not appear to have been specially assigned to any duties, but he took an oath of office as judge, and was described as such in the records and returns of the election. O'Connor administered the oath of office to his colleagues, and described himself in the jurat to each certificate as "judge." It is the theory of counsel for the incumbent that the effect of the transaction was such that Madura and O'Connor became transposed, the former becoming clerk and the latter judge, and that Mader, who was called to take the place of the absent clerk, in fact, did so, notwithstanding he was sworn as judge, but that O'Connor performed some or all of his

duties. O'Connor was one of the persons who indorsed his name upon all the ballots, and for this reason alone the contestant asks to have the entire vote of the precinct thrown out.

At the threshold of such a discussion as this the courts are met by two propositions, neither of which can be ignored or evaded. One is the constitutional enactment (sec. 22, art. I): "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise"; and the other, inherent in the idea of representative government, is that the free and uncorrupted will of the voter shall be given effect. In other words, that there shall be a "free ballot and a fair count." These principles pervade and dominate the whole field of inquiry, and affect the decision of every litigated question. All statutes and parts of statutes irreconcilably in conflict with or derogatory of either of them are nugatory, but none is presumed to have been intended so to be. The object of the so-called Australian election laws is not, as some judicial decisions seem to indicate, to limit or obstruct the free exercise of the elective franchise or to restrict the free expression of the will of the voters, but to promote both these things by removing opportunities for imposition, intimidation and corruption; and being remedial in their nature they are to be liberally construed for the accomplishment of the latter end and no other. In consideration of the circumstances the district court decided by Judges Day and Redick, Judge Sears *contra* (the contest being had before the three), that O'Connor was an ostensible and *de facto,* if not a *de jure* judge of the election, and that his signature upon the ballots was regular. We think the ruling was right. It is in evidence by several of the voters that they supposed him to be such, and there was nothing to indicate the contrary to any of them, and there is no evidence that any of them suspected the contrary. To hold otherwise would be to put by judicial construction an insuperable obstacle between the voters and the polls. It would be to require the electors at their peril

to make inquiry, and decide correctly, and without deliberation, a question upon which three district judges were unable to agree after hearing elaborate arguments at the end of forty consecutive days of investigation, and about which the members of this court may finally differ. If the statute attempts the imposition of such an obligation it is unquestionably void. We do not think that it does so. Section 146, chapter 26, Compiled Statutes, 1903 (Ann. St. 5784), prescribes comprehensively and in detail the conduct of the voter while at the polling place. Among other regulations is the following: "He shall receive from a judge of the election board a ballot on the back of which two judges of the board shall first write their names in ink. * * * The voter shall then fold his ballot so as to conceal the names and marks thereon, and to expose the names of the judges of the election board upon the back thereof, and shall without delay" deliver the same to a judge of the election, who shall verify the signatures upon the back thereof and deposit it in the ballot box. The voters strictly and literally complied with this section. They verified their ballots and the indorsements upon them as well as they were able to do, "at a glance," to use the phrase of former decisions of this and other courts, and having folded them as directed, handed them to a sworn official for further verification and deposit. If after all this they can be deprived of their votes because one member of the election board, whose name is indorsed on the ballots, was a clerk instead of a judge, the validity and result of elections would in all cases be in the discretion of the boards.

The contestant demands that the whole vote of the second precinct of the fourth ward in South Omaha shall be thrown out because of the following facts found by the court, which do not appear to be in dispute: During the election hours some of the election officials were under the influence of liquor, but not sufficiently so to incapacitate them from the performance of their duties, but some of them were so incapacitated during the canvass. Two of

the election board were absent at one time during the election hours. There was whiskey in a room adjacent to and opening off from the polling place. Voters were assisted by election officials without having the oath of disability administered to them, and ballots prepared by such assistance were deposited and counted. Election officers did not make any effort to prevent bystanders from going behind the guard-rail, and a police officer on two occasions removed intruders from that place. Strangers assisted the judges and clerks of election in the counting and canvass of the votes after the polls were closed, and it was found generally, without other specification, that some of the election officers were guilty of malconduct, but that their incapacitation arose in part from misunderstanding of official duty; and finally, "The court finds that the ballots deposited with the county clerk of Douglas county, Nebraska, by the election officers of said second precinct of the fourth ward in the city of South Omaha were the identical ballots cast at said election by the persons voting at said election, and that said ballots, as returned by said judges of election and deposited with the county clerk of said county, were, when deposited with said county clerk, in the same condition in all respects as when voted by the several electors and deposited in the ballot box at and during said election." The court further finds there should be counted for the contestant, William W. Bingham, and for the incumbent, Frank A. Broadwell, in said second precinct of the fourth ward of the city of South Omaha, the number of votes as provided in the stipulation of parties filed in this cause, to wit: contestant, Wm. W. Bingham 62, incumbent, Frank A. Broadwell, 190."

The assisted ballots above mentioned were three only in number, and by stipulation were deducted from the total cast for the incumbent, and therefore need not be further considered.

The general finding that some of the election officers were guilty of malconduct, we think too vague and indefinite to effect so grave a result as to defeat a popular

election. Certainly not every offense of that kind, however trivial, can have such serious consequences. Concerning the rules violated by the conduct specified, it is insisted that they, like the requirement of the indorsement of ballots, are mandatory, and doubtless in a sense they are so, because breach of them or of some of them is punishable as a misdemeanor, but the acts particularized are not such as the voters procured to be done or in which they participated, nor to which, so far as appears, they consented, nor which it was within their power to prevent. There is no pretense that the officers of the election, or any one else, were or was guilty of actual fraud or corruption, or influenced in anything that was done by any fraudulent or corrupt motive, or that the conduct complained of in anywise affected the result or the accuracy of its ascertainment. We think the considerations already advanced justified the trial court in overruling the contestant's objection, which they did. If elections could be defeated for such irregularities, committed under such circumstances, it would hardly be possible to hold one that would be valid.

In the neighborhood of 150 ballots were objected to, some by one party and some by the other, because of irregular and defective marking and alleged marks for identification. They were annexed to the bill of exceptions and returned with it into this court. For the examination and disposition of these ballots the court adopted the following rules: "1st. Where the ballot was indorsed upon the back by the signature of but one judge, the court refused to count such ballots. 2d. Where from the appearance of the ballot it was unable to determine the elector's choice, or where it was evident that the voter had intended to destroy the ballot, then the court refused to count the same for either candidate. 3d. Where the name of the candidate as printed upon the ballot had been erased and another name written in, if the name thus written in was already printed upon the ballot, then the ballot was excluded. 4th. Where the voter made no effort to make a (X), but merely made a straight line (I), or circle (O), such ballot was excluded.

5th. Where names were written upon the back of the ballot, or where the voter made improper markings on the back of the ballot, such ballot was excluded. 6th. If the voter wrote words on the face of the ballot not necessary or proper to express his choice, having no relation whatever to a cross within the circle, such ballots were rejected."

It will be observed that all the foregoing are rules of exclusion, so that ballots not described and classified by them were treated as valid and counted. In our opinion they are, in their general operation and effect, to be commended, but in some respects, to which we have called attention elsewhere, we think they are too rigidly exclusive, and may have operated to deprive some voters of honestly cast ballots, the intent of which is not in doubt. Thus modified by ourselves we are of opinion that the rules are at least as strict and critical as would have been justifiable by the statute and the former decisions of this court. Section 151, chapter 26, Compiled Statutes, 1903 (Ann. St. 5789), provides: "When a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part." In harmony with this statute this court held in *State v. Russell,* 34 Neb. 116:

"It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures, or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class. * * * The fact that a number of ballots are, without any evidence of a fraudulent intention on the part of the voters, distinguishable from others cast at the same polling place, as, for instance, marked with a pencil or with ink of a different color, does not bring them within either the letter or spirit of the statute."

This opinion was expressly approved and reaffirmed in *Mauck v. Brown,* 59 Neb. 382, in the following language:

"It is true the manner of marking the ballot might serve to identify it; but with the policy of the law as declared in the section, wherein it is stated that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention it shall be counted, and the construction given to the law by this court in *State v. Russell*, 34 Neb. 118, and *Spurgin v. Thompson*, 37 Neb. 39, there was an indication here of the voter's intention which was entitled to recognition, and it was proper to count the vote."

The district judges in this case considered that, "Where from the nature of the marks the voter's intention was plain, and it was evident that the marks of which complaint were made were not made for the purpose of identifying the ballot, then the vote should be counted." And so, in illustration of the rule thus announced and reiterated in *State v. Russell,* and *Mauck v. Brown, supra*, this court counted a ballot in the latter case upon which the cross-mark opposite the candidate's name was made on the left side of the ballot, instead of on the right side in the space reserved for that purpose, the opinion saying: "It seems clear that it was the intention to vote for the particular candidate, and therefore the ballot should be counted." These decisions are the more significant because at the time of their rendition there was a statutory provision in existence, shortly afterwards repealed, which enacted: "Do not make any mark upon the ballot save as above directed or the ballot will not be counted." The legislature was, perhaps, conscious of what the court does not seem clearly to have apprehended, that so rigid a regulation was a practical obstruction to the voter in violation of the constitution. Perhaps the matter is as concisely and comprehensively summed up, as is done elsewhere, in *Orr v. Fawcett*, 17 Wash. 188. The statute in that state provides: "The voting shall be by ballot. No ballot shall bear any impression, device, color or thing designed to distinguish such ballot from other legal ballots, or whereby the same may be known or distinguished." In considering this statute the supreme court say:

"Whatever may be said of the Australian system, a glance at the ballot at a general election is sufficient to convince anyone that it is not an easy thing for a person of common understanding to intelligently and without great chance of mistake express his wish. A person accustomed more to the plow or the plane than to the pen would almost certainly be confused when he was ushered into a dark booth with this ticket, with its multifarious provisions and its immense dimensions spread out before him. Indeed, it is probable that the most careful business man who has been accustomed to perusing and executing documents of a business character, will have grave misgivings as to the correctness of his vote when he leaves the booth. And to hold that every misconception of the printed directions of the law would deprive an elector of his vote, would certainly be a holding not within the contemplation of the legislature which passed the statute we have just mentioned, for it has been careful to provide that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention it shall be the duty of the judges of election to count such part."

And in determining what ballots should be counted the court lays down this rule, in the syllabus:

"Ballots are not invalidated by failure to strictly comply with the statutory directions for marking them, under the liberal rule for arriving at the voter's intention allowed by our statutes, but when the markings are evidently intended for the purpose of expressing the voter's intention, the ballots should be counted. Under this rule, ballots are entitled to be counted although having a X to the left, instead of the right, of the name of the candidate voted for; when having a double XX opposite a name; when having a X opposite names of candidates of one party and lines drawn through the names of opposing candidates; when having a X opposite one candidate and an obliterated X opposite the opposing candidate; when having pencil marks run through lines of amendments submitted, or a X over all of them, or the words 'no,' 'yes,' 'against,' 'for,' written opposite."

In the body of the opinion the court say:

"It is also true, however, that in the absence of constitutional inhibition all statutes tending to limit the citizen in the exercise of the right of suffrage should be liberally construed in his favor. If his ballot is rejected, it must come within the letter of the prohibition, and when the statute specifically declares under what conditions ballots shall be rejected, courts should not enlarge these conditions or make other or different conditions from those expressed in the statute grounds for rejecting the ballots. It will be noted that our statute provides only one condition under which a ballot should be rejected, viz., a ballot from which it is impossible to determine the elector's choice, and, after all, this should and must be the intention of the legislature. The important thing is to determine the intention of the voter and to give it effect." To the same effect are *Howser v. Pepper,* 8 N. Dak. 484; *Attorney General v. Glaser,* 102 Mich. 405; *State v. Sadler,* 25 Nev. 131; *Tandy v. Lavery,* 194 Ill. 372.

The principles announced by the foregoing decisions are sustained by the nearly, if not quite, unanimous voice of the authorities, and to our minds are manifestly correct. No means could be devised that would be better adapted to hinder and impede the electors than a scheme for rejecting ballots bearing irregular marks evidently innocently made, as the result of ignorance, inattention or awkwardness, and the quashing of elections because of minor irregularities of procedure and conduct by election officers and bystanders, that could be prevented only by a discipline more strict and severe than is usually maintained in military parades. Such a system would be admirably calculated to facilitate secret frauds and corruption of a kind most difficult to detect, and to commit the results of election almost solely to the discretion of election boards and inspectors, who, without danger of observation, could admit of trivial deviations from prescribed rules whenever it should suit their purposes so to do, and on other occasions could avail of them to defeat the

elections. Under such circumstances the presence of the electors at the polls would be of as little importance as that of negroes at similar places in a southern "black belt."

In no case is it more imperative than in election contests that the maxim should be applied that the burden of proving fraud is upon him who alleges it. It ought never to be inferred from slight irregularities, unconnected with incriminating circumstances, nor should it be held as established by mere suspicions, often having no higher origin than partizan bias and political prejudices.

In line with these principles we have recounted the ballots which have been sent up with the bill of exceptions. In the main, the district court in its count applied the principles and rules which it had adopted for the counting of these ballots. In a number of instances, however, we have counted ballots which were rejected by the district court. For instance, where a ballot was marked in the proper space with what has been designated as an "H" mark, or a wheel, or star-like mark, or a figure "X," we have considered that the addition of one or more lines to the cross has not defeated the voter's intention. We have also counted a ballot rejected by the district court where the voter had made a mark opposite the party name at the head of the column, and had obliterated the same by erasing it or by covering it with solid pencil marks, circular in form, and had also indicated his intention by properly placing a cross in the space opposite the name of a candidate for the office of the clerk of the district court. We have also counted several ballots where marks were made in each of the circles opposite the name of the political party at the top of the ballot, thus rendering it impossible to tell which of the respective political parties the voters desired to have his ballot counted for as a straight ticket, but the voter at the same time making an appropriate mark opposite the name of a candidate for clerk of the district court, thus clearly indicating his intention as to such officer. A number of ballots have also

been counted by us where names were apparently written by the voter in the space provided for candidates for road overseer, or justice of the peace, and a cross made by the voter opposite thereto; and we have counted ballots in which the voter properly voted for clerk of the district court, but made a mistake in marking opposite the name of some other candidate and endeavored to obliterate the same by filling the square with solid pencil marks.

In general it may be said that, unless we were satisfied from the appearance of the ballot that any irregular or unauthorized mark appearing thereon was placed there as a distinguishing mark, we counted the same. Where words were written upon the face or back of the ballot, other than names of candidates or election officers, the ballot was rejected. Marks made by awkwardness or inadvertence, or by mistake of the voter, were not seized upon by us as instruments of disfranchisement. In some cases where the voter had drawn a line through the name of persons for whom he did not desire to vote, but in other respects his ballot was proper, it was not rejected. It will be seen that we have modified the strict rule of *Hauck v. Brown, supra*, in the direction of giving effect to the voter's intention, even if evidenced by other markings than a mathematically exact cross, and have refused to defeat it by calling every accidental or awkwardly or ignorantly made mark or blot a distinguishing or identifying mark.

By this method of counting, both candidates received accessions to the total number of votes which had previously been counted for them—Mr. Broadwell gaining 13 votes and Mr. Bingham 14 votes. In addition to these ballots we have added to the vote for Mr. Bingham 21 ballots and to the vote for Mr. Broadwell 12 ballots which were rejected by the district court in the eighth precinct of the third ward of Omaha for the reason that the names appearing upon the back thereof were of one judge and one clerk and not of two judges. With these additions the total vote for Broadwell is 8,979, and the total vote for

Bingham is 8,968, leaving Mr. Broadwell a majority of eleven votes.

Whatever may be said of individuals and of special interests, it will not do to presume that the mass of the voters are fraudulent or corrupt. When, if ever, the time shall come that such a presumption shall be just, the only means, if any, of the preservation of society will be the abandonment of the experiment of free government. In the present instance no specific charge or pretense of corruption or of fraudulent intent is made, but we are asked to infer such an offense from apparently accidental or awkward or ignorant markings or mutilations of some 150 ballots selected from some two score precincts, a part of them in the cities, and a part in the country, the number selected from each varying from one to six or eight, and the average being about four or five, or else we are expected to hold them constructively fraudulent. We doubt if the doctrine of constructive fraud is applicable to such cases, but if it were so, the presumption would be rebutted by the circumstances. The very fact that the ballots were collected from such scattered sources in such small numbers precludes the idea of combination or design, or that they were cast with other than an honest intent.

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

LETTON 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.

STATE, EX REL. MICHAEL GARDNER, V. CHARLES E. SHRADER, SHERIFF.

FILED APRIL 19, 1905. No. 14,056.

1. **Petition in Error:** MOTION TO DISMISS: WAIVER. A motion to dismiss a petition in error because of failure to file a motion for a new trial in the lower court is a waiver of objections to the sufficiency of the summons in error.

2. ———: MOTION FOR NEW TRIAL. Failure to file a motion for a new trial is not fatal to the jurisdiction of an appellate court and will not support a motion to dismiss a petition in error.

3. **Habeas Corpus.** There is no provision of law for the filing of a motion for a new trial in a *habeas corpus* proceeding in a county court.

4. ———: COMPLAINT. A prisoner will not be set at liberty by a writ of *habeas corpus* because the complaint on account of which he is held in custody states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention.

5. **Remand.** A prisoner set at liberty by *habeas corpus* may, upon reversal of the order by an appellate court, be remanded to the custody from which he was freed.

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

John C. Watson, E. F. Warren and *William Hayward,* for plaintiff in error.

Norris Brown, Attorney General, William T. Thompson, W. B. Rose and *A. A. Bischoff, contra.*

AMES, C.

The plaintiff in error was arrested upon a criminal warrant issued by the county judge of Otoe county. The complaint charged that he had sold and conveyed certain lands lying in that county, without having title thereto "either by law or equity, by descent, devise or by written

contract or deed of conveyance, with intent to defraud" the owner thereof. The statute provides a punishment for selling or conveying any tract of land "without having a title to the same by descent, devise *or evidence,* by a written contract or deed of conveyance, with intent to defraud." It will be observed that there is a variance between the complaint and the statute, consisting of the omission from the former of the words, "or evidence." Because of this variance the accused contended, and contends, that the complaint is void, and procured his discharge from the custody of the sheriff, by whom he had been arrested upon the warrant, by means of a writ of *habeas corpus* sued out of the county court. From the order of discharge the sheriff prosecuted a petition in error to the district court, which rendered a judgment of reversal, and made an order remanding the accused to the custody of the officer. From the judgment and order, proceedings in error are prosecuted in this court. The record recites that the accused appeared specially in the district court and moved that the summons in error be quashed for informality, and, after that motion was overruled, moved that the petition in error be dismissed because of failure to file a motion for a new trial in the county court. The latter motion was also overruled. It is clear that the second motion was a waiver of the first, and it seems to us equally clear that the ruling on the second was correct. Even if it be conceded that a motion for a new trial in the county court was requisite, omission to file one would not deprive the district court of jurisdiction of the petition in error, but, at most, would limit the scope of the inquiry upon that petition. In such a case omission of the motion might work an affirmance of the judgment of the county court, but it would not require a dismissal of the proceeding in error. But counsel for plaintiff in error have called our attention to no statute, and we know of none, authorizing the county court to grant or entertain a motion for a new trial in such cases. Without such a motion the error proceeding would present

nothing not otherwise disclosed upon the face of the record. Apparently no evidence was offered in either court, and although the district court expressly granted leave and time for the preparation and settlement of a bill of exceptions, none was ever made.

There are several formal assignment of error in this court which amount to no more than a single complaint that "the judgment of the district court is contrary to law," and are so vague as doubtfully to be entitled to consideration here. But the contentions chiefly urged in the brief of counsel are two, first, that the complaint upon which the arrest was made fails to charge an offense under the statute; and second, that the accused having been set at liberty by the county court, he is protected by the constitution and the statute from subsequent arrest or imprisonment under the judgment and order of the district court. If the second contention is upheld the statutory right of review would never be available except to the accused, an intention which is not expressed by its language; and it seems to be well settled both upon principle and by authority that the plaintiff in error was not put in jeopardy by the *habeas corpus* proceeding in the county court in a sense that entitles him to the protection of the guaranties invoked. The nature of the proceeding cannot, perhaps, be better described than in the language of Mr. Chief Justice Waite in *Ex parte Tong,* 108 U. S. 556, as follows:

"The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is

a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the constitution and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution." *State v. Huegin,* 110 Wis. 189, 85 N. W. 1046.

As to the first contention it seems to be well settled that a prisoner will not be set at liberty by a writ of *habeas corpus* because the complaint, on account of which he is held in custody, states an alleged offense so defectively that it is or may be subject to successful attack by demurrer or motion to quash, if it contains enough substantially to accuse him of an act justifying his arrest and detention. To hold otherwise would be not only to adapt the writ to the ordinary uses of a proceeding in error, but to warrant, by its means, intolerable interference with the ordinary and regular progress of criminal prosecutions. *Ex parte Kowalsky,* 73 Cal. 120; *Ex parte Prince,* 27 Fla. 196, 26 Am. St. Rep. 67; *Ex parte Whitaker,* 43 Ala. 323; *Parker v. State,* 5 Tex. App. 579; *Emanuel v. State,* 36 Miss. 627; *Ex parte Watkins,* 3 Pet. (U. S.) *193; *Ex parte Parks,* 93 U. S. 18; *Matter of Eaton,* 27 Mich. 1; *Ex parte Kitchen,* 19 Nev. 178; *In re Marshall,* 6 Idaho, 516, 56 Pac. 470; *State v. Huegin,* 110 Wis. 189, 85 N. W. 1046.

We do not, however, intend to intimate an opinion as

to whether or not the complaint in this case is so far defective as to be subject to successful assault by demurrer or motion, but unquestionably it charges, substantially, that the accused sold and conveyed, with intent to defraud, land of which he had no real or apparent title at law or in equity.

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

LETTON 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.

D. B. GRIFFITH, APPELLEE, v. W. F. BONAWITZ, APPELLANT.

FILED APRIL 19, 1905. No. 14,069.

1. **Election Contest:** RECORD. The record of a popular election is made up and finally completed at the polls and nothing can afterwards be taken therefrom or added thereto, and a trial judge cannot exclude any part of it from evidence in the trial of an election contest. *Mauck v. Brown*, 59 Neb. 382, so far as inconsistent herewith, overruled.

2. **Trial De Novo.** On appeal from the decision of a district court in a contested election, the entire record should be brought up, and it will be considered by this court *de novo*.

3. **Pleading.** On an appeal from the decision of a county court in a contested election, it is not requisite to file new pleadings in the district court.

4. **Marking Ballots.** On the trial of a contested election ballots will not be treated as void simply because of irregular or unauthorized markings or mutilations which appear to have been innocently made as the result of awkwardness, inattention, mistake or ignorance, if the lawful intent of the voter can be ascertained therefrom.

APPEAL from the district court for Jefferson county: ALBERT H. BABCOCK, JUDGE. *Affirmed.*

W. H. Barnes, J. C. Hartington and *W. J. Moss,* for appellant.

John Heasty and *C. H. Denny, contra.*

AMES, C.

This is an appeal from a decision by the district court of a contest of an election to the office of county assessor. The procedure adopted by the district court was analogous to that practiced on the trial of an ordinary adversary action, and there are returned with the bill of exceptions 244 ballots which the court formally excluded from evidence because of certain irregular, defective and unauthorized markings. The appellee, citing *Mauck v. Brown,* 59 Neb. 382, contends that the present proceeding is a technical appeal, in which the familiar rule obtains that this court will not correct the errors of the trial court with reference to exclusion of evidence, but will decide the case upon the record as it is brought here, and that therefore these excluded ballots cannot be considered. That the decision cited sustains this contention there is no doubt, and our minds are equally free from doubt that in this respect it is wrong and ought to be overruled. It was said in *Bell v. Templin,* 26 Neb. 249: "A tribunal to determine contested elections need not be, strictly speaking, a judicial body, the powers exercised being *quasi* political and administrative." And in *Thomas v. Franklin,* 42 Neb. 310, it was held more explicitly and emphatically that "the proceeding for contesting an election provided for by this statute is, strictly speaking, neither an action at law nor a suit in equity. It is a summary proceeding of a political character"—and that "it is not only a privilege but it is the duty of this court, on its own motion, to look into the record and determine whether the proceeding is authorized by such statute." If such is the case, and we quite agree that it is, it is difficult to understand how such proceedings can be rightly conducted in a purely judicial

tribunal, and in the opinion of the writer, it was both a mistake and a misfortune that the courts did not firmly decline the task many years ago when it was first thrust upon them. But however that may be, it is clear that in such contests the judges serve in the capacity of election inspectors, no more and no less. The record of an election is completely and finally made up at the polls. After it is finished no person or tribunal can lawfully add to or diminish it by a jot or tittle. The whole duty of reviewing bodies is to inspect and interpret it, and for no other purpose than to aid in so doing is parol evidence admissible. A so-called inspection that should be restricted to a part of it would be an absurdity. This seems to us so plainly manifest that comment is unnecessary and very nearly impossible. It follows that if this court is to perform any useful office upon appeal to it in such cases, the district court cannot exclude any part of the record, but must send it all up for review. A contrary practice would require all such contests, in order to give this court possession of the entire record, to be brought here by petition in error, but by analogy the only final judgment this court could render in that event would be one of affirmance. On the discovery of error the contest would require to be remanded to the district court for a new trial to be followed by another proceeding in error, and the end would seldom or never be reached until after the expiration of the term of office, the subject matter of the litigation.

The foregoing considerations dispose of another preliminary objection that no new pleadings were filed in the district court. The complaint and answer thereto that were filed in the county court, were transmitted with the record on the appeal, and embodied all the grounds of contest that were permissible thereafter to be urged in the proceeding. New pleadings could have been nothing but copies and would have served no useful purpose.

There is no charge of fraud or of intentional violation of the election law. The rejected ballots were collected, a few from each of the eighteen election precincts in the

county. The following descriptive classification of them is contained in the brief of appellant and its accuracy is not disputed by his adversary: "The first classification of the excluded ballots to which we direct the attention of the court are those ballots which are marked in the proper circle or square with a defective cross, or mark other than a cross, and this is the objection upon which most of the ballots were excluded. These marks are as various as the ballots and range from the use of three or four marks, all crossing each other, to the use of a straight line. In none of these ballots is there any question as to the intention of the voter. The purpose of the voter is clear. The second classification is the placing of a cross in both the Democratic and People's Independent circles at the head of the ticket. An inspection of the ticket discloses that in every instance the nominees on this ticket are the nominees of both the Democratic and People's Independent party, so that a cross in both circles is a vote for one and the same man, and does not and cannot create confusion in the count of the ballot. The third classification are those ballots upon which the voter has made a mistake, and attempted to erase, and thereby left a mark foreign to the ballot. The fourth classification are those ballots upon which the voter has voted for more than the proper number, or has by mistake voted for the candidates of both parties, thereby destroying the ballot as to those particular candidates. The fifth classification are those ballots upon the face of which on the line provided for such purpose is written a name, evidently placed there to be voted for, but no mark is placed after the name in the square. The sixth class are ballots which are mutilated, but from the face of which the intention of the voter can be readily gathered. The seventh class are ballots upon the face of which appear marks in the wrong place, but which have no reference to the vote for either of the parties thereto. The eighth class are those ballots upon the back of which appear the initials of one judge of election and the name of another judge. There are some few of the excluded ballots

that have more than one of the above objections and therefore come under more than one class."

It would not be profitable to reiterate the views of the law expressed in the opinion in *Bingham v. Broadwell, ante,* p. 605, argued and submitted and considered jointly with this case and decided at the same time. It is notable that in both cases the objections that are made to individual ballots are of a character that is commonly described as "technical." That is to say, the purpose or intent with which they were cast is not in doubt, and the honesty of the voter is not questioned, but it is sought, by one party or the other, to defeat that intent because of some alleged defect or informality, the evident result of innocent awkwardness, mistake or ignorance. To the accomplishment of such an object, we cannot lend our sanction, and seemingly the court might find some more profitable employment. Unless this country has recently undergone a revolution that has escaped our notice, a voter can be lawfully deprived of his suffrage or a popular election can rightfully be quashed for only a few causes, namely, fraud or corruption, intimidation or violence or such gross irregularity as renders the ascertainment of the will of the individual, or of a majority, or a plurality, as the case may be, impossible. If history teaches any lesson relative to the subject, or relative to any subject, for that matter, it is that electors are far less likely to be guilty of malconduct than are election and returning boards, supervisors and inspectors. A requirement of excessive strictness in compliance with technical formalities has in all times been a most facile instrument for defeating the popular will. Less "terrible" but more to be feared than "an army with banners" are intricate and complicated election laws in the hands of skillful and unscrupulous manipulators. It is true that any of the defects or markings of the ballots mentioned in the foregoing classification might have been and may be employed for the purposes of subsequent identification and fraud, but there is not the least suspicion that any of them was so employed, and we think

that there ought to be at least a suspicion of wrong-doing before the courts reverse the famous dictum of Edmund Burke and "indict a whole community."

There is only one class of ballots above mentioned which in our opinion call for special discussion, that is, those that were indorsed by one judge of election and by the initials of another. They are 26 in number and may be regarded as in literal violation of what has been decided to be a mandatory requirement of the statute. They are not a violation of the statute in strict literalness or of its spirit at all. In treating of the indorsement the statute uses the terms "names" and "signatures" interchangeably. A name is a word or words, designation or appellation used to distinguish a person or thing or class from others, and words indicated by single letters are only less adapted to that purpose than words indicated by several letters. A signature is whatever mark, symbol or device one may choose to employ as representative of himself. One of the judges, the initials of whose name were written on 25 of the ballots, was P. A. Buller, and the other whose initials appeared upon one of the ballots was A. J. Flatung. Buller was sworn as a witness and testified to having written the letters on the ballots himself with no sinister intent, which indeed is not suspected. He further testified that he wrote them as, and intending them for, his signature, and that he was accustomed to so using them instead of his full name upon his letters and some of his business documents, particularly weight or scale certificates or checks. The object for which the indorsements are required is evident. It is for the purpose of the identification and authentication of the ballots, so as to render it certain that none not officially issued shall be used for voting. That this object was as effectively accomplished, and as likely so to be, by the means adopted, as it would have been by the use of the full name or of the surname and the first two initials, is not disputed or doubted, and we think the spirit, if not the letter, of the statute was satisfied. The letters written by Buller with his own hand

upon a promissory note or other contractual promise would have obligated him to the full extent in law, and if they had been fraudulently attached to such a document by another, the act would have subjected the offender to criminal prosecution and conviction. It was stipulated that the letters A. J. F. on the remaining ballot were made by the election judge, Flatung, under the same or similar circumstances. In view of our conclusions as to the law which are set forth in the foregoing opinion and in *Bingham v. Broadwell, supra,* we have made a careful examination and recount of all the ballots to which objection was made by either party, and have corrected the tally made by the district court as follows: The district court by its count gave to Bonawitz 1,229 ballots, to which by our count we added 137, making a total of 1,366. The district court gave to Griffith 1,282 ballots, to which we have added 99, making in all 1,381, showing a majority in favor of contestant and appellee of 15 votes.

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

OLDHAM, C., concurs. LETTON, C., took no part in the decision.

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

AFFIRMED.

VICTOR G. LINDGREN V. OMAHA STREET RAILWAY COMPANY.

FILED APRIL 19, 1905. No. 13,666.

1. **Evidence** examined, and *held* to show no actionable negligence on the part of defendant.

2. **Case Distinguished.** *Omaha Street R. Co. v. Larson,* 70 Neb. 591, examined, approved and distinguished.

3. **Harmless Error.** Action of the trial court in excluding evidence examined, and *held* not reversible error.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Brome & Burnett and *A. G. Ellick,* for plaintiff in error.

John L. Webster and *W. J. Connell, contra.*

OLDHAM, C.

This was a suit for injuries to person and property alleged to have been occasioned by the impact of a street car operated by the Omaha Street Railway Company with plaintiff's buggy on the 28th day of April, 1902. The facts underlying the controversy are that, on the evening of the 28th day of April, 1902, the plaintiff was driving in a top buggy drawn by a single horse on his way home from his place of business; that he drove from the west onto 24th street, which is a street running north and south through the city of Omaha; on this street are two lines of street railway track, owned and operated by the defendant company. The east line of this track is used by cars going north, and the west line of the track by the cars going south. When plaintiff drove on 24th street he crossed both lines of the street railway track and looked for cars, as he testifies, but saw none approaching; he then drove along this street parallel to the east line of the railway track for about two blocks, when he came to two or three teams that were hitched or standing between the east line of the track and the curb of the street; when he reached these teams he turned down onto the east line of the street railway track, and as he did so he looked for a car, but saw none. He drove for about 200 or 300 feet along the line of the street railway track when, he says, he looked back and saw a car approaching from the south within about 10 feet of him. He then turned his horse from the track, and in stepping off the track the horse slipped and fell, and the

car almost instantaneously with the fall of the horse struck the buggy in which plaintiff was driving, and inflicted a severe injury upon him, and also broke and injured the buggy. Plaintiff did not observe the rate of speed of the car, and was knocked senseless by the impact, and could not tell anything as to how far the car ran after the accident. Another witness for plaintiff, named Jacobs, was standing by his team near to the point of the collision. He testifies, in substance, that he saw the car approaching; and when about 20 feet from plaintiff saw plaintiff turn his horse off the street railway track, saw the horse fall and stumble off the track, and saw the car strike the buggy in which plaintiff was riding, and then he went immediately to plaintiff's assistance. He was uncertain as to how far the car ran after the collision, and did not remember to have heard the bell rung or the gong sounded when the car approached plaintiff's buggy. There was an effort to prove by this witness the speed of the car, but this evidence was excluded, and error predicated on this ruling of the court will be subsequently discussed. Another witness, named Downs, who stood in front of his barber shop near to the point of the injury, testified that he saw plaintiff driving on the track of the defendant railway company, and saw the car when it approached to about 20 feet of plaintiff's buggy, saw plaintiff turn his horse from the track, and saw the horse slip and fall, and the car, in about a minute afterward or in a very short time, strike the buggy, and saw plaintiff thrown from the buggy by the impact of the car. He testifies that the car ran about 20 or 30 feet after the impact before it was stopped. This was all the evidence that was offered by plaintiff on the cause of the injury, other testimony being medical evidence as to the extent and nature of the injury sustained. At the close of plaintiff's testimony the court directed a verdict for the defendant, and plaintiff brings error to this court, alleging error in the action of the trial court in directing a verdict and in excluding the testimony of witness Jacobs as to the speed of the car at the time of

the injury. We will consider these assignments in the order in which they are presented in plaintiff's brief.

1. Does the evidence introduced by plaintiff show any actionable negligence on the part of the defendant directly causing or contributing to the injury complained of? The negligence alleged in the petition is, in short, that defendant was running its car at an unreasonable rate of speed; that it neglected to sound an alarm by bell or gong when approaching plaintiff's buggy, and that it neglected to use due diligence, care and caution to avoid the injury after discovering plaintiff's perilous position. In the first place, there is no testimony in the record that defendant failed to give a warning by gong or bell when approaching plaintiff's buggy, the witnesses merely saying that they did not remember of hearing any signal, but no one said that he would have heard a signal had one been given. There is no testimony in the record admitted by the court as to the rate of speed at which the car was moving at the time of the impact. The only thing in the record from which a deduction might be made on this question is found in the evidence of witness Downs, who testified that the car ran about 20 or 30 feet after the impact before it was stopped. This standing alone we do not think sufficient to show a reckless rate of speed. Plaintiff contends that under the undisputed testimony the case falls within the rule recently announced by this court in *Omaha Street R. Co. v. Larson*, 70 Neb. 591. This rule is based on what is commonly called the "doctrine of the last chance," and stands on the principle that, even if plaintiff had been negligent in going on the track of the defendant, yet that if after defendant discovers plaintiff's perilous position it carelessly and recklessly neglects to use ordinary diligence to avoid a collision, its negligence in this particular supersedes the alleged contributory negligence of the plaintiff and becomes the direct cause of the injury inflicted. In *Omaha Street R. Co. v. Larson, supra,* the testimony tended to show that, after the motor car causing the injury had come in contact with plaintiff's

horse and buggy and had lifted the horse on to the fender of the car, it carried the horse and dragged the buggy behind him about 130 feet before overturning the buggy and causing the injury complained of. Evidence was introduced tending to show that by ordinary care and skill the car could have been stopped within a space of about 40 feet. We held this testimony presented a proper question for the determination of the jury as to whether defendant had used due diligence in stopping the car after its impact with plaintiff's horse. We think the doctrine here announced sound in principle, but are unable to see how the evidence in the instant case placed it within this rule. There is no testimony tending to show that, after plaintiff's horse slipped and fell, defendant by the exercise of even the highest diligence could have stopped the car in time to avert the impact. In fact, it seems to us, after a careful examination of the evidence contained in the record, that what is shown is simply a pure accident for which no one is legally to blame. Plaintiff was not guilty of contributory negligence in driving on defendant's track when he saw no near approaching car. He went where he had a right to go, and occupied a street set apart for vehicles as well as for street railway cars, and drove in a careful manner thereon. When he discovered a car approaching from the south he attempted to do what he should have done, that is, he turned his horse off the street railway track to give the right of way on this track to the car. In attempting to do this an unforeseen accident happened. The horse slipped and fell; this, plaintiff could not have foreseen, nor could the motorman or conductor of defendant's car have reasonably anticipated. In our judgment this accident to the horse was the direct and logical cause of the injury, for, as before stated, there is no testimony even remotely tending to show that defendant, after the discovery of the perilous position of plaintiff caused by the fall of his horse, could have stopped the car in time to avoid the injury, and unless the evidence had tended to show this the "doctrine of the last chance"

has no application to the facts concerning the injury in the case at bar. We therefore conclude that under the evidence admitted the trial court was fully justified in directing a verdict for the defendant.

2. The second allegation of error is based on the rule of the trial court in excluding the testimony of witness Jacobs as tending to show the rate of speed of the car at the place of the injury. The testimony offered was as follows:

Q. Now, at the time you first saw the car, did you observe the movement sufficiently so that you could see whether it was moving slowly or fast?

A. Yes, sir.

Q. Now, you may state what the movement of the car was?

Objected to. Sustained. Offer to prove. Mr. Brome: The plaintiff offers to prove by the witness on the stand that the car, at the time the witness first saw it, was moving rapidly and at a high rate of speed. Offer denied. Plaintiff excepts.

It is true, as contended by counsel for plaintiff in error, that this court has held that a nonexpert who has observed the motion of a car is qualified to testify as to his opinion of the speed at which the car was moving at the time of the observation, and had plaintiff in the case at bar asked the witness as to the number of miles an hour at which, in his judgment, the car was moving, we think the evidence would have been competent and should have been admitted, and that its exclusion might have constituted reversible error in the case. But this is not what was asked the witness. He was simply asked to state whether the car was running slowly or fast. The offer was then made to prove by the witness that the car at the time the witness first saw it was moving rapidly and at a high rate of speed, but there was no offer to prove the number of miles an hour, so that the jury could have determined what was meant by the car running slowly or fast; and the offer we think was objectionable for its indefiniteness and un-

certainty. If the witness, in his opinion, had been asked to state whether the car was running 5, 10 or 15 miles an hour, the answer would have given the jury a standard to compare its rate of speed with the rate prescribed by the ordinance for the running of cars at the place of the injury. But, because of the indefiniteness and uncertainty of the offer, we think the court committed no prejudicial error in sustaining the objections to the question and denying plaintiff's offer. Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

DAVID ESCRITT ET AL. V. PETER MICHAELSON.*

FILED APRIL 19, 1905. No. 13,715.

1. **Appeal Bond: VALIDITY.** A bond given in an attempted appeal to this court from an order of the district court awarding a writ of assistance in a mortgage foreclosure proceeding, conditioned for the payment of rent, is valid as a contract where the obligor has by reason of the bond retained possession of the premises pending such appeal. *United States Fidelity & Guaranty Co. v. Ettenheimer*, 70 Neb. 147, followed and approved.

2. **Appealable Order.** An appeal will lie from an order awarding a writ of assistance in a foreclosure proceeding after the sale has been confirmed and deed ordered, subject to the conditions of an appeal from an order confirming the sale.

3. **Judgment: REVERSIBLE ERROR.** The failure of the clerk, in recording a judgment, to certify that certain of the defendants are sureties, where such is the fact, is reversible error, though not presented to the trial court. *Blaco v. State*, 58 Neb. 557, followed and approved.

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* Rehearing allowed. See opinion, p. 640, *post*.

ERROR to the district court for Antelope county: JOHN F. BOYD, JUDGE. *Reversed with directions.*

E. D. Kilbourn and *J. J. Sullivan,* for plaintiffs in error.

Jackson & Williams and *Field, Ricketts & Ricketts, contra.*

OLDHAM, C.

This suit had its origin in an action to foreclose a real estate mortgage instituted by Hester McLean against Charlotte McCormick and others in the district court for Antelope county, Nebraska. Pending an appeal from an order of confirmation of sale, at which plaintiff McLean was the purchaser, he transferred his interest in the land by quitclaim deed to one Michaelson. Upon an affirmance in this court of the order of confirmation, a sheriff's deed was issued to McLean. Michaelson thereafter applied for a writ of assistance against all persons claiming under the defendants in the foreclosure suit. David Escritt, one of the plaintiffs in error in this case, resisted the application of Michaelson for a writ of assistance, claiming to be a lessor and purchaser of the land without notice of the proceeding. The application of Michaelson was granted by the district court and a writ of assistance ordered, to which order and judgment Escritt excepted, and applied to the court for a supersedeas bond to stay the writ pending an appeal from the order in this court. This application was granted, the court fixing the amount of the bond at $1,000, and imposing as one of the conditions that Escritt should pay Michaelson the rents and profits of the premises while he remained in possession, in the event the order should be affirmed in the supreme court. The bond was executed with Escritt as principal, and William Randall and C. D. Gardner, the other plaintiffs in error herein, as sureties, and delivered to the clerk of the district court and duly approved by him. Escritt prose-

cuted his appeal, and the judgment of the lower court was affirmed in an opinion written by POUND, C., which is not officially reported, but may be found in 4 Neb. (Unof.) 187. After the mandate in this case had been returned to the district court, Michaelson instituted the case at bar for judgment for rents and profits of the lands during the pendency of the appeal on the supersedeas bond executed by plaintiffs in error. In the petition filed by Michaelson, he alleged the order of the district court for the possession of the real estate, the giving of the supersedeas bond for the purpose of preventing the issuance of a writ of assistance, the filing and approving of the bond, with the conditions named, the removal of the cause to the supreme court, the final determination of the cause adversely to the appellant, and that the appellant (Escritt) had remained in possession pending his appeal, and had the use and occupation of the premises, and that the reasonable value of the rents and profits for such time was $600, for which he prayed judgment against Escritt and the sureties on his supersedeas bond.

The defendants below, who are plaintiffs in error here, filed answers separately, admitting each allegation of the petition, except as to the value of the rents and profits, and denied the authority of the court to incorporate the provision in the supersedeas bond which provided for the payment of rents pending the appeal. A general demurrer was interposed to each of these answers and sustained by the district court, and the defendants refusing to further plead were adjudged to be in default. The court proceeded to hear testimony as to the value of the rents and profits of the premises pending the appeal in this court (a jury having been waived by plaintiff), and thereupon entered judgment in favor of the plaintiff in the court below in the sum of $600, jointly, against all the defendants, and omitting to find which was principal and which were sureties on the obligation. To reverse this judgment the defendants bring error to this court.

Three propositions are urged as grounds for the reversal

of the judgment of the trial court, the first being that there was no provision of law authorizing the condition in the supersedeas bond sued on which obligated the appellant to pay for rents and profits of the premises pending the appeal, and that as appellant was compelled to comply with this condition in order that he might stay the judgment of ouster, the bond could not be said to have been voluntarily entered into.

The question of the right of appeal from an order awarding a writ of assistance, after the sale is confirmed and deed ordered in a foreclosure proceeding, is not entirely free from doubt under the authorities. In *Beatty v. De Forrest*, 27 N. J. Eq. 482, it was held that, after a sale in a foreclosure suit, where the purchaser has got his deed, a writ of assistance will go *ex debito justitiæ* to put him in possession. Beeseley, C. J., in rendering the opinion said:

"In my opinion, a purchaser under a decree, having a sheriff's deed, has as much right to the assistance of the court to be put in possession, as a plaintiff in a court of law has to an execution after judgment." In this case it was held that an appeal would not lie from an order granting the writ. A different rule, however, and one nearer in conformity with the spirit of our practice has obtained in Michigan and California. In *Baker v. Pierson*, 5 Mich. 456, it was said:

"We think the appeal will lie, unless it was discretionary in the court below to grant or refuse the writ, as it might think proper. In this sense it was not discretionary; but it was discretionary in the sense in which the granting or refusing of an injunction is discretionary—that is, in a doubtful case. The discretion in all such cases is a legal discretion, to be exercised in doubtful cases only, and not where the case is clear and free from doubt. It is then a strict matter of right, which the court is as much bound to recognize and enforce as any other right of a party. The order denying the writ is a final order—one that is conclusive on the

right of the appellant; which right is, to be put in possession of the premises purchased by him at the mortgage sale, as an incident to his purchase. It is a right to the immediate possession of the premises against the parties to the foreclosure suit, and all who are bound by the decree, whether parties or not. It grows out of the decree and purchase under it, and can be enforced by the court rendering the decree, and no other court; and an order denying the writ of assistance to enforce it is a final order, touching the right, from which the purchaser may appeal to this court."

In *City of San Jose v. Fulton,* 45 Cal. 316, it was held: "The writ of assistance is a summary proceeding resorted to under the rules of chancery practice to give effect to the decree, and presupposes that the rights of the parties are only such as follow upon the decree and the sale had pursuant thereto. If, however, it appear that those rights have been changed by reason of an agreement, or alleged agreement, subsequently entered into, so that the issuance of the writ would or might work injustice, it should be withheld, and the parties remitted to the ordinary remedies afforded in the courts." In this case an appeal from a motion to vacate the order was entertained.

While the question of the right to an appeal from an order awarding the writ, after confirmation of sale is had and the deed ordered, has never been directly passed upon by this court, yet such order was reviewed on appeal in *Merrill v. Wright,* 65 Neb. 794, and the order of the district court awarding the writ was reversed. At the former hearing of the instant case, the appeal was entertained and determined on its merits. We therefore conclude that under the practice prevailing in this state an appeal may be taken from an order awarding a writ of assistance on the same conditions as it may be taken from an order confirming a sale. In sound practice the writ of assistance should never issue except on motion and notice, as intervening rights not existing between the parties to the decree might be involved, or subsequent agreements as to pos-

session might exist even between the parties to the suit which might affect the right to the writ.

Even if the filing of the bond to supersede the order was unauthorized, the question would still arise as to whether or not the plaintiff in error, having availed himself of this unauthorized relief and having filed a bond which kept him wrongfully in possession of the premises during the appeal, did not bring himself squarely within the doctrine announced by this court in the recent case of *United States Fidelity & Guaranty Co. v. Ettenheimer,* 70 Neb. 147, in which it was held:

"A bond, given in an attempted appeal in an action of forcible entry and detention, conditioned for the payment of rent, is valid as a contract, if the obligor has by reason of the bond retained possession of the premises, though the statute authorizing such appeal is afterwards held unconstitutional."

The second question relied upon is that the sustaining of the demurrer was prejudicial because the general denial with which the answers concluded fairly put in issue the amount and value of the rents and profits. The contention would have some merit in it if the default of the defendants below had operated as a confession of the amount of damages prayed for in the petition, but under section 134 of the code, plaintiff was compelled to submit proofs as to the amount of his damages, although the defendants were adjudged in default, and this he did. Consequently, defendants were not prejuiced in any manner on this account.

There is, however, a technical error in the form of the judgment in that it does not find that plaintiff in error Escritt was principal, and that Randall and Gardner were sureties on the bond. In the recent case of *Blaco v. State,* 58 Neb. 557, it was announced that the failure of the clerk in recording a judgment to certify that certain of the defendants are sureties, where such is the fact, is reversible error, though not presented to the trial court.

In conformity with this rule, we are compelled to rec-

ommend that the judgment be reversed and the cause remanded to the district court, with directions to render a judgment on the amount found, and certify therein that Escritt is principal on the bond, and Randall and Gardner are sureties thereon.

AMES and LETTON, 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, with directions to render a judgment on the amount found, and certify therein that Escritt is principal on the bond, and Randall and Gardner are sureties thereon.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed February 22, 1906. *Former judgment adhered to:*

1. **Appealable Order:** SUPERSEDEAS. An order granting a writ of assistance in a foreclosure suit, after decree, sale, confirmation thereof and the execution of a sheriff's deed, directing the sheriff to put the purchaser in possession of the premises, is a final order and is appealable; but is not such an order, within the meaning of the third subdivision of section 677 of the code, as may be superseded by giving the waste bond therein provided for.
2. **Discretion of Court.** The court making such an order may, in his discretion, allow it to be superseded upon condition that the appellant give a bond for the payment of a reasonable rent for the use and occupation of the premises during the pendency of his appeal.

BARNES, J.

When this case was before us the first time the judgment of the district court was affirmed. See *Escritt v. Michaelson, ante*, p. 634, where a clear and concise statement of the facts will be found. A rehearing was allowed; the case has been heard by the court, and the question now is, shall we adhere to our former decision?

It is strenuously contended by counsel for the plaintiff

that the supersedeas bond, which is the foundation of this action, contains conditions not required by the statutes; that the district court had no right or authority to make the payment of rent one of its conditions; that all that was required to supersede the order of the district court granting the writ of assistance was to give what is commonly called a waste bond; that the order of the court requiring the bond to be conditioned for the payment of the rent rendered it void (at least as to that condition), and the judgment thereon cannot be sustained. If it be true that an order granting a writ of assistance is an order for the delivery of the possession of real estate within the meaning of the third subdivision of section 677 of the code, as it stood before the adoption of the amendment of 1903, then the plaintiff's contention is well founded. It seems to us, however, that such is not the case. The section above mentioned, as amended, reads in part as follows:

"No appeal in any case in equity now pending and undetermined, or which shall hereafter be brought shall operate as a supersedeas, unless the appellant, or appellants, shall within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows: * * * *Third*—When the judgment, decree, or order directs the sale or delivery of possession of real estate the bond shall be in such sum as the court, or judge thereof in vacation shall prescribe, conditioned that the appellant or appellants will prosecute such appeal without delay and will not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate, and pay all costs, and if the appeal be from an order of confirmation of sale the bond shall be further conditioned if the appellant will pay to the purchaser the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession if the order appealed from be affirmed."

It is insisted that the order granting a writ of assist-

ance was an order directing the delivery of the possession of real estate within the meaning of the statute above quoted. We cannot agree with this contention. A writ of assistance is the ordinary process used by a court of chancery to put a party, receiver, sequestrator, or other person into possession of property when he is entitled thereto either upon a decree or upon an interlocutory order. *Stanley v. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245. The most familiar instance of its use is where, as in the instant case, land has been sold under a decree foreclosing a mortgage, but it is also employed wherever a court of equity, having jurisdiction of the persons and the property in controversy, has determined the rights of the litigants to the title or possession of the real estate. The remedy is founded on the rule that the court of equity, where it can do so justly, will carry its own decrees into full execution without relying on the cooperation of any other tribunal. The rule is well established that the writ will issue in favor of a purchaser at a sale of real estate under a decree, but will only be allowed against parties to the suit, their representatives, privies, or those who came into possession under one of the parties while the suit was pending. The writ will not issue where the rights of the party have not been fully adjudicated in the principal suit. Indeed, it is the practice in many jurisdictions to incorporate an allowance of the writ in the order of confirmation; and this rule is followed in some of the districts in this state. Without doubt it is the proper practice, and one which would have prevented the present controversy. So it may be said that a writ of assistance performs the same office in a suit in equity as does an execution in an action at law. It is nothing more than the process by which the court of equity finally carries its judgment or decree into effect.

The authorities in this country are divided on the question as to whether an appeal lies from an order granting such a writ, and we might be justified in holding that such an order is not appealable. Heretofore, however, we

have taken a different view of the matter. In *Merrill v. Wright,* 65 Neb. 794, 101 Am. St. Rep. 645, we entertained an appeal from such an order, and determined the questions involved on their merits. We also passed on the merits of the order in the present case without questioning the right of appeal, and we are of opinion that an order granting the writ of assistance is appealable as a final order. It does not follow, however, that it is such an order as is embraced in the third subdivision of section 677 of the code, that is to say, an order for the delivery of the possession of real estate. The statute above quoted was evidently intended to apply to judgments rendered and orders made in actions where the title or right to the possession of real estate are involved as the subject of the litigation, and not to an order for a writ of assistance which may be necessary to carry the judgments and orders of a court of equity into effect, after all the rights of the parties have been determined and nothing remains but to execute such judgments and decrees; and it is our opinion that the order in question is one of those which can be superseded only by an order of the court; that in making such order the court may require it to be conditioned upon such reasonable terms as he may direct. In the case at bar the plaintiff was a tenant of the owner of the equity of redemption to certain lands in Antelope county; an action was commenced against such owner, and all other parties interested in the premises, to foreclose a mortgage thereon; judgment of foreclosure was rendered; an appeal from that decree was prosecuted to this court, where the judgment was affirmed. The property was thereafter sold under the decree, and in due time such sale was confirmed. From the order of confirmation the case was again brought here on appeal, and a hearing resulted in the affirmance of that judgment. The plaintiff herein had been in possession of the premises as tenant of the defendants in said action from the beginning, and during the pendency of the litigation. After a deed to the premises had been executed by the sheriff in accordance

with the final order of the court, the plaintiff refused to vacate, and still withheld the possession of the premises from the defendant in error. The litigation being ended, and all of the rights of the parties having been judicially determined, there was nothing left for the defendant to do but to bring an action at law to recover the possession of the premises, or apply to the court, in the same case, for a writ of assistance to carry its judgment into effect. The defendant pursued the latter course, and the court having made such order it was within his power to fix the terms upon which it could be superseded during the pendency of an appeal. That the defendant was entitled to the use and occupation of the land from and after the date of the order of confirmation of sale there can be no doubt; and if the plaintiff desired to retain possession of the premises during the pendency of his appeal, the condition that he give a bond to pay a reasonable rent for the use and occupation thereof was proper and reasonable, and such a condition as the court had undoubted authority to exact. If we should sustain the plaintiff's contention we would establish the rule that, after a decree of foreclosure, and sale of the premises, and a confirmation thereof, one who is bound by the decrees and orders of the court may refuse to comply with the same and compel the purchaser to apply for an order for a writ of assistance, may prosecute an appeal from such order, and retain possession of the premises during the pendency thereof, without paying rent to the owner, although he is entitled to the use and occupation of his land from and after the date of the order of confirmation of sale. We cannot believe that it was the intention of the legislature to establish such an unjust and inequitable rule by the adoption of section 677 of the code above mentioned, and we decline to give it such a construction. Having reached the conclusion that it was proper for the court to require the plaintiff to give the bond in question in order to supersede the order for the writ of assistance, it is unnecessary for us to determine the question as to whether or not it is a good common law obligation.

Several other questions have been discussed by counsel, but an examination of our former opinion convinces us that they are satisfactorily disposed of therein. For the foregoing reasons, we are of opinion that our former judgment should be adhered to, and it is so ordered.

JUDGMENT ACCORDINGLY.

SEDGWICK, C. J., concurs in the conclusion reached.

LOUIS LESIEUR, ADMINISTRATOR, APPELLANT, V. OCTAVE SIMON ET AL., APPELLEES.

FILED APRIL 19, 1905. No. 13,728.

1. **Limitation of Action.** The four years' period of limitation fixed by statute on actions to set aside fraudulent conveyances is not tolled by the death of the fraudulent grantor.
2. **Evidence** examined, and *held* to support the judgment of the district court.

APPEAL from the district court for Sarpy county: GEORGE A. DAY, JUDGE. *Affirmed.*

McNish & Graham and *George A. Eberly,* for appellant.

W. W. Young, contra.

OLDHAM, C.

This was an action in the nature of a creditors' bill, filed by the plaintiff in the court below as administrator of the estate of Alexander Simon, deceased. The proceeding was instituted to set aside certain conveyances made by the deceased in his lifetime of personal and real property to his children and heirs at law. At the trial of the cause in the district court, judgment was rendered in favor of defendants, from which plaintiff appeals to this court.

It appears that on November 29, 1901, Alexander Simon died intestate in Sarpy county, Nebraska, leaving as his sole heirs at law defendants Octave Simon, Edmund Simon, Gustave Simon and Mary Simon; and that on April 15, 1902, a petition was filed in the county court of Sarpy county by certain creditors of the deceased praying for the appointment of an administrator of the estate of the deceased; and that on July 16, 1902, letters of administration were issued to the plaintiff herein who immediately qualified as such administrator; and that on September 4, 1902, claims were allowed against the estate as follows: L. J. Horton, $661.47; George W. Young and George A. Eberley, $44.82; and the firm of Young & Eberley $81.61. That on September 1, 1902, the plaintiff filed his report setting forth the fact that there was no real or personal property belonging to said estate that could be found by him, and on January 29, 1903, instituted this cause of action. Prior to the 7th day of February, 1901, the deceased and his sons and daughter resided in Stanton county, Nebraska. The claim of L. J. Horton was founded originally on an account for goods and merchandise sold to the deceased in the year 1894. This account was placed in judgment in the county court of Stanton county on April 5, 1898, and the transcript of this judgment was filed in the district court for Stanton county, and an execution was issued thereon which was returned *nulla bona.* The claim in favor of George W. Young and George A. Eberley was founded upon an indebtedness evidenced by a promissory note dated the 29th day of January, 1896, which claim was subsequently reduced to judgment, and a transcript of said judgment was duly filed in the office of the clerk of the district court for Stanton county long prior to the death of Alexander Simon. The claim of Young & Eberley is based upon a promissory note dated January 29, 1896, due one year after date.

The first conveyance alleged against in the petition is an assignment of a school land contract by deceased to his daughter Mary Simon, which assignment bore date July

27, 1894, but was not recorded until September 11, 1899. The evidence, however, clearly shows that from the date of the assignment of this contract defendant Mary Simon was in possession of the lands claiming them as her own, and that these facts were well known to the creditors for whom plaintiff sues, and that, on September 11, defendant, for a valuable consideration and in good faith, assigned this contract to one Dr. Person, subject to the indebtedness due the state, and that this assignment to Dr. Person was at once filed for record. As there is no evidence in the record to impeach the *bona fides* of this transfer, it need be considered no further. The next conveyance alleged against is a bill of sale of certain personal property made by deceased on the 28th day of December, 1897, to his son Octave Simon. This bill of sale was duly recorded in the office of the county clerk of Stanton county at the time it was delivered, and the creditors of deceased had actual as well as constructive notice of this conveyance. Another bill of sale of the 26th day of November, 1898, from deceased to his son Octave Simon conveying personal property therein described is also alleged against. This bill of sale was duly filed for record November 26, 1898, and the evidence clearly shows that the creditors had actual as well as constructive notice of this conveyance from the time of its recording. Another conveyance alleged against is a chattel mortgage from deceased to his son Edmund Simon, bearing date December 29, 1897, and filed for record on said day, and of this the evidence shows that the creditors had actual as well as constructive notice from the time of the filing.

It being established that the creditors of the estate had actual as well as constructive notice of these conveyances for more than four years before the institution of this suit, this action to set them aside is plainly barred by the statute of limitations, unless such statute is tolled by the death of Alexander Simon. At the time of Simon's death the statute had run for more than three, and nearly four, years. It is conceded that the general rule is that when

the statute begins to run it runs continuously; this rule being subject to only such exceptions as are plainly provided in the statute, and to cases in which the party entitled to bring the action is restrained by some legal process from doing so. Section 20 of the code tolls the statute when the cause of action accrues against a person outside of the state until he comes into the state, and also provides that if, after the cause accrues, he depart from the state, the time of his absence from the state shall not be computed as any part of the period within which the action must be brought. This section of the statute has no application to the case at bar, as deceased and all the defendants have lived continuously in the state since each of the several causes of action accrued, and there is nothing in this section suspending the operation of the statute because of the death of a resident defendant. Section 17 of the code provides that absence from the state, death, or other disability of a nonresident shall not operate to suspend the period within which actions *in rem* shall be commenced by and against such nonresident or his representative. Now, the action in this case partakes largely of the nature of an action *in rem,* its object being to fix the status of the property alleged to have been conveyed by the conveyances assailed, and subject it to the payment of the claims against decedent's estate. In the case of *Lantry v. Parker,* 37 Neb. 353, an action to quiet title was held to be an action *in rem* within the meaning of section 17 of the code. In this case, IRVINE, C., speaking for the court, quotes with approval the language of Mr. Justice Field in *Pennoyer v. Neff,* 95 U. S. 714, 734, in which he says:

"It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such

are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem,* in the broader sense which we have mentioned."

It is further held in this opinion that the object of section 17 of the code was to prevent the too general application of section 20, and to permit the statute to run in those cases wherein constructive service on plaintiff might proceed notwithstanding his absence. We therefore conclude that the death of the alleged fraudulent grantor does not toll the statutory period in which actions to set aside fraudulent conveyances must be brought, and that the learned trial court was right in holding that the action to set aside these conveyances was barred by the statute of limitations. This case is in harmony with the earlier holding of this court in *Hurley v. Estes,* 6 Neb. 386.

There is one other conveyance alleged against in the bill, and that is a conveyance from John Koch of three lots in the original town of Gretna, Sarpy county, Nebraska, which was made and executed to the defendants on the 7th day of February, 1901. The petition alleged that this property was purchased with means furnished by the deceased, and that the defendants held it as trustees of the deceased. There is no evidence in the record to in any way sustain this allegation. On the contrary the testimony clearly shows that this property was purchased by the defendants with their own means, and that deceased never had or claimed any interest in the property. Consequently, the finding of the trial court that this conveyance was made in good faith and for a valuable consideration, and that deceased had no interest in it, is fully supported by the evidence.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

JOHN A. CREIGHTON, APPELLEE, V. ERNEST E. CRANE, ET AL., APPELLANTS.

FILED APRIL 19, 1905. No. 13,758.

Mortgage: EXTENSION: HUSBAND AND WIFE: EVIDENCE. Where the legal title to mortgaged premises is in the husband, and his wife joins in the execution of the mortgage to secure a note signed by the husband alone, and the time of payment of such note is extended without the knowledge or consent of the wife, and the wife claims ownership of the mortgaged property under an antenuptial agreement with the husband, she must show that the holder of the note or his privies had notice of her claim of ownership of the premises at the time the extension was granted to entitle the property to stand in the position of a surety.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

John O. Yeiser, for appellants.

Woolworth & McHugh, contra.

OLDHAM, C.

This is an appeal from a decree of the district court for Douglas county for the foreclosure of a real estate mortgage. The facts underlying the controversy are that, in 1895, Ernest E. Crane held the record title as owner of a certain lot situated in the city of Omaha, and occupied the same with his wife, Florence I. Crane, another defendant herein, as a homestead. On December 28, 1895, defendant Ernest E. Crane procured a loan upon said premises in the sum of $800; executed a note for that amount, and

secured the same by a mortgage executed by himself and wife upon the premises. This note was purchased before maturity, in the ordinary course of business, by plaintiff, John A. Creighton, who, on June 30, 1903, instituted this action for the foreclosure of the mortgage. The execution of the note and mortgage was admitted, as well as the default in the payment of the note and interest, but Florence I. Crane answered that she was the real owner of the property sought to be foreclosed in the action, by virtue of an antenuptial agreement with her husband, and that she had executed the mortgage simply as surety for her husband, and that the payment of the note had been extended one year without her knowledge, and that thereby the mortgage became released and discharged. These allegations were denied by plaintiff's reply, and the court entered a decree finding that, at and prior to the execution of the note and mortgage, the legal title to the real estate was in Ernest E. Crane; that prior to the marriage of Ernest E. Crane and Florence I. Crane an antenuptial agreement was made between them, by which the said property was to become the property of Florence I. Crane; that after the marriage and prior to the execution of the mortgage Ernest E. Crane and Florence I. Crane occupied the premises as a homestead, but that no conveyance of the title was made from Ernest E. Crane to Florence I. Crane; that before the maturity of the note an extension of one year was granted without the consent of the owner, Florence I. Crane; and that John A. Creighton was the owner of the note and mortgage; and that default had been made in the payment of the note prior to the institution of the suit. On these findings the court decreed the foreclosure of the mortgage in the ordinary manner. From this decree Florence I. Crane appeals to this court.

The contention of appellant is that, as Florence I. Crane was the real owner of the property, her signing the mortgage was merely for the purpose of securing the debt of another, and her property thereby pledged stood in the position of a surety for such debt, and whatever will dis-

charge the surety will discharge such property; that as the time of the payment of the note was extended without consent of the surety, such act operated in law as a release of the mortgaged property.

Conceding, for the sake of the conclusion, that the evidence is sufficient to show that Florence I. Crane was the real owner of the mortgaged property, and that the time of payment of the note was extended for one year without her consent, there is one other thing necessary to warrant the conclusion that the extension of the time of payment of the note without consent of the surety released the mortgage, and that is the fact that the holder of the note knew that Florence I. Crane, or rather the property pledged by her, was held as surety for the debt of Ernest E. Crane. The rule is laid down by Brandt, Suretyship and Guaranty, sec. 44, as follows: "Where the fact of suretyship does not appear from the mortgage, the wife must show that the creditor knew of the suretyship in order to entitle the property to stand in the position of a surety. There was plainly nothing in the record of the title to this property to put the holder of the note and mortgage on inquiry as to the relation of Florence I. Crane toward the property, for the title of the property stands in the name of the husband, who borrowed the money and executed the note, and had the wife join with him in the execution of the mortgage. No evidence was introduced in the record tending to show that the wife had ever made any claim of ownership to the property to the original mortgagee, or the present holder of the note. Consequently, she is not in a position to complain of the extension granted, without first having by some act informed the holder of the note or his privies of her relationship toward the mortgaged premises. *Wilson v. Foot*, 11 Met. (Mass.) 285.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

SETH TERRY ET AL. V. J. A. JOHNSON.

FILED APRIL 19, 1905. No. 13,765.

1. **Evidence** examined, and *held* sufficient to sustain the judgment of the trial court.

2. **Habeas Corpus:** CUSTODY OF CHILD. The right of a parent to the custody of a minor child of tender years is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown or a forfeiture of such right clearly established. *Norval v. Zinsmaster*, 57 Neb. 158, followed and approved.

ERROR to the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

E. O. Kretsinger, for plaintiffs in error.

Hazlett & Jack, contra.

OLDHAM, C.

On February 16, 1904, J. A. Johnson filed his petition for a writ of habeas corpus in the district court for Gage county, Nebraska, to recover possession and custody of Beulah Johnson and Effie Johnson, two minor daughters of the petitioner, alleging that the respondents, Laura Terry and Seth Terry, the grandparents of the children, and Menzo W. and Edgar M. Terry, uncles of the children, unlawfully restrained them of their liberty. Respondents, by way of return to the writ, alleged, in substance, their relationship to the children and that the petitioner was an unfit person for the care and custody of the children. That, after the death of the mother of the children, the relator, after having taken insufficient care of his daughters, Beulah and Effie, brought them to the home of their

grandparents in Gage county, Nebraska, and there left the children, where they remained ever since, without any care or attention on his part, and without his aiding in their support, education or maintenance. The return concluded with a general denial, and a prayer that Beulah and Effie might be remanded to the care, culture, nurture and education of their grandparents, and that the writ be discharged. On issues thus joined there was a trial to the court, and a finding that the respondents named in the petition and writ unlawfully deprived Effie Johnson of her liberty, but that as to Beulah Johnson there is no such restraint exercised by any of the respondents. The court further found that the respondents are in all respects suitable and proper people to have the care and custody of either or both of said minors, and that the father, J. A. Johnson, is a suitable and proper person to have the care and custody of Effie Johnson, and adjudged, ordered and decreed that, on the second day after the adjournment of the district school, at which the minor was attending, that the respondents Seth Terry and his wife shall deliver Effie Johnson to her father, and that the custody of said Effie Johnson be awarded to the relator. There are other orders in the decree which are not complained of in either brief, and therefore need not be set out. To reverse this judgment both relator and respondents bring error to this court. Relator complains of the judgment and finding as to the care and custody of Beulah Johnson, and respondents as to the judgment concerning the custody of Effie Johnson.

From a very voluminous record of the evidence offered at the trial of this cause, the following facts material to its proper determination have been gleaned: That the relator, J. A. Johnson, is a farmer residing in Page county, Iowa; that on the 1st day of March, 1887, he was married to Nancy Terry, the mother of the minor children, and resided with her on his farm in Page county until the 24th day of March, 1902, when she departed this life; that at the time of the mother's death, she left surviving

her the two children in dispute, Beulah Johnson, who will be 17 years of age on the 15th day of April, 1905, and Effie Johnson, who will be nine years of age on the 4th day of August, 1905, and a son, Everitt Johnson, who is now 12 years of age; that after the death of the mother the children resided for a short time with their father on his farm in Iowa, and on the 17th day of November, 1902, they came on a visit to their grandparents, near Pickrell, in Gage county, Nebraska; that the son Everitt remained a short time with the grandparents and returned to his father, who subsequently placed him in charge of an aunt residing in Omaha, Nebraska, for the purpose of enabling him to attend the high school in that city. It appears, notwithstanding the almost reprehensible effort that has been made by counsel for each of the contending claimants of the custody of the children in controversy to show otherwise, that up to and at the time of the death of relator's wife the family of relator and the grandparents entertained and cultivated cordial relations with each other; that after the death of the mother the grandparents invited the children to visit and remain temporarily at their home; that the father visited them after their arrival there, was in correspondence with his children, made arrangements to provide for their higher education either in Omaha or Council Bluffs, and always recognized his parental responsibility and moral obligation to provide for their support, maintenance and education. The evidence shows by an overwhelming preponderance that the father is an honest, industrious and thrifty man, who has abundant means and a proper disposition to rear and educate the children. The evidence on the other hand shows that the grandparents are likewise thrifty, industrious, upright people, who are in easy financial circumstances, and are deeply attached and devoted to the children, and proper people, as the court found, for the custody of one or both of them. In other words, the findings of fact of the trial court with reference to the character and reputation of both the father and the grand-

parents clearly reflect the overwhelming weight of the testimony contained in the bill of exceptions. It might be further remarked that the finding of fact that the evidence failed to show that either of the respondents had attempted to restrain or control the action of the elder daughter Beulah in returning to her father is also fully supported by the testimony. The evidence on this branch of the case showed that Beulah acted on her own volition in refusing to return to her father's home, and not from restraint imposed by either of the respondents.

Text-writers on domestic relations are uniform in holding that in determining the custody of a child near the age of maturity the wish of the child, if based on proper information and experience, should be given great weight and consideration; and as it clearly appears from the testimony of Beulah Johnson that she prefers to reside with the grandparents, rather than return to the custody of the father, we think the court was fully justified in refusing to make any order concerning the custody of this child further than to leave her free and unrestricted in any subsequent desire she might have to return to her father before reaching the years of maturity.

With reference to the custody of Effie Johnson, the evidence clearly shows that respondents did seek to assert their rights to the custody of this child, and showed a decided disposition to resist the efforts of the father to take her from them. This, then, presents the question as one of law as to which has the superior right to the custody of a child of tender years, the father of the child or its grandparents, when each is shown to be a proper party for the exercise of such a duty. It is urged by counsel for respondents that only the best interest of the child should be considered, and that the question of the natural right of the parent should be regarded as only of secondary importance. In support of this contention he cites *Sturterant v. State*, 15 Neb. 459; *Giles v. Giles*, 30 Neb. 624; *State v. Schroeder*, 37 Neb. 571, and *Schroeder v. State*, 41 Neb. 745. The doctrine contended for does

seem to receive some support in *Sturtevant v. State, supra,* in the general and unrestricted declaration used that only the best interest of the child should be considered. Chapter 34 of the Compiled Statutes, 1883, was in force at the time of the decision in *Sturtevant v. State, supra,* and the provision then existing gave the father the first right to the custody of the child. This provision of the statute is criticised in the opinion, and was amended in 1885 by the enactment of section 6, chapter 34, Compiled Statutes, which provides: "The father and mother are the natural guardians of their minor children, and are equally entitled to their custody, and to care for their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies, or is disqualified for acting, the guardianship devolves upon the other." The general language used in all the above cited cases is explained and qualified in a later and better considered opinion of this court, *Norval v. Zinsmaster,* 57 Neb. 158, in which it is held:

"The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parent of such custody unless it be shown that such parent is unfit to perform the duties imposed by the relation or has forfeited the right."

The closing sentence of this latter opinion emphatically repudiates the doctrine that a parent has only a secondary interest in the custody and maintenance of his own children, by the clear, ringing closing sentence that, in determining the question of the custody of a child, "the right of the parent is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or a forfeiture clearly established." Generally speaking it is for the best interest of the child that it should be in the care of its natural parents.

It is recorded in Sacred Writ that in the early days of the reign of the wise King Solomon he was called upon to determine the question of the custody of an infant

child claimed by two women from lowly walks of life. The record does not show that in the trial of the cause he had any witnesses summoned to determine which of the applicants could provide the most sumptuous home for the child, or which could array it in the costliest raiment, or offer it the highest social and educational advantages; but the record does show that when by artful strategy he had determined which of the suitors was the real mother of the child, he at once announced an award, which is recorded in the 27th verse of the 3d chapter of 1st Kings, as follows: "Then the king answered, and said, 'Give her the living child, and in nowise slay it; she is the mother thereof.' "

It therefore follows that the judgment of the district court is right in principle, and we recommend that it be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

JOSEPHINE HASLACH V. THEODORE WOLF ET AL.

FILED APRIL 19, 1905. No. 13,889.

1. **Petition** examined, and *held* sufficient to allege a purchase of the promissory note in dispute for value, before maturity, under the law merchant.

2. **Promissory Note:** INDORSEMENT. Where there is no evidence as to the date of an indorsement on a negotiable promissory note of the name of the payee or an endorsee, the presumption of law is that it was made before maturity and that the holder thereof is a *bona fide* holder for value.

ERROR to the district court for Platte county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

McAllister & Cornelius, for plaintiff in error.

A. M. Post, J. J. Sullivan and *Albert & Hobart, contra.*

OLDHAM, C.

This cause of action is before this court a third time for review. The cause originated in the district court for Platte county, Nebraska, as a suit on a promissory note, and the petition filed was as follows:

"In the District Court for Platte County, Nebraska.

"JOSEPHINE HASLACH,
Plaintiff,
v.
THEODORE WOLF AND EMMA WOLF,
Defendants.

"The plaintiff complains of the defendants, for that on 1st day of June, 1887, said defendants made and delivered to Wm. H. Beck his certain promissory note of which the following is a copy:

" '$2,000 CRESTON, June 1, 1889.

" 'Five years after date, we or either of us promise to pay to the order of Wm. Beck Two Thousand Dollars ($2,000), at Creston, with New York exchange, for value received, without relief whatever from valuation or appraisement law, with seven and a half per cent. (7½) interest from date, interest payable semiannually until paid and attorneys' fees.

" 'THEODORE WOLF and EMMA WOLF.'

"Said note is indorsed as follows: 'Pay to the order of Josephine Beck, William H. Beck.' 'Pay to Josephine Haslach, Josephine Beck.'

"For a valuable consideration this plaintiff purchased this note before maturity, and this plaintiff is now the owner and holder thereof. No part of said note has been paid except the interest, which has been paid to December 1, 1895, and there is now due on said note from the de-

fendants to the plaintiff the sum of $2,000 with interest at seven and a half per cent. (7½) per annum from December 1, 1895, for which, with costs of suit, plaintiff asks judgment."

To this petition defendant Theodore Wolf filed a separate answer, which, in substance, admitted the execution of the note in controversy, and alleged that after said note, by its terms, had become due and payable, it was by the payee thereof, William H. Beck, without any consideration therefor, indorsed and transferred to Josephine Beck, who without consideration indorsed and transferred the same to the plaintiff, and that the plaintiff, as well as Josephine Beck, had notice of the defense existing against said note between plaintiff and the payee therein named. The answer then set out an unsettled partnership account between the maker of the note and William H. Beck, the payee, and alleged that at the time of the execution of the note the payee therein named was indebted to the maker on said accounting in a sum largely in excess of the face of the note. The answer prayed for an accounting bewteen defendant Theodore Wolf and William H. Beck, the payee of the note. A reply was filed to this answer by plaintiff in the nature of a general denial. When the cause came on for hearing it was ordered by the court that the issue joined on the *bona fides* of the transfer of the note to the plaintiff be separately tried as an issue of law. A hearing was accordingly had on the question of the *bona fides* of the purchase, and the district court found that the note was a nonnegotiable instrument. To reverse this judgment of the district court plaintiff brought error to this court. Our decision on this branch of the case is officially reported in 66 Neb. 600, and the judgment of the district court was reversed and the cause remanded for further proceedings. After the district court had found that the note was nonnegotiable, William H. Beck, the payee of the note, was made a party defendant, and appeared and pleaded to the allegations of defendant's answer as a petition, and having joined issues thereon, a trial was had to the court, which resulted

in a judgment in favor of defendant Wolf and against his former partner, William H. Beck, for the amount due on the note. Beck took an appeal from this judgment, which, on a hearing in this court, was affirmed in an opinion unofficially reported, by LOBINGIER, C., published in 4 Neb. (Unof.) 306. When mandates were issued on each branch of the case and returned to the district court, defendant filed a motion in the district court for judgment on the pleadings and mandates. This motion was sustained by the trial court and a judgment for defendant was entered, and to reverse this judgment plaintiff again brings error to this court.

The tangled web which has been woven around the issues involved in this case, we think, can be unraveled by the application of a few elemental principles of pleading and practice. By our decision in this cause, reported officially in 66 Neb. 600, we held that the note sued upon was negotiable. In our unofficial opinion, published in 4 Neb. (Unof.) 306, we affirmed a judgment on a partnership accounting between Theodore Wolf, the maker of the note, and William H. Beck, the payee, which found that the payee was indebted to the maker in a sum equal to the amount due on the note at the time the note was executed. Now, if the petition sufficiently alleges a purchase and indorsement of the paper before maturity under the law merchant, it follows that, on the face of the petition, plaintiff took the paper shorn of all equities existing between the parties to the instrument, and that the motion for judgment on the pleadings and mandate should have been overruled. But if the petition is insufficient on its face to show that plaintiff is an innocent holder of the note, then the trial court was justified in sustaining the motion.

We have copied the petition at length, not for the purpose of commending it as a model pleading, but rather to determine the sufficiency of its allegations. The petition alleges that the note bears certain indorsements, which are set out, and it also alleges that the plaintiff purchased

the note for a valuable consideration, before maturity, and is now the owner and holder thereof. It is not alleged, however, that the indorsements were made before maturity; and defendant by his answer alleges that the indorsements were all made after the maturity of the paper and with full knoweldge of the equities existing between the maker and payee. The allegations in the answer are denied by the reply. Therefore the question to be determined is what legal presumption arises from an allegation in a petition on a negotiable promissory note, alleged to have been purchased under the law merchant, before maturity, from a mere recital of the indorsements on the paper, without any allegation as to when the indorsements were made?

In the case of *Rahm v. King Wrought-Iron Bridge Manufactory,* 16 Kan. 530, this question was reviewed in a very able and exhaustive opinion by Brewer, J., and it was there held that "where there is no evidence as to the date of an indorsement, the presumption of law is, that it was made before maturity, and that the holder is a *bona fide* holder for value." This proposition seems to be concurred in very generally by the text-writers. See 1 Daniel, Negotiable Instruments (5th ed.), sec. 728; 2 Randolph, Commercial Paper, sec. 686, and cases there cited. It follows from basic principles that if it is not necessary for plaintiff to prove the date of the indorsements in the first instance, it is not necessary to allege them in the petition.

We are therefore of the opinion that the learned trial judge erred in sustaining defendant's motion for judgment on the pleadings and mandates, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and LETTON, 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.

WILLIAM ALBIN, BY GEORGE N. LA RUE, GUARDIAN, APPELLEE, V. CHARLES C. PARMELE ET AL., APPELLANTS.

FILED APRIL 19, 1905. No. 14,065.

An incumbrance includes all interest in the land which may subsist in a third person to the diminution of the value of the land, but consistent with the passing of the fee by conveyance; hence, an outstanding lease for a period of years is an incumbrance.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed with directions.*

Jesse L. Root and *Samuel M. Chapman,* for appellants.

Matthew Gering, contra.

OLDHAM, C.

This cause is here a second time on appeal. The former opinion in the case was written by AMES, C., and is reported in 70 Neb. 740. A full statement of the pleadings and facts at issue is contained in the former opinion, and this renders a further detailed statement unnecessary. The action was instituted by William Albin, by George N. La Rue, his guardian, against Charles C. Parmele and Laurena Ann Carey, for the purpose of canceling and setting aside a warranty deed executed and delivered to Charles C. Parmele by William Albin and wife to certain lands situated in Cass county, Nebraska, and also for the purpose of canceling a deed from Charles C. Parmele and wife to Laurena A. Carey, and a mortgage from Laurena A. Carey to Charles C. Parmele. At the first trial in the district court all these conveyances were canceled, but a lien for $850 for the purchase money paid by Charles C. Parmele was decreed against the premises. On appeal the decree of the district court was modified by canceling the lien for purchase money, and it was held that the estate devised to William Albin by the will of his father

Benjamin Albin in the premises in controversy was a life estate without power of alienation or incumbrance. It appeared from the record in the first trial of this cause that in 1899 William Albin, while not under guardianship, had executed a lease for five years on the premises to his brother for the sum of $200 a year. This lease took effect March 1, 1900, and terminated March 1, 1905, and was assigned to defendant Carey by the lessee. All testimony with reference to this lease had been excluded by the trial court at the first hearing, and on a motion for a rehearing filed in the case of *Albin v. Parmele, supra,* the following additional opinion, reported in 70 Neb. 746, was rendered (SEDGWICK, J.):

"It being insisted that the defendant Carey was in possession of the premises under a lease which does not appear to have been adjudicated below, and evidence upon questions affecting the right of possession having been excluded by the trial court, we think that the judgment of this court should not determine that question; and, to remove any doubt or uncertainty in that regard, the judgment heretofore entered in this court is modified so as to remand the cause to the district court with instructions to determine the right of possession in accordance with the opinion and judgment of this court." On a reversal of the cause under these directions the district court held that under the decree entered in this court the lease was absolutely void and executed without authority and canceled the same, and to reverse this finding a second appeal to this court is taken by defendants Parmele and Carey.

It is now insisted by counsel for appellants that the learned judge of the district court has failed to follow the directions under which the cause was remanded. We think that in a restricted sense this contention is well-founded. In the first judgment entered by the district court the annual rents and profits of the land in dispute was determined to have been of the value of $250 a year, and against the judgment, so entered, was set off the lien for purchase money, which lien on appeal to this court

was canceled and held for naught. Consequently, when the cause was remanded the accounting for rents and profits as decreed stood as a judgment absolute against the defendants. Now the object of remanding the cause was to have the court, in the accounting for rents and profits and in determining the right of possession at the time the suit was originally instituted, inquire into all the facts and circumstances connected with the possession of the defendants under the alleged lease. It is claimed with reference to the lease in controversy that it was executed by William Albin after he had been discharged from his first guardianship, and that it was executed to his brother for what at that time was a fair and equitable allowance for the rents and profits of the land devised to Wiliam Albin. As a lease for a term of years we are satisfied that under the opinion rendered in this court the conveyance was invalid and within the prohibition of the will against the right of William Albin to alien or incumber the life estate devised to him, because an incumbrance includes all interest in the land which may subsist in a third person to the diminution of the value of the land, but consistent with the passing of the fee by conveyance; hence, an outstanding lease for a period of years is an incumbrance. *Fritz v. Pusey,* 31 Minn. 368, 18 N. W. 94; *Grice v. Scarborough,* 2 Spear (S. Car.), *648; *Batchelder v. Sturgis,* 3 Cush. (Mass.) 201; *Porter v. Bradley,* 7 R. I. 538; *Noyes v. Rockwood,* 56 Vt. 647.

We are not unmindful that under the canon of construction by which this will was interpreted at the first hearing of the cause we must, if possible, carry into effect the manifest intention of the testator. Now, it is plain that this will was executed with the intent of providing a means of support for a degenerate and spendthrift son, such as William Albin is conceded by all parties to this controversy to be. William Albin is himself incompetent to manage and cultivate the lands in controversy, consequently, to obtain a livelihood from their use he must of necessity employ someone to cultivate them for him, and

whether this be done directly by hiring help and receiving the proceeds of the farm, or indirectly by receiving a fair and equitable allowance for the use of the farm, arrives at the same end by different means. While, as before stated, the lease as a conveyance for a term of years is prohibited, yet, we think, that in an equitable accounting for the rents and profits of the land by defendant Carey, the court should take into consideration the amount of rent actually paid to William Albin during the time the lessee occupied the premises, and should for this purpose treat the lessee as standing in the position of a tenant at will, rather than for a term of years. The lease under any view expired on the first day of March, 1905, so that we recommend that the judgment of the district court be reversed, with directions to take an accounting of the amount due for rents and profits of the premises in controversy during the time they were occupied under the lease, and to credit this account with such sums as William Albin has received from the lessee during the existence of the lease.

AMES and LETTON, 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, with directions to take an accounting of the amount due for rents and profits of the premises in controversy during the time they were occupied under the lease, and to credit this account with such sums as William Albin has received from the lessee during the existence of the lease.

REVERSED WITH DIRECTIONS.

MARGERY H. SMULLIN ET AL., APPELLANTS, V. IDA M. WHARTON ET AL., APPELLEES.*

FILED APRIL 19, 1905. No. 13,509.

1. **Wills:** BEQUESTS: TRUSTS. Where a person, knowing that a testator with whom he has confidential relations in leaving him a devise or bequest intends it to be applied for the benefit of another, either expressly promises or by his action at the time implies that he will carry the testator's intention into effect, and the property is left to him with the faith on the part of the testator that his promises will be kept, he will be held as trustee.

2. **Equity.** In such case the will has full effect by passing an absolute legacy to the legatee, but equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee as a trustee *ex maleficio* to turn over the gift to them. The court acts not upon an express trust created by the testator but, on account of the fraud, upon the conscience of the devisee.

3. **Elements of Trust.** A trust must be reasonably certain in its terms as to the property embraced in the trust, the beneficiaries, the nature of the estate they are to have, and the manner in which the trust is to be executed, and when any of these elements is indefinite or uncertain the trust must fail.

4. ———. Whenever the objects of the supposed recommendatory trust are not certain or definite, whenever the property to which it is to attach is not certain or definite, whenever a clear discretion or choice to act or not to act is given, and whenever the prior dispositions of the property import absolute and uncontrollable ownership, words of recommendation or request will not create a trust.

5. ———. Unless the property upon which the trust is to operate can be ascertained with reasonable certainty, an express trust will fail, and so of a constructive trust, whose extent and limits are the same as the express trust which it was attempted to create. Whether express or constructive, the same certainty as to the property is necessary.

6. **Case Distinguished.** *Little v. Giles*, 25 Neb. 313, distinguished.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Affirmed.*

* Rehearings allowed. See opinions, pp. 690, 705, *post*.
Rehearing denied. See opinion, p. 710.

John C. Cowin, V. O. Strickler and *James H. McIntosh*, for appellants.

W. W. Morsman, contra.

LETTON, C.

This action was originally brought in the district court for Douglas county by Margery H. Smullin and others, appellants, as plaintiffs, against Ida M. Wharton and John C. Wharton, appellees, as defendants. George H. Boggs of the city of Omaha died on the first day of June, 1895, leaving his widow, the defendant Ida M. Boggs, now Ida M. Wharton, surviving him and leaving no children. On the 16th day of May, 1895, about two weeks before his death, he executed a will by which he left all his personal estate, the home property and a lot in the city of Omaha to his wife absolutely, and devised all the residue of his real estate in trust to Harry A. Westerfield, to pay the income to his wife during her life and to distribute what was left in the trust at her death among his brothers and sisters, and the surviving children of any deceased brother or sister. This will was duly offered for probate, whereupon the surviving brothers and sisters and the children of a deceased sister of the deceased instituted contest proceedings upon the ground of undue influence. These proceedings were finally brought to this court, and an opinion rendered therein (*Boggs v. Boggs*, 62 Neb. 274) affirming the decision of the district court, and of the county court, admitting the will to probate. After the termination of the proceedings establishing the will, this action was begun by the surviving brothers and sisters and the children of a deceased sister of George H. Boggs to declare a trust in the property for their benefit. The allegations of the petition, in substance, being that their brother George H. Boggs died leaving a will as set forth; that at the time of his death Boggs was 55 years old, his wife a few years younger, and that the plaintiffs, his brothers and sisters,

were older than he and in comparatively reduced circumstances; that the parents of Mrs. Boggs were well to do; that Boggs and his wife had no children and that it was Boggs' intention that his wife's family should not have any of his property, but that it should all go to his brothers and sisters, except what his wife needed for her support; that he further intended at the end of each year that the net revenue of the estate, after deducting the living expenses of his widow, should be divided among the plaintiffs, and that his wife should make a will leaving all the property to plaintiffs at her death; that his wife at the time of the making of the will was fully advised of these intentions, and that she then before the will was executed gave him her solemn promise and undertaking that she would carry out his wishes, and accepted said trust; that he believed said promises of his wife, had full faith and confidence that she would execute the trust; that he relied upon said promises in signing the will; that shortly after the execution of the will he transferred to his wife part of his property to avoid the trouble and expense of probate, but at the same time subject to her agreement about it; that the defendant, Ida M. Wharton, has wrongfully and fraudulently repudiated her said agreement, has refused to perform the same and denies the plaintiffs' rights.

The answer sets up two defenses; the first defense consisting of affirmative averments setting up the transfer of real and personal property made after the execution of the will and before the testator's death; specific denials of the allegations of the petition whereby a trust is sought to be raised; an admission that the testator requested Mrs. Wharton to help his brothers and sisters from time to time according to her own judgment and discretion, as they had done during the testator's lifetime, provided the brothers and sisters should not make her any trouble by contesting the will, which she promised to do; averments that all the provisions for his wife's benefit in the will and all the transfers made *inter vivos* were intended to be ab-

solute and unconditional, and a plea that the alleged promises being wholly in parol are void under the statute of frauds. The second defense pleads the proceedings in the contest over the property of the will; that the plaintiffs herein introduced evidence for the purpose of proving the alleged promises on the part of the defendant, Ida M. Wharton, to the testator set forth in the petition in this suit, and that the final judgment in said cause probated, allowed and established the said will as the last will and testament of the deceased George H. Boggs. The reply was a general denial to the first defense, and to the second defense it alleged that the supreme court found that the defendant, Ida M. Wharton, took the property upon the trust alleged in the petition herein. The cause was tried to the district court for Douglas county and judgment rendered against the plaintiffs in favor of the defendants.

The record in this case is very extensive, but upon the most essential facts there is very little controversy between the witnesses. A full statement of the facts as to the conditions and circumstances and the relations between George H. Boggs, his wife, the defendant herein, and the plaintiffs is contained in the lucid opinion in the will case (*Boggs v. Boggs, supra*), to which reference is made. It is necessary, however, in the case at bar to examine and carefully weigh all of the testimony bearing upon the question of the creation of the alleged constructive trust, and further, to examine the law as laid down by the courts of England and this country for the purpose of evolving the proper principles to be applied to the facts as we believe them to be established by the testimony. In this connection it may be well to note that under a recent statute the trial in this court is a trial *de novo*. The conclusion which this court may come to from the testimony in the case is not controlled by the inferences drawn by the district court as to the facts.

The transaction from which appellants assert that the constructive trust for their benefit takes its inception took place upon the 16th day of May, 1895, at the time of the

execution of the will of that date. It appears that after Mr. Boggs returned from Chicago, about the first of May, when he was seriously ill, he had spoken to his confidential secretary, Mr. Westerfield, about changing his will, and on the 16th day of May he gave Westerfield specific directions to send Mr. Connell, his attorney, to him for the purpose of seeing about his will. Connell saw Mr. Boggs, received instructions about a change in the will, and returned to the residence of Mr. Boggs in the evening with the will prepared for signature. Mr. Connell went to Mr. Boggs' room and in the presence of Harry A. Westerfield read the new will to him. Westerfield testifies that when he came to the reading of the trust provision, Mr. Boggs asked if that could not be changed, and that Mr. Connell said he thought that expressed his wishes about as well as they could be expressed in any other way. After the will was read Mr. Boggs suggested that Mrs. Boggs be sent for. She was called into the room and Mr. Connell then read the will to her. After it had been read to her, Mr. Boggs asked his wife how that suited her, and she said that it pleased her, that whatever pleased him pleased her. He then stated that he had placed her in circumstances so that she could never want for anything. So far there is no dispute among the witnesses as to what occurred. But from this point the witnesses differ somewhat in their testimony.

Westerfield testifies that "he went on and stated that he had placed her in circumstances so that she would never want for anything. He wanted her to live—continue to live—as they were living; have all the money she needed, and keep up the house and everything just the same, and then he said: 'At the end of every year I want you to divide the surplus among my people.' And she said: 'All right, whatever pleases you pleases me, I will carry out your wishes.' And then he told her that her people were in good circumstances to take care of themselves, but his people were all poor, and that he wanted her to make her will so that at her death the entire estate would go to his

brothers and sisters. He said: 'If you want to give—then if you want to give something to charitable purposes, say five or ten thousand dollars, that is all right, but I want the bulk of my estate, my entire estate, to go to my brothers and sisters.'. And she said: 'All right, whatever pleases you pleases me.' Then he said: 'I want that done now.' Mr. Connell said to him: 'Whatever you give to Mrs. Boggs you want to give it to her out and out, you do not want to give her anything with a string tied to it.' He says: 'I know Mrs. Boggs, and she is disposed to do the fair thing, and I know that she will carry out your wishes.' Q. Well, just state when the will was signed with reference to the conversation? A. Right there. The will was signed then. Q. Just after? A. After Connell said this to her. Q. That you have just stated? A. Yes, sir, it was dropped there. The conversation was dropped and they helped him up. He was lying on the couch and he sat at the table and signed the will. Dr. Knode was called in, after the will was signed Dr. Knode left. After Dr. Knode left Mrs. Boggs called to Mr. Boggs and asked him what she would do in case the will was contested. He was lying on the couch at the time. He said: 'Why, there will be no contest.' 'But,' she says, 'suppose there is a contest, what shall I do?' He said: 'There will be none.' She says: 'Suppose there is a contest?' 'Well,' he says, 'then fight it.'"

Mr. Connell, after relating the circumstances up to the same point as to where Westerfield's testimony is quoted, substantially to the same effect, says that Mr. Boggs said to her: "Now, I have had Mr. Connell prepare this will, so that you will have everything you want, and I want you to live just as we have been living before this, and I want you to have everything you desire, and the will has been drawn by Mr. Connell for that purpose." And he said: "You know that my people are poor and your people are well to do, and I would like to have you, if you have any surplus, to help my people." And she said: "Anything you wish, George, I will do." He corroborates Westerfield

as to Mr. Boggs expressing the wish that he would like to have her help them out of any surplus she might have, but does not remember that she was to do this annually or at any stated time. But he does not deny specifically Westterfield's testimony.

Mrs. Wharton, formerly Mrs. Boggs, admits she told Mr. Boggs she would carry out his wishes; denies that anything was said as to an annual division of surplus or about her making a will in favor of plaintiffs, and says she agreed to help his relatives if they did not make her any trouble, but nothing was said as to the extent she was to help them. This is the substance of the direct testimony as to what occurred at the time the will was signed, except that one Millie Novotny, a domestic servant, testified that she was in the hall at the time of this transaction, and she relates at length a conversation substantially the same as that testified to by Westerfield. It appears from Mrs. Wharton's testimony that Millie told her the next morning that she had heard every word of the will read, and from other circumstances we believe she actually did overhear a part of the conversation, but her testimony is so interwoven with improbable and imaginary circumstances that we deem it inadvisable to give it any weight in attempting to ascertain what conversation actually took place in the room. There is indirect testimony however which corroborates Westerfield.

On the morning of the next day after the will was signed Mr. Hill who had been Mr. Boggs' partner for many years called upon him. He says Mr. Boggs told him "he was not feeling very well, and he says: 'I have made a will,' and he says: 'My wife has agreed that after she has everything she wants, and lived just as we have been living, at the end of the year that she would divide the surplus among my people.' This is about all of the talk." "He went on to say that his wife was going to carry it out, and would divide with his people at the end of the year."

Mrs. Drake, another sister, says Mrs. Boggs told her about ten days before Mr. Boggs died that it was all fixed;

that everything was left to her, and that she was to pay taxes, keep up expenses just as George would do, and at the end of every year divide what is left over with the brothers and sisters; that Mr. Connell had said: "Mrs. Boggs, this is all left to your honor," and she had replied: "Yes, and it shall be just as Mr. Boggs wishes."

John W. Boggs, a brother, testifies that a few weeks after George died he called on Mrs. Boggs and that she said: "Now, the property business is all settled, just as George said it was. I am to make my will, and agree to make my will, and will this property to you folks at my death, the property that is in trust—that was put into Harry Westerfield's hands; it was put in his hands to take care of, but she had control of it all, she claimed; and said that George first wanted to turn that property over to us at this time; that immediately after his death he wanted us to have it, but she thought that it ought to go to us through her—the same talk about that we had before, that it would go to us through her. She said that he had given her the house and lot, and that house back of the high school, and all the personal property amounting to about $75,000, somewhere along there, and that was for her to live on, but she still went further and stated that if anything happened, or she became unfortunate or anything, or lost her property, she could sell a piece of this other property, if she needed it, to apply to her own use." He says she further said she had promised to divide the surplus each year.

Mrs. Wharton's attention was called specifically to each one of the incidents narrated by the witnesses Mrs. Drake and John W. Boggs in which they testified to statements or declarations made by her with reference to the disposition of the property, and she denies making any such admissions or statements as are ascribed to her in regard to the property as these witnesses testify to.

After a careful reading of all the evidence, we have come to the conclusion that the transaction actually occurred as testified to by the witness Harry A. Westerfield. His testimony is strongly corroborated by that of Mr. Connell

who was placed upon the stand by the defendant, and is further borne out by the testimony of Mr. Hill, John W. Boggs and Mrs. Drake. The probability of its being true is further enhanced by a consideration of all the circumstances and relationships of the parties. We are impressed with the fact that Mr. Boggs had a strong affection for his father's family. When he attained a comfortable position in life he thought of them and of their needs. In his will of November, 1885, he gave his father, who was then alive, $2,000 and divided the remainder of his property equally between his wife and his brothers and sisters. By the will of 1893, the undivided half of his real estate, in addition to the homestead, was left absolutely and unconditionally to his wife, and the residue of the estate was given to Harry A. Westerfield, as trustee, for the use of his wife during her life, and at her death whatever of the estate was remaining in the trust should go to his brothers and sisters. By the will of 1895, a lot in Omaha was added to the real estate devised in 1893 to the wife, and the whole of the remaining real estate, in place of half of it, was placed in trust with Westerfield. Before the panic of 1893 his property is estimated to have been worth about $395,000, but in the crash which came he had seen his assets shrink and diminsh in value nearly $150,000, since in 1895 they are estimated to have been worth about $250,000. In the wills of 1893 and 1895 his first care was to provide for his wife He desired that his death should make no difference whatever in her manner of living; that she should live as well and be surrounded with as many luxuries as when he was alive. But in 1895, having had such an object lesson in the uncertainty of the value of investments, he evidently wished that she should have full, undisputed and exclusive control over all of his estate, so that even if it became necessary to sell a part of the property in order to maintain her in the style to which she had been accustomed she should have the power and right to direct the sale. This end was attained by giving her the absolute power of disposition during her lifetime

over all the property. At the same time, however, his brothers and sisters being older than himself and poor, while her relatives were well to do, he desired that any surplus which might remain after his wife had all the comforts and luxuries to which she was accustomed, and after she had all the income she desired to gratify her wishes, should go to his brothers and sisters. Though the will apparently increased the provisions for the benefit of his brothers and sisters, yet, since the youngest of them was ten years older than she, if they received nothing until after her death in the usual course of human events they would never share in his bounty. And in this fact we see the moving cause of his request to her to divide her surplus revenue with them.

The legal question presented is whether or not the requests made by George H. Boggs and the promises made by his wife at the time of execution of the will and before it was signed, together with her refusal to perform her agreement, constitute her a trustee *ex maleficio* for the benefit of the plaintiffs.

We have been favored with able arguments at the bar and with exhaustive printed briefs upon the legal questions presented. The position taken by the appellants in brief is that under the rules of equity, in such a case as this, the court will compel the wife to keep faith with her husband by constituting her a trustee for the benefit of the interested parties; that whether Mrs. Boggs when she gave her assent intended a fraud or not is immaterial, her refusal to carry out the trust having the effect of consummating a fraud; that the court will presume Mr. Boggs would not have made his will as he did if his wife had stated she would not carry out his wishes; that the relations between husband and wife are confidential; that Mr. Bogg's confidence was betrayed, and that the fraud gives rise to a constructive trust.

The appellees on the other hand maintain that before a constructive trust can be impressed upon the property the donee must have procured the gift to himself by fraud,

and not even then, unless the testator would, but for such fraud, have made the gift to the person alleging the fraud, nor even then, unless the evidence be clear, unequivocal and convincing. And that the trust sought to be established is void under the statutes of frauds and of wills.

We are convinced that Mrs. Boggs at the time she made the agreement with her husband to pay the surplus income each year to his brothers and sisters, and to make a will whereby his estate should go to them at her death, rather than to her own relatives, fully intended to carry out his wishes. While the relations during her husband's lifetime between herself and his family were not very close, still when her dying husband requested her to care for his aged relatives she willingly assented. Even at that season, however, she anticipated trouble and asked her husband what she was to do if they should contest the will. They did contest the will, and by their actions renewed and added to a feeling of hostility which apparently had formerly existed. The good will which was manifested by Mrs. Boggs to them at the time of and soon after her husband's death was changed to animosity, and under the influence of these feelings she has refused to carry out her husband's wishes. An important question which arises, however, in this connection is whether or not but for her promises to him he would have executed the will in the form that it was executed. Unless the will was signed by the testator in the form that it was because he relied upon his wife's promise to carry out his wishes, and unless we come to the conclusion that if she had not so promised, the will would not have been executed in the form that it actually was executed, no constructive trust would rise. It is important to notice in this connection that before the will was signed Mrs. Boggs was called into the room, his wishes were clearly stated to her, she promised to carry them out, and not until after the promise was made was the will signed. Had she stated then that she refused to carry out his wishes, one cannot doubt that other provisions guarding and preserving the interests of his

brothers and sisters would have been inserted in the will itself.

Cases of like nature to this have been before the courts for many years. The uniform rule in England has been that where a person, knowing that a testator in giving him a devise or bequest intends it to be applied for the benefit of another, either expressly promises or by his action at the time implies that he will carry the testator's intention into effect, and the property if left to him with the faith on the part of the testator that his promises will be kept, he will be held as a trustee. The court will not allow him to set up the statute of frauds or the statute of wills as a defense, for the reason that by his conduct he induced the testator to leave him the property. The court does not violate the statute, but for the prevention of fraud impresses a trust upon the gift in the hands of the devisee in order to prevent fraud. The will is not interfered with, the property passes by it, but equity acts, not because of the trust declared by the testator, but because of the fraud of the devisee. The court acts not upon an express trust created by the testator, but, on account of the fraud, upon the conscience of the devisee.

In *Sellack v. Harris,* 5 Vin. Abr. 521, a father purchased land. When on his deathbed he sent for his eldest son and told him these lands were purchased with his second son's money and that he intended to give them to him, whereupon the eldest son promised that he should enjoy them accordingly. The lord chancellor held that because of the fraud, in that the eldest son promised the father on his deathbed, the case was taken out of the statute of frauds.

In *Segrave v. Kirwan,* Beat. (Irish) 157, where an attorney who drew a will whereby he was appointed executor did not inform the testator of the rule of law that the personal estate undisposed of by will belonged to the executor, and where the defendant testified he was not aware of the legal effect of his appointment, the lord chancellor said that no fraudulent imposition had been

proved, and no imputation on defendant's personal character can result from the decree; yet that under the circumstances a court of equity will not permit him to retain the residue of the estate for his own benefit, and that he must be made a trustee of it for the next of kin. It was argued in that case as in the one at bar that to grant the relief prayed would in fact set aside the will, and that the ecclesiastical court has sole jurisdiction, and it was said by the court: "The will still remains operative in all its legal effects as established by the ecclesiastical court, but the court of equity controls it according to rules of conscience. The law of the court in this respect is not confined to implication arising on the face of the will. It extends to all cases wherein fraud or other circumstances peculiarly cognizable in equity occur."

In *Marriot v. Marriot,* 1 Strange (Eng.) 666, counsel contended that the probate of the will was conclusive evidence, and that a court of equity could not look into the disposition of the estate, but the court said: "A court of equity must consider what is the real will of the testator, and they cannot declare a trust according to their own fancy, nor according to what the testator should have willed, for then they make the will, and not the testator. But they may, to answer the real intention of the testator, declare a trust upon such will, though it be not contained in the will itself, which is in these three cases: (1) In that of fraud upon a legatary before mentioned. (2) Where the words imply a trust for the relations, as in the case of a specific devise to executors, and no disposition of the residuum. (3) In the case of the legatee promising the testator to stand as a trustee for another. And nobody has thought that declaring a trust in any of those cases is an infringement of the ecclesiastical jurisdiction."

In *Devenish v. Baines,* Finch, Ch. Prec. 3, a copyholder by his will intending to give the greatest part of his estate to his godson and the other part to his wife, the wife persuades him to nominate her to the whole and that she would give the godson the part designed for him.

Decreed against the wife notwithstanding the statute of frauds.

In *Barrow v. Greenough,* 3 Ves. (Eng.) 151, the testator requested the defendant, who was one of his executors and the person to whom the residuary estate finally was to come, to pay to his sister, Ellen Barrow, an amount greater than left to her in the will, which he promised should be done, though at the same time asking the testator to have a new will made inserting this provision. This the testator refused to do, saying he would leave the same to the defendant's generosity. The defendant's counsel insisted that this was contrary to the statute of frauds, and that it was left to defendant's discretion as to payment. The master of the rolls said: "I will not criticise upon words; nor do I think the word 'generosity' can be construed to take away the effect of a solemn desire of the testator coupled with the promise of the defendant. The defendant had no intention of fraud at that time, for he desired the testator to make a new will. * * * The question is, whether by reposing that trust in the defendant the testator was not prevented from making a new will. The defendant ought to have told him, that if he did not put it in his will, he would not do it, instead of that he promised to do it; upon which the testator refuses to make a new will, and says, he leaves it to his generosity, that is, he leaves it to his conscience. * * * The question is, whether the confidence, that the defendant would perform the trust he undertook, did not prevent the testator from making a new will." See also *Chamberlain v. Agar,* 2 Ves. & Bea. (Eng.) 259; *Mestaer v. Gillespie,* 11 Ves. (Eng.) 638, note.

The same rule has been well expressed in this country in *Trustees of Amherst College v. Ritch,* 151 N. Y. 282, 324, as follows: "The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has

full effect by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee *ex maleficio,* to turn over the gift to them. * * * Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved, but to promote justice and prevent wrong the courts compel the legatee to dispose of his gift in accordance with equity and good conscience."

Nearly all the cases upon this subject have been collected in the opinion of the supreme court of Indiana in *Ransdel v. Moore,* 153 Ind. 393, 53 L. R. A. 753. We can add nothing to the able and exhaustive discussion of this question by that court. The Indiana court has examined, and cites in the opinion, not only the majority of the English cases upon the question, but almost every American case, among them being nearly all the cases cited in the briefs or in the argument of the case at bar, and draws the conclusion that the act of the husband in that case preventing the wife from making the will, and in promising to act as trustee, though there was no actual fraud, and the promise was in parol, made him a trustee for the brothers notwithstanding the statute of frauds.

Section 4 (chapter 32, Compiled Statutes, 1903; Ann. St. 5953) of our statute of frauds provides that the preceding section, which prohibits the creation of any trust over lands except by a deed in writing, shall not be construed to prevent any trust from arising or being extinguished by implication or operation of law. This section removes the transaction under consideration from the operation of the statute, because such trusts arose by operation of law before the statute of frauds was ever enacted. Nor, under the rule long ago laid down by the English courts, and followed by the courts of this country, does the statute of wills prevent the raising of this trust by the operation of the chancery powers of the court upon the conscience of the devisee. The section is only

declaratory of the rule which had long existed independently of any statute.

We conclude, therefore, that by the promise made by Mrs. Boggs to her husband at the time of the execution of the will, relied upon by him in signing that instrument, and her refusal to carry out her promise, she thereby became a trustee *ex maleficio,* if the trust was definite and certain enough to be capable of enforcement. Though no fraud was intended by her at the time, yet by the circumstances of confidence and trust arising from the marriage relation, her husband trusted her and relied upon her to carry out his wishes; and her refusal to do so after her promise and after the property was vested in her was such a fraud as will make her, in equity, a trustee, if a trust was created by the language used by Mr. Boggs. In other words, we conclude that the plaintiffs are entitled to be treated in relation to the estate as if the words used by Mr. Boggs had actually been written in the will.

There remains to be considered the question of whether the trust thus created is clear and definite enough in its provisions and so free from uncertainty that a court of equity can enforce its execution. The rule seems to be that whenever the property to which such a trust is designed to attach is not certain and definite, or whenever the prior disposition of the property by the will is such as to import the absolute and uncontrollable disposition of it, a trust will not be created. The earlier English cases carry the doctrine of precatory trusts to a greater extent than the later cases, and at present the party claiming that such a trust exists for his benefit must show that his case falls within the rules of certainty of subject matter, as well as establish the intention to charge the property. A trust must be reasonably certain in its terms, as to the property embraced in the trust, the beneficiaries, the nature of the estate they are to have, and the manner in which the trust is to be executed, and when either of these elements is indefinite and uncertain the trust must fail. 3 Pomeroy, Equity Jurisprudence, sec. 1009. If

there is such uncertainty that it cannot be known who is to take as beneficiary the trust will fail, or if the property which is attempted to be put in trust is so uncertain that it cannot be separated or distinguished from the individual property of the trustee the trust will be void for uncertainty. No trust will be created where the property to be the subject of the trust is left uncertain. *Winch v. Brutton,* 14 Sim. (Eng.) 379; *Fox v. Fox,* 27 Beav. (Eng.) 301; *Cowman v. Harrison,* 10 Hare (Eng.), *234. Unless the property upon which the trust is to operate can be ascertained an express trust will fail, and so of a constructive trust whose extents and limits are the same as the express trust which it attempted to create. Whether express or constructive the same certainty as to the property is essential. Note to *Knox's Appeal,* 6 L. R. A. (Pa.) 356; 2 Story, Equity Jurisprudence, secs. 1070, 1073.

The same night that the will was executed Mr. Boggs inquired of Mr. Connell whether he could not give his wife outright certain other property, and, upon being told that he could, directed Westerfield to prepare a deed to the same real estate specifically devised to his wife and an assignment of certain notes secured by real estate mortgage amounting to about $72,000. These papers were prepared, and the next day executed by Mr. Boggs, and delivered by him to Mrs. Boggs, so that property to that extent was removed from the operation of the will. Mrs. Hoover testifies her brother told her after this that he had given his wife $25,000 or $30,000 to do with as she pleased, while other testimony would indicate an intention to include the whole estate in the attempted trust. We are uncertain from the evidence whether it was the intention of Mr. Boggs that the personal property which he thus segregated and delivered to Mrs. Boggs in his lifetime and the real estate thus conveyed to her should be impressed with a trust, or whether it was his intention that this property should become hers absolutely. All authorities agree that in order to create a trust the intention must be clear and satisfactory. As to this property we believe the evidence

is not sufficient to justify a court in impressing a trust upon it for the benefit of the plaintiffs. If it had been Mr. Boggs' intention so to do at the time he signed the will he evidently changed his mind. At all events there is too much uncertainty about the transaction to warrant this court in holding that this property was not given absolutely to the wife. It is incumbent upon the plaintiff to establish clearly the existence of a trust upon the property, and this they have failed to do.

As to the request that Mrs. Boggs should make a will in favor of the plaintiffs there are several reasons why this cannot be enforced. Mr. Boggs said in making the request: "If you want to give anything to a charitable institution, or anything else, why do it, say five or ten thousand dollars. I want the bulk of my property to go to my people." Under the provisions of the trust in Westerfield all of the real estate might be sold by the direction of Mrs. Boggs. She might use the proceeds for her living, or dispose of it as she pleased. Under the oral request she might give to charity, or anything else, five or ten thouthousand dollars, and was only asked to bequeath "the bulk" of the property to his relations. There is no certainty in the property here. Mrs. Boggs could convert all of the real estate into money, could use as much as she pleased, could give to charity an indefinite sum, and was only asked to leave the "bulk" of the property to the plaintiffs. Where "the bulk of the property" is given the amount is uncertain and the trust must fall. *Palmer v. Simmonds,* 2 Drew (Eng.) 221. In *Curtis v. Rippon,* 5 Mad. (Eng.) 434, a testator gave all his property to his wife "trusting that she would use it for the spiritual and temporal good of herself and children, remembering always the church and the poor." The vice chancellor held "the wife absolutely entitled to the property, there being no ascertained part of it provided for the children, and the wife being at liberty at her pleasure to diminish the capital either for the church or for the poor." See also 1 Lewin, Trusts, *132, *133, *134; *Knight v. Knight,* 3 Beav. (Eng.) 148.

In *Eade v. Eade,* 5 Mad. (Eng.) 118, the bequest was, "I give all the remainder of my effects, cash, goods, plate, books, etc., of every description to my wife, Alice Eade Eade (the plaintiff) requesting that she will at her death leave 200*l.* to each of the Miss Nortons and leave the remainder of her property to my nephews, George and William Eade, in such proportions as she thinks proper." Sir John Leach, vice chancellor, says: "A request or recommendation will raise a trust, if the objects and that the property are described with such certainty that the court can execute it. The defendants, the Miss Nortons, are plainly entitled to the legacies of 200*l.* each; and if the testator had requested his wife at her death to leave the remainder of his property to George and William Eade, there would have been a clear trust in their favor, because the remainder of the testator's property could have been ascertained. I cannot say that by the remainder of *her* property at her death he meant the remainder of *his* property. It must be understood to mean such property as she happened to possess at her death, from whatever source derived. This testator having therefore, in effect, left his wife at liberty to deal with the remainder of his estate as she pleased, his request as to the uncertain property of which she might be posessed at her death, cannot create a trust."

In *Bryan v. Milby,* 6 Del. Ch. 208, 13 L. R. A. 563, the gift was of all of the estate to the testator's wife. "And I do *request* my wife if she should not *require* the whole of my estate *as a support,* that she will will at her death the remainder to the children of my brother, Charles A. Bryan." Saulsbury, chancellor, said: "The subject of the gift claimed as precatory was not certain. * * * There might be, or there might not be, any remainder of his estate which could be enjoyed after his wife's death by any person whomsoever. A necessary ingredient or characteristic, therefore, in a precatory devise or gift is wanting in this case. There was nothing that this court could have ordered impounded if application for that purpose

had been made to it. I must therefore decide, and I do so decide, that the gift to Mrs. Bryan was absolute and unconditional, and not upon an obligatory trust in favor of the complainants." See also *Bills v. Bills,* 80 Ia. 269, 8 L. R. A. 696; *Cornwell v. Wulff,* 148 Mo. 542, 45 L. R. A. 53; *Orth v. Orth,* 145 Ind. 184; *Howard v Carusi,* 109 U. S. 725, 731, 3 Sup. Ct. Rep. 575.

We deem it advisable to note and distinguish in this connection the case of *Little v. Giles,* 25 Neb. 313. In that case the facts were that one Jacob Dawson made an absolute bequest of his estate to his wife with power to sell as long as she remained his widow, upon the condition that if she married again "all of the estate herein bequeathed, or whatever may remain," should go to his children. The court held that a conveyance of the real estate by Mrs. Dawson after the death of the testator, and before her remarriage, conveyed the fee to the realty, and her subsequent marriage did not affect the title to the same. In the opinion there are cited, apparently with approval, a number of cases holding that, whenever it is the intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because inconsistent with the absolute property in the first devisee. The question whether or not the limitation over of "whatever may remain" was void was not in issue in the case and was not passed upon by the court. This is pointed out by Mr. Commissioner AMES in *Schimpf v. Rhodewald,* 62 Neb. 105, wherein he says that, in *Little v. Giles,* "this court did not definitely or distinctly decide whether the widow took the whole estate in fee and the devise over was void, or whether she took a life estate only, with power to sell and convey the fee and the devise over was valid and effective upon the undisposed of residue, if any, at the date of her marriage. * * * 'Conveyances executed by the devisee during her widowhood were alone in the controversy, and it was held that during that time she had power to convey the fee. This sufficed for the disposition of the suits, and that this was all that this court

definitely decided, is apparent from the syllabi in *Little v. Giles, supra,* which were prepared by the same hand that wrote the opinion in that case.' "

To effectuate the request made by Mr. Boggs that his wife should make a will in favor of the plaintiffs is impossible, for the court has no power to regulate Mrs. Boggs' discretion as to the amount of any gift she may desire to make to any charitable institution, or for any other purpose, nor to say she shall or shall not dispose of a large part of the estate as best seems to her. Further than this "the bulk of my property" is a very vague, uncertain and indefinite term, not subject to definite ascertainment. It may vary from a little over half to nearly the whole estate, and is not susceptible of being rendered certain by any proceedings within the power of a court.

There remains to be considered whether or not the direction that the surplus money in Mrs. Boggs' hands each year, if any there should be after she had had everything she wished, was to be divided between the plaintiffs, can be enforced as a trust. We may assume that the direction given by Mr. Boggs was positive enough to make it the duty of his wife to carry out his wishes, if the property upon which the request was intended to operate was sufficiently definite in amount and subject matter, and did not depend upon the absolute power of disposition of the trustee as to whether there would ever be any property upon which it could operate.

In *Cowman v. Harrison,* 10 Hare (Eng.), 227, the testator gave his wife a yearly income from certain property and "particularly recommended, desired, and directed his wife, at her decease, by will or otherwise, to divide or dispose of what money or property she might have saved from the yearly income thereinbefore given to her, amongst all his children in equal shares." The vice chancellor said: "The first question which arises, is upon the right of the children and parties claiming through them under the will of John Barwise the father to the savings of the

income of Joanna the widow. Two views were put forward as to the effect of this clause with regard to the savings. The plaintiffs argued that it was a gift of the income to the widow for her life, with a gift over to the children of so much as she might not spend, bringing the case within *Surman v. Surman*, 5 Mad. (Eng.) 123. On the other hand, the defendants contended, that this was a precatory gift, a gift made by means of a request imposed upon another, to whom the beneficial interest is given. The first thing to be considered is, within which class the disposition falls, which must be determined by the subject of the gift, and the terms of the bequest. The subject of the gift in this case is 'savings.' The 'savings' are to be made by the widow. The amount of such savings is dependent entirely upon her. It cannot be imputed to the testator that he intended this part of his will as an inducement to his widow to spend the whole of her income; and if not, what then did he intend that she should save? He meant to give what she might save, but what she saved would depend entirely on her will and pleasure; and so far therefore as regards the subject of the bequest, it was to be the testator's gift; but whether there should ever be anything upon which it could take effect depended upon the will and pleasure of the widow. Then what are the terms of the bequest? The widow is to dispose of it by will or otherwise. It is under her disposition that the children are to take. They take under her disposition, made by the testator's desire, and not under any gift contained in his will. This is the very nature of a precatory gift. It is not the case of a gift to A with a gift over of the subject to B; but it falls within the class of cases where there is a gift to A, with a request that he will bequeath it to B. I am of opinion, therefore, that this is a precatory gift. The next question is, whether, as a precatory gift, it is good. The rule as to such gifts is, that there must be a certainty of subject; and the foundation of that rule stands on very solid grounds. The right of a donee to spend the subject matter of the gift is inconsist-

ent with the nature of a trust; and the court therefore collects in that case, that there can be no intention to impose a trust. The disposition is such, that, if a trust were raised, it could not be enforced; and the court therefore will not impute to the testator an intention to raise it."

This principle is applicable in the case at bar.

In the instant case the amount of money which is necessary for the support and maintenance of the appellee is left entirely uncertain, no limit is placed to her expenditures for her own use. Is it not beyond the province of a court to act as custodian, director and purveyor of the household expenses of an individual in a case where the expenditure is left alone to the individual's discretion? Courts of equity in this country have not been swift to assume the plenary powers so often exercised in England by the court of chancery. The court cannot undertake to control her expenditures, to dictate how much she shall pay for her clothing, for the furnishing of her home, the exercise of hospitality or for whatever outlay she may desire to make. It was her husband's intention that she alone should have the control over the amount of money she should spend. If she desires to travel she has the right to do so, provided the income is sufficient to pay her way. The court cannot undertake to limit nor prescribe in any manner or in any form the amount of money which she may use. It is within her power to spend all the income if she so desire, and thus leave no surplus upon which the trust may operate. Since the amount of any surplus liable to be divided between the appellants is uncertain, indefinite and incapable of ascertainment, a court of equity will not attempt to establish or administer such a trust. A court can only enforce a disposition of property which has been made by the deceased if it is capable of being enforced, and will not attempt to make a new disposition of it, or to make more definite and specific the disposition of the property which the testator may have made himself. From these considerations we conclude that the direction by Mr. Boggs that the surplus income

each year coming to his wife from the property left to her by the will cannot be adjudged and set apart to the plaintiffs by a court by way of enforcing a trust in the same on their behalf.

Upon the whole case we are of the opinion that we cannot make that certain which was left uncertain by the testator, and cannot establish and fix a trust upon the property for the appellants' benefit.

We recommend 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.

The following opinion on rehearing was filed January 3, 1906. *Reversed with directions:*

Wills: BEQUESTS: CONVEYANCES: TRUSTS. B a short time before his death, which he knew must soon occur, devised and bequeathed to his wife (they both being advanced in years and childless) certain of his real estate and all of his personalty, to have and to hold absolutely and unconditionally in her own right forever. The remainder of his realty, being the major portion of his estate, was devised to W, trustee, upon the following trusts: (1) To pay out of same the expenses of maintaining the trust. (2) To deposit to the credit of his wife for her own use the net income therefrom. (3) On request of the wife in writing to sell any part thereof and deliver to her for her own use absolutely the proceeds, or otherwise invest the same in the name of the trustee for the purposes therein specified as she may direct. (4) Upon the decease of the wife to divide whatever of his said estate as shall then be remaining between the brothers and sisters of the testator (naming them) share and share alike, and the issue of deceased brothers and sisters, if any. Before the will was executed the wife was called into the room and it was read over to her, the testator asking if it suited her, and she answered in the affirmative. He then made certain oral requests and directions with reference to his estate, the substance being that he had placed her (his wife) in comfortable circumstances so that she

would not want for anything; that he wanted her to live as they were living, and at the end of every year to divide the surplus among his people; that her people were in good circumstances, but his people were poor, and that he wanted her to make a will so that at her death his estate would go to his brothers and sisters; that if she wanted to give to charitable purposes say five or ten thousand dollars, that would be all right, but that he wanted the bulk of his estate, his entire estate, to go to his brothers and sisters. To all this she expressed her assent and entire willingness to carry out the testator's wishes. The wife shortly after the execution of the will expressing fear that it would be contested, the husband by instruments of conveyance and assignment absolute and unconditional in terms transferred to her substantially all the property going to her directly by the terms of the will. After the death of the testator the wife refused to comply with the parol requests and directions made at the time of the execution of the will and assented to by her, and disavowed their binding and obligatory character on her, asserting that she had an uncontrolled discretion as to whether any of the property or the income therefrom passing by the will should go to the collateral heirs of the testator. *Held:* (1) Conceding that the wife became the general owner of the property embraced in the express trust because of the power given to alienate and acquire legal title thereto and to the proceeds thereof in her own right, that a constructive trust arose in favor of the collateral heirs as to all such property, and that the wife should be charged as a trustee *ex maleficio.* (2) That her interest in such property, the proceeds thereof and the net income therefrom was limited to the amount reasonably necessary and required to support and maintain her in the comforts and style of living to which they had been accustomed, and to give not to exceed ten thousand dollars for charitable purposes, the equitable title to and interest in the remainder passing to the collateral heirs named in the will, and to be distributed between them according to its terms and the parol requests and directions of the testator. (3) That the property to which the constructive trust attaches is sufficiently definite and certain as to render the trust capable of execution and enforcement, and that our former holding to the contrary should be modified accordingly.

HOLCOMB, C. J.

In the opinion heretofore filed will be found a full and accurate statement of the case, and but little need here be added in order to intelligently understand the controverted points and the course of the discussion to follow. *Smullin*

v. Wharton, ante, p. 667. The suit was begun for the purpose of having declared and established a trust in favor of the plaintiffs, appellants here, in the property devised to the defendant Ida M. Wharton, formerly Ida M. Boggs, appellee. The trust sought to be fastened on the property rests in parol, and one of the vital questions for determination is whether the words spoken by the testator when he executed his last will, whereby the property was devised to the appellee Ida M. Wharton, are to be construed as mandatory, and sufficient under the circumstances to raise a constructive trust in favor of the appellants, or were merely precatory, leaving to the legatee an uncontrollable discretion as to whether she would comply with the expressed wishes and desires of the testator made at the time of the execution of his last will. In the former opinion the issues were generally determined in favor of the contention of the appellants, but the trust sought to be fastened on the property, it was held, must fail because of the lack of certainty and definiteness of the subject of the trust, the property embraced within it, or on which it would operate, and, for that reason alone, the alleged trust was declared indefinite, uncertain and incapable of enforcement. Upon further consideration of the case, and after listening to able and exhaustive arguments of counsel, and considering the subject with the aid of printed briefs thoroughly covering the case in all its phases, with numerous citations of authorities, we are not disposed to recede from anything said in the former opinion as to the plaintiffs' contention being well founded in all respects in so far as these contentions were upheld. We purpose now to address ourselves more directly to the question of whether the trust sought to be declared and established ought to fail because of a lack of certainty as to the property embraced in an otherwise valid and enforceable constructive trust arising in favor of the appellants. In order to gain a somewhat clearer idea as to what the testator intended regarding the ultimate disposition of his property, and what his directions were in respect thereto, and how his lan-

guage should be construed, both spoken and written, it may be of benefit to note some of the indisputable facts established by the record. The controversy is between his near blood kindred, his brothers and sisters and their issue on the one hand and his surviving wife on the other. He and his wife had passed the meridian of life and were childless. He was devoted to her, and had the full measure of love and affection for his near relatives, who were in comparatively poor circumstances. He had been more successful and during his life had accumulated a competence; his estate at the time of his death being of the approximate value of $250,000 or upwards. He died June 1, 1895. In November, 1883, he wrote his own will, giving his wife one-half of the whole of his real and personal estate, and to his near blood relatives the other half. In March, 1893, he executed a new will whereby he gave to his wife absolutely and unconditionally, to have and to hold, all of the same absolutely and unconditionally in her own right, his home property, consisting of two lots in the city of Omaha, and in addition thereto the undivided one-half of all his other real estate, and also absolutely and unconditionally all his personal property of whatsoever nature of which he might die seized and possessed. The remainder of his real estate was devised to Harry A. Westerfield as trustee upon the following trusts: (1) To pay out of the same all the expenses of maintaining the same and administering the said trust. (2) To deposit in bank to the credit of his wife for her own use the net rents, issues and profits thereof. (3) On the request in writing at any time of his said wife to sell any part thereof and to deliver to her for her own use absolutely the proceeds of such sale, or otherwise invest the same in the name of the trustee and for the purposes herein specified, as she may direct. (4) Upon the decease of his said wife his trustee was directed, without unnecessary delay, to divide whatever of his said estate as should then be remaining in this trust equally, share and share alike, between his brothers and sisters and the issue of deceased brothers and sisters,

if any, such issue to take the share of the deceased parent. The will as thus executed, it is manifest, was not entirely satisfactory to the testator, and he, a short time before his death, more than once spoke of having it changed. On the 16th day of May, 1895, and within a few days of his death from an illness he knew must shortly terminate fatally, a third will was drawn by his lawyer and duly executed, and by which he died testate, in which there were no substantial changes from the provisions contained in the second except that, as to his real estate, his wife was given absolutely and unconditionally in her own right the home place and one certain other lot situated in the city of Omaha, all the remainder of his real estate being devised in trust in the identical language, and under the same provisions, contained in the second will. In all other respects the latter two wills were similar in their wording and terms. It is obvious that the testator, when the last will was executed, and when impending dissolution was near at hand, was desirous that his near kindred should share in his bounty, else why did he place the bulk of his property in trust with the trustee named, and provide so minutely for its final distribution, or what was left of the trust estate, to them in the manner expressed in the will? It is apparent from the record that the testator had some misgivings regarding the terms of the will as last drafted, for it is in evidence that during the reading of the provisions relating to the trust estate the testator inquired of his lawyer, who drafted the will, if that could not be changed, and that, in substance, the reply was made that his wishes were expressed as well as they could be in any other way. And it is in evidence also that in the conversation following between the testator, his wife and his lawyer, the latter said to him in substance, that whatever was given to the wife should be given out and out; that the testator did not want to give her anything "with a string tied to it," and added, "I know Mrs. Boggs, and she is disposed to do the fair thing, and I know that she will carry out your wishes."

But one inference can be drawn from the remarks to

which we have alluded, and that is, that the testator was gravely concerned about his relatives and the certainty of their becoming the beneficiaries of his bounty, as he clearly intended and desired that they should. His wife was provided for to the full extent of his ability beyond peradventure of doubt, but the status of his relatives, those named in the express trust provisions, was not clear to him, and whether or not, perchance, they might receive nothing was what led to his inquiries of his counsel, and expressions of desires and directions to his wife, and fully accounts for the conversation between them out of which a constructive trust, if one exists, must arise. The former opinion treats fully of this phase of the case and we need not undertake to review the transaction in detail. Suffice to say that in these verbal requests and directions on the part of the testator to his wife as to the ultimate disposition of his estate, which she assented to and expressed herself as perfectly willing to carry out in the utmost good faith, the substance was that he wished his wife to enjoy the use of the property, or such portion thereof as might be found necessary to support and maintain her in the same comfort and style of living they were accustomed to, and that the surplus, if any, of the net annual income of the estate devised in trust should be divided between his relatives mentioned in the will, and that such of the estate as remained at her death should likewise pass to the same persons or, in the event of the death of any of them, to the children of such deceased person. It is upon these oral statements, assented to by the wife, and her promises and agreement, resting in parol, as they do, and refusal to comply with them, that appellants ask that a constructive trust be established and decreed in favor of such heirs upon all of said estate and the net income therefrom, above that required to maintain the wife during her lifetime, and her right to bestow for charitable purposes a sum not exceeding ten thousand dollars.

Soon after the execution of the will the wife, it appears, became alarmed lest the will should be contested, and

desired to know of the testator what she should do in the event her fears were realized. The testator, while expressing confidence that no contest would be instituted, advised her to resist if one were begun. This conversation, as we view the record, explains why the testator, after the execution of the will and before his death, conveyed and transferred absolutely and unconditionally, by duly executed deeds of conveyance and instruments of assignment, all of the real estate mentioned and described in the will as passing to her directly, and substantially all the personal property, the instruments of assignment covering specific property, while by the will all his personal property was bequeathed to her. By these instruments, if they are effective, with the exception of a small amount of personal property, the trust estate alone was left to be administered upon under the terms of the will. In the opinion heretofore prepared by the commissioner and adopted by the court, it is held that a constructive trust in favor of the appellants was created by the oral requests and directions of the testator, the assent of the wife thereto, and her attempted repudiation of the obligation she assumed regarding the final disposition to be made of the estate of the testator, but for the fact that the subject of the trust, that is, the property on which it was attempted to be fastened, and on which it was to operate, was too indefinite and uncertain, the trust therefore failing because incapable of enforcement. It is to this latter conclusion that complaint is made in the motion for a rehearing, and for the further consideration of which oral arguments on the motion were requested.

It is manifest, we think, that the testator intended to provide for the comfort, care and support of his wife during her lifetime to the extent, if required for that purpose, of the whole of his estate, and undertook to accomplish this purpose in such a way as that no future contingency or misfortune should result in a miscarriage in the bestowal of his bounty on her, the first and principal object of his solicitous care and loving affection. It is equally

manifest, as it seems to us, that after his wife had been surely and certainly provided for so that she might live as they had lived in the past, the remainder of his estate should go to the children of his own father and mother and their children, rather than to her heirs or to strangers. In reaching this conclusion we have ever kept in view the indisputable evidence of his intentions, as disclosed by the several wills by him executed, in connection with the more or less uncertain and unsatisfactory testimony of the several witnesses concerning the transaction and conversation between him and his wife occurring at the time of the execution of the last will. These written documents, when considered alone, furnish substantial evidence disclosing an intention on the part of the testator in disposing of his property to bestow a portion of it on his own kindred, unless required by his wife for her own support and living according to their station in life. It is to be observed that in the first will the property was divided equally between his wife and his collateral heirs, and in the second and third it was divided into two portions, one of which was given to his wife absolutely and unconditionally in her own right, and the other portion was devised to Westerfield in trust and upon different terms than that devised directly to the wife. In the trust provisions it was not mentioned that the wife should become the unconditional and absolute owner. The power of alienation given her was, it is true, for her own use absolutely. That is, in the one case the property passed to her in her own right absolutely, while in the other the power of disposition was restricted "for her own use absolutely," the remainder, if any, to be among the other objects of his bounty as therein named. The testator manifestly had a purpose in thus providing for the devolution of his property, and to ascertain that purpose we need not, as we view the record, search in vain. There was certain of his property he desired should pass to his wife directly, unconditionally and absolutely in her own right. Other property he preferred to place in trust, with the right to

his wife to its use for her maintenance and support during her life, the remainder to go to and be divided between his relatives as therein mentioned at her death. We are not to be understood as saying that the wife's title to the trust property was legally charged with an express trust in favor of the other devisees mentioned, and yet it is not altogether clear that such a result may not legally flow from the provisions of the express trust. It would seem that there would be merit in the argument that she would not in equity be permitted to dissipate this trust property, use its proceeds extravagantly, nor, for the same reason, transfer it to third parties merely to convert the property to her own right and ownership, and thus deprive the other devisees of any share in the estate. When the testator made provisions for the expenses of maintaining this trust, and of selling and reinvesting the proceeds, and of distributing the remainder at the death of his wife to his near kindred, it is obvious that he contemplated that there would be property to be thus administered in trust during the whole of the lifetime of his wife, and ultimately divided between those who were undoubtedly the objects of his bounty second only to her.

Passing this point, however, and treating the wife, as we do, as the general owner of, and with power to acquire the legal title to, the property covered by the express trust, and construing the power of alienation therein given her as being inconsistent with a gift over to the other beneficiaries therein mentioned, and therefore free from a trust arising in their favor subject to her right to use what is reasonably necessary to support her during life, it must, we think, follow, as expressed in the former opinion, that the oral requests and directions of the testator made at the time of the execution of the last will, and assented to by the wife, raise a constructive trust in their favor as to all such property, and the wife should be held with reference thereto as a trustee *ex maleficio*. To hold otherwise is to ignore the expressed will and manifest desire of the testator, and the effect would be to per-

mit the devolution of this property to the heirs of the wife and to strangers, where it is obvious he never intended it to go and was especially anxious and desirous that it should not go. To allow the wife to take this property unconditionally in her own right, to do with it according to her uncontrolled discretion, is, as it seems to us, to thwart the testator's clearly expressed intentions, and to authorize the accomplishment of what he made an earnest effort to avoid, and would have, beyond doubt, avoided in no uncertain way or ambiguity of expression, were it not for his settled determination to provide for his wife's support and maintenance to the utmost extent of his power so to do, and the absolute confidence he reposed in her that she would carry out his known wishes by giving to his own near kindred that portion of his estate devised in trust, and not required for her own support in maintaining her in comfort and according to the style of living they had been accustomed to. It is believed that a consideration of the matters contained in the several wills and the manner of their execution lend confirmation and added emphasis to these views. We are of the opinion that the oral requests and directions of the testator, and the assenting thereto by the wife at the time of execution of the last will, when, while the shadow of death was creeping over him, he was attempting to make satisfactory arrangement and final disposition of his earthly affairs, place the matter of a constructive trust arising in favor of the collateral heirs beyond the pale of serious controversy. To now construe the will, and the parol agreement in relation to the property, as authorizing the wife to take the property absolutely and unconditionally, would result in a fraud on his right of disposal of his property and on the rights of those who were the objects of his bounty after his wife was provided for. It would be by her own wrong that she obtained the possession of and right to this property, and equity will not permit her to do that. When the testator expressed the desire that the "bulk of his estate (the bulk of) his entire estate," should

go to his own people he was, as we view his language and surrounding circumstances, evidently speaking of the estate charged with the express trust.

We are led to this conclusion because of his separation of his estate into two parts, and of the language used in providing for the disposition of each portion. Relative to that portion passing to his wife directly, he used strong and positive terms, disclosing an intention to bestow such property on her absolutely, without condition and in her own right forever. These words and the terms used are inconsistent with the idea that she took only a life estate, or an estate charged with a trust in favor of his collateral heirs. Furthermore, three or four days afterwards, by the most formal sort of conveyance and written assignments this same property, or substantially all of it, was transferred to his wife as fully and unconditionally as it is possible to transfer the highest and most perfect known title to property. The other wills disclose indubitably a disposition on the part of the testator to give a portion of the estate absolutely to his wife and the remainder to his collateral heirs. Giving due considerations to all of these evidences as to his intentions, and his verbal expressions made at the time of the execution of the last will, it seems reasonably clear that he impounded a specific portion of his estate, the bulk of it, to be used, first, for the support of his wife, if required, and second, the remainder to go to his heirs as named in the provisions of the express trust found in the will. If from the record the deduction be proper that a constructive trust should be declared and established, as is held in the former opinion, except for a sufficient description of the property to which the trust attaches, and it be now, upon further consideration, determined that the property embraced in the constructive trust is the same as covered by the provisions creating the express trust found in the will, then it occurs to us that there exists no serious difficulty in ascertaining with reasonable definiteness and certainty what property the trust is fastened upon, and enforcing the trust according to the de-

clared will of the testator. We think it is tacitly conceded in the very able argument of counsel for appellees that if all the other elements of a constructive trust are found to exist, the element of description and certainty as to the property embraced in the trust is not so lacking as to be fatal, or that the trust must fail on that account. What counsel for appellees do argue is that, in determining whether a trust is created, we must look to the written instrument as well as the oral declarations of the parties made at the time, and that, when so considered, the evidence fails to establish the trust alleged. It is contended that the most that is fairly inferable is that the spoken words of the testator are merely precatory, and that it is left wholly to the wife's discretion whether she will bestow any of the property on those mentioned in the express trust provisions of the will.

We are not disposed to recede from anything said in the former opinion, save in respect of the question of the certainty and definiteness of the property embraced in the trust resting in parol. If this language be construed, as we think it should be, as applying to the property devised to Westerfield in trust, and as giving to the wife the right to the use of the annual income in so far as it is required to maintain her in the style and comfort she had been accustomed to, and also a like right to the original fund or property devised in trust, if so required for a like purpose, then the matter is resolved into a very simple proposition wherein lies no serious difficulty in the way of the enforcement of the trust. The five or ten thousand dollars to be devoted to charity, if the wife so desires, involves only a matter of mathematical computation, the limit being ten thousand dollars, the limit in other respects being what is required and reasonably necessary for the support of the wife in the style and comfort in which she had been living. The rights of the parties in the main aspects of the case are well summed up in the former opinion, *ante,* p. 667, in the following language:

"We conclude, therefore, that by the promise made by

Mrs. Boggs to her husband at the time of the execution of the will, relied upon by him in signing that instrument, and her refusal to carry out her promise, she thereby became a trustee *ex maleficio,* if the trust was definite and certain enough to be capable of enforcement. Though no fraud was intended by her at the time, yet by the circumstances of confidence and trust arising from the marriage relation, her husband trusted her and relied upon her to carry out his wishes; and her refusal to do so after her promise and after the property was vested in her was such a fraud as will make her, in equity, a trustee, if a trust was created by the language used by Mr. Boggs. In other words, we conclude that the plaintiffs are entitled to be treated in relation to the estate as if the words used by Mr. Boggs had actually been written in the will."

The ground upon which relief was denied was based upon the holding, which is well supported by the authorities, to the effect that "whenever the property to which it (the trust) is to attach is not definite or certain" a trust will not be created. All the other tests as to what is necessary to create a constructive trust are found to be in favor of the appellants.

Accepting, as we do, the correctness of the proposition with reference to the certainty required in describing property on which the trust is to operate, there yet remains the question, does the description of the property in the case at bar which is embraced in the alleged constructive trust, on account of its indefinite and uncertain character, fall within the rule? It is rightly said in the opinion the declarations of the testator on which the constructive trust rests are to be construed and treated as if they had actually been written in the will. If the testator's language or the substance of it were incorporated in the will, would the court find any difficulty in construing the words used and give force and effect to their evident intent and meaning? We dare say not. Let us consider what the effect would be. They would naturally occur after the main provisions for the disposition

of the testator's estate. All parts of the instrument, if possible, should and would be given force and effect They would be inconsistent with and render nugatory the provisions bestowing directly on the wife absolutely and unconditionally in her own right forever certain portions of the estate as therein described. They would be consistent and in perfect harmony with the provisions concerning the trust estate, and would act as a limitation of the terms therein found which apparently pass to the wife the full and unrestricted beneficial interest in the trust estate. They would make clear that as to this part of the estate she had only the right of use reasonably necessary to support and maintain her as she had been accustomed to living. The division of the annual net income from this trust estate is what is unmistakably referred to when he expressed the desire that the surplus should go to his relatives. There can be no mistake about this, and this serves as an explanation as to his purpose to give a portion absolutely to his wife, and reserve, as he did in the last will, the bulk of his estate, first, for her use if required, and second, the remainder to go to his own relatives in preference to hers or some one she might select. The wording in the instrument giving the wife absolute and unconditional ownership in her own right forever in one instance, and in the other restricting the right or interest to her use, has, as we view the subject, a powerful and over-mastering significance. This view of the matter renders the whole instrument harmonious in all its parts, effective and enforceable. It, as we look at the record, effectuates the purpose and intention of the testator. This latter, the testator's intention, is the cardinal rule of testamentary construction. It is the great underlying principle that should constantly be kept in view. It is the "'pole star' or the 'sovereign guide' when referring to this governing principle of testamentary causes; and the doctrine, in one formula or another, is constantly affirmed in the reports. But it is the intention of the testator as expressed in his own will which governs; and this intention

must be discerned through the words of the will itself, as applied to the subject matter and the surrounding circumstances." Schouler, Wills (3d ed.), sec. 466. On the question of uncertainty the supreme court of the United States, adopting the language of Lord Brougham, said:

"We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favor of one view rather than another, before we reject the whole." *Home for Incurables v. Noble,* 172 U. S. 383.

In *Cox v. Wills,* 49 N. J. Eq. 130, the legacy was given to the wife "in good faith, believing that she will make a will and thereby distribute so much of the last named legacy among my near relatives as she may not use for comfortable maintenance, and it is my will that my said wife shall make such distribution." The court said: "Power to expend for comfortable maintenance should be *construed,* in my judgment, to mean what is *reasonably necessary* for that purpose, having regard to the previous habits, tastes and style of living of the donee, and the amount of the estate."

In *Cresap v. Cresap,* 34 W. Va. 310, the following language was contained in the will: "I give and bequeath to my beloved wife, A. C. C., in trust for her support and maintenance during her life, all my estate both real and personal with full power and privilege to sell and convey any, all or so much of my real estate in such a manner as she may see fit, in as full and complete manner as I myself can do, to sell and dispose of my personal estate, or so much as she may see fit, for her own support, according to her condition in life, and for the benefit of my estate, so far as she may see proper." These words, it is held, will not confer upon the wife either a fee simple in the testator's real estate or absolute property in his personal

estate. It is also held that such a provision is not void for uncertainty as to quantity, for the reason that that is certain which may be made certain. In the case at bar we may say, as was said in another case: "If the widow should give away the whole of the estate to strangers, can any one deny that it would defeat the testator's manifest intentions? The question gives the answer and that answer is decisive." See also *Smith v. Bell,* 6 Pet. (U. S.) 68; *Mansfield v. Shelton,* 67 Conn. 390, 52 Am. St. Rep. 285; *Barnes v. Marshall,* 60 Mich. 248, 60 N. W. 468; *Knox v. Knox,* 59 Wis. 172; *Noe v. Kern,* 93 Mo. 367.

Justice and equity require that the alleged trust in favor of appellants found to have been created should be held sufficiently definite and certain in all its essential elements and capable of enforcement, and that effect be given to the expressed intentions of the testator, and a palpable injustice prevented by giving appellants a measure of the relief they are seeking. The former opinion should be accordingly modified, and the trust property held to have vested in the collateral heirs of the testator named in the will, subject to the use of the net annual income and the principal estate by the appellee, Ida M. Wharton, as the same may be reasonably necessary and required to support and maintain her in the style of living she had been accustomed to, and subject to her right to devote not exceeding $10,000 to charity.

The judgment of affirmance is vacated, and the decree of the district court is reversed and the cause remanded, with directions to enter such a decree in the trial court as will fully conserve the rights of both parties in harmony with the views and conclusions herein and in the former opinion expressed and announced.

JUDGMENT ACCORDINGLY.

BARNES, J., dissents.

The following opinion on motion for rehearing and to modify mandate was filed June 7, 1907. *Sustained in part:*

LETTON, J.

The appellee has filed two motions. The first one alleging that the court has not considered or decided the issue of *res judicata* in this case, and urging that the case be reconsidered upon this point. As a second defense it is alleged in the answer that, in the contest of the will, Mrs. Wharton was a party as proponent, and that the plaintiffs in this suit were parties contestant, objecting to the probate of the will and asking for affirmative relief, and that it was alleged by the contestants that, prior to the making of the will, it was Mr. Boggs' wish and intention to give his wife only a small portion of his property absolutely, and the balance for her natural life, and at her death to descend to the plaintiffs, and that she should annually divide between herself and them the net income from the estate, and that Mrs. Wharton did by undue influence induce the testator to make the will offered for probate contrary to what he desired, and for the purpose of excluding them from any share in his property. The answer in this case further alleges that after a trial of the issues it was finally adjudged that the will was valid; that the testator was competent to execute the same; that no undue influence had been exercised, and that all the objections should be overruled and the will admitted to probate. The appellee now contends that the judgment admitting the will to probate is a bar as to the matters set forth in the answer in the will contest to establish undue influence, which are the same facts relied upon in this case to establish the constructive trust; and it is said that the county court in the will contest had full power to grant the relief demanded by the plaintiffs in this case, for the reason that it had equity powers. It is further said that the former judgment is an adjudication that the absolute and unconditional gifts made to his wife were made voluntarily; that the testator was not induced to make the same by any fraud or undue influence of the wife, and that these acts and provisions are in all respects valid.

In the contest case, however, the plaintiffs sought to set aside the will entirely, in order that they might acquire the estate by the laws of inheritance; while the purpose of this action is directly contrary in that it assumes and adopts as its basis the validity of the will, but seeks to impress upon certain of the property conveyed by the will to Mrs. Wharton a trust for the benefit of the plaintiffs. The relief sought in this case is inconsistent with the theory upon which the will was contested. In the probate court the plaintiffs could not have said with one breath that the will was invalid because it was procured by fraud and undue influence, and with another that the will was valid, but a trust was impressed upon certain of the property conveyed by it. It is unnecessary to decide whether the present action could have been maintained in the first instance in the county court. It could not have been maintained at the same time that the appellants were contending that the will was void, and that they took the property as heirs at law. The matters given in evidence in the contest proceedings with reference to the circumstances surrounding the making of the will, which were urged as tending to show undue influence, while insufficient to establish this fact, were yet material to consider upon the theory that the will was valid, and that a trust *ex maleficio* was impressed upon the property, and the decision establishing the validity of the will is not conclusive upon the question whether or not a constructive trust was raised.

In the opinion of this court upon the contest of the will it is said:

"He (the testator) had asked his wife, and she had agreed, to give whatever of the income she did not need or use to his relatives, for whom he made no immediate provision, and had also asked her to make a will in their favor. * * * Where undue influence is charged, the question is, in substance, whether or not the testator acted freely and upon his own judgment or under some species of coercion or imposition." *Boggs v. Boggs,* 62 Neb. 274.

In the present case the question is whether he was led to exercise his judgment and free will in her favor, relying upon her promises to do for his relatives that which, but for his reliance upon her promise, he would himself have done in his will. The first decision determined that the will of the testator was not overcome by the will of his wife. The present case determines that his action was so far dependent upon her promises that she is constituted a trustee to carry out those promises. Manifestly these conclusions are not inconsistent with each other.

By the second motion the appellee urges the court to interpret the opinion, and to modify and make definite and certain the directions to the district court, in substance, so as to direct that the maintenance of Mrs. Wharton according to the testator's wishes be charged upon the income and *corpus* of the trust estate devised to Westerfield, and also to charge the legal expenses incurred by Mrs. Wharton in sustaining the will of the testator, and in defending this action, upon the same trust estate, and to take an account necessary to make such provisions. While we think that the last opinion filed in this case sufficiently evidences the intention of the court, still there are some expressions used which perhaps tend to ambiguity, and which may not be as clear as may be desired. We therefore deem it well to amplify and, if possible, make more specific and definite our views as to the duty and liability of Mrs. Wharton with reference to the proceeds of the property impressed with the trust.

We think it is clearly pointed out in the opinion that, after the conversations occurred upon which it is held the constructive trust arose, the testator removed from the operation of the trust certain specific property of which he made an absolute gift to his wife, free and untrammeled by any restrictions or limitations of any kind or nature whatsoever. This included the home and other real estate and personal property. With this property so conveyed the *cestuis que trustent* have no concern whatsoever. They have no interest in it. It belongs solely to Mrs. Wharton.

Both the property itself and the income from it are hers to do with as to her seems best. The remaining property was placed in trust with Westerfield, with the right to his wife to use the income from it, or if necessary the *corpus* thereof, for her maintenance and support during her life, in her accustomed style, or to give a part to charity, and the annual surplus income after this was done, and the property in trust remaining at her death, was to be divided among his relatives. It was from the property devised to Westerfield in trust that the wife was to obtain the income required to maintain her in the style and comfort she had been accustomed to, and not until this had been done did any right exist on the part of the plaintiffs to share in the income or in the fund. It is urged that it was Mr. Boggs' intention that the income of all the property should be used, so far as necessary, for her maintenance, and that the surplus should then go to the heirs, but this conclusion is incompatible with the idea of the subsequent absolute conveyance to the wife of the property not in the Westerfield trust. It was evidently Mr. Boggs' intention to make assurance doubly sure, by giving his wife for her maintenance, first, the income from the trust estate, and, if that were insufficient, then the body of that estate to the extent necessary, leaving her own absolute property which he conveyed to her to be untouched unless the trust estate were exhausted. We think also that it was clearly his intention that the property used as a home should be preserved for that purpose, and we think it would be a violation of the testator's intention if the homestead were disposed of or vacated, and a sufficient amount taken from the income of the trust estate to provide another residence. These conclusions of course are to be taken together with the language in the second opinion, and are simply explanatory of what has been said therein.

Mrs. Wharton's reasonable expenses in the litigation in which the will was established should be paid out of the whole estate taken under the will, including taxable costs and reasonable attorneys' fees. The taxable costs in this

case should be adjudged against Mrs. Wharton personally, each party paying their own attorneys.

The motion of the appellee is sustained so far that the case is remanded, with directions to the district court to take an account of and ascertain what sum per annum is sufficient to support and maintain the appellee, Ida M. Wharton, using the family homestead, according to the style of living to which she was accustomed at the time of the death of the testator, and to charge the payment of the same annually during her life upon the income of the trust estate devised to Westerfield, and upon the *corpus* thereof if the income is insufficient, and according to the conditions of said trust; second, to charge the said appellee as trustee in trust, to pay and distribute annually all such surplus income from the trust estate, if any there be after providing for the maintenance of the appellee as aforesaid, and such gifts to charitable purposes as she may desire to make from time to time, not exceeding $10,000 in all, to the brothers and sisters of the testator, share and share alike, the issue of deceased brothers and sisters, if any such issue, to take the share of the deceased parent; third, for such other accounting and decree as may be necessary to carry fully into effect the provisions of the constructive trust declared to exist, and of the trust declared by the will in Westerfield, and according to the views expressed in the opinion by Chief Justice HOLCOMB, and of this opinion.

JUDGMENT ACCORDINGLY.

The following opinion on motion for rehearing was filed October 3, 1907. *Rehearing denied:*

By the Court: In the brief upon the motion for rehearing one point only is discussed. It is contended that the judgment in the former action in which the probate of the will was contested is a bar to this action. The promise of Mrs. Boggs (now Mrs. Wharton) to carry out certain pur-

poses of the testator did not have the effect to overcome his will and judgment. It therefore was not adjudicated in the former judgment that no such promise was made. Such promise did not constitute undue influence, and the judgment establishing the will, by which it was determined that the will was not procured by undue influence, did not determine that no such promise was made. To procure one to make a contract or will by entering into a distinct contract, or by making a distinct promise, is not ground for setting aside the contract or will so induced, but is rather ground for enforcing the promise which induced the making of the contract or will. There was no specific finding in the contest case that Mrs. Boggs did not make the promises that she is now alleged to have made. The general finding that the will was not procured by undue influence does not negative the existence of such a promise, because such promise to accept a trust under the will and to provide for the testator's relatives as he desired can be enforced and did not require that the contest be sustained. The question therefore whether Mrs. Boggs made such promises as to constitute her a trustee *ex maleficio* was not determined by the former decision in the contest of the will.

The motion for rehearing is

OVERRULED.

ROME MILLER, APPELLEE, V. JAMES B. KITCHEN ET AL., APPELLANTS.

FILED APRIL 19, 1905. No. 13,693.

1. **Corporations:** RECEIVERS. A receiver will not readily be appointed in a stockholder's suit for mismanagement of corporate affairs where neither the corporation nor the corporate officers are insolvent and the corporation is a going concern profitably conducted.

2. **Equity.** Where it is within the ordinary powers of a court of equity to grant sufficient relief to a complaining minority stockholder who alleges mismanagement by corporate officers, a receiver will not be appointed.

APPEAL from the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Reversed.*

John C. Cowin and *George E. Pritchett,* for appellants.

Hall & McCulloch and *J. W. Woodrough, contra.*

LETTON, C.

This is an appeal from an interlocutory decree appointing a receiver in a stockholder's suit. The plaintiff, Rome Miller, is a stockholder in the Kitchen Brothers Hotel Company, and brings the action against James B. Kitchen, as president, and the corporation itself, alleging fraud and mismanagement on the part of the officers of the corporation and praying for an accounting and a receiver, but not asking to wind up the corporate affairs. The findings of fact upon which the receiver was appointed are substantially, though much abridged, as follows: Kitchen Brothers Hotel Company is the owner of certain hotel property in the city of Omaha known as the Paxton Hotel, with a capital stock of 500 shares of a par value of $1,000 each. In June, 1890, all of the stock of said corporation was owned by the defendant, James B. Kitchen, and his brother, Richard Kitchen, each owning 250 shares. Richard Kitchen died on the 29th day of June, 1890. Part of his shares of stock were bequeathed to various relatives and legatees and the balance of the shares, being 157 in number, were sold under a decree of the probate court to one Perkins, who sold the same on the 3d day of June, 1901, to the plaintiff, Rome Miller. Elizabeth Whalen, who intervened in the action to participate in the relief granted plaintiff, is the owner of five shares of stock acquired under the will of Richard Kitchen. The defendant, James B. Kitchen, owns 293½ shares of stock and ten other per-

sons own shares of stock varying in number from one to 13⅓. Ever since the death of Richard Kitchen, the defendant, James B. Kitchen, has had the absolute control and management of the affairs of the corporation, and has caused to be selected as directors, George E. Pritchett, his attorney, J. J. Points, his bookkeeper, Ralph Kitchen, his nephew, and Elizabeth Kitchen, his wife, having given to each of said parties, except Ralph Kitchen, a share of stock to qualify them to act as directors. The court found further that the defendant James B. Kitchen has controlled the affairs of the company for his own personal interest without any regard whatever for the interests of the other stockholders; that no stockholders' meetings have been called; that he has executed leases of his own property to the corporation for large and extravagant rental; that he has carelessly permitted the books of the company to be lost or destroyed, and has kept the books in such a manner that they fail to show the correct amount of receipts and disbursements of said company; that he has received large sums of money for which he has not accounted, and has caused to be conveyed to himself certain real estate of the company for a grossly inadequate consideration; that he caused to be sold to the company certain premises belonging to him individually, adjoining the hotel upon the west, at an excessive price, and executed a mortgage to himself as an individual upon the hotel property to secure deferred payments upon the same; that for many years the profits of the business have been large and that the defendant has failed to satisfactorily account therefor. As a conclusion the court finds that ever since the death of Richard Kitchen, the defendant James B. Kitchen has converted the properties and profits of the corporation to his individual use to the injury and loss of all the other stockholders, and finds that if he is permitted to continue in the control and possession of the assets and affairs of the corporation great and irreparable injury to the rights of the other stockholders will ensue.

The appellants have not pointed out specifically wherein

the findings of the district court are not supported by the facts in evidence. They say that the evidence fails to establish the allegations of the petition in regard to misconduct of the defendant Kitchen. They further contend that since the only complaints are that an excessive salary was paid to the president, that too much was paid for the property leased or purchased by the corporation, and that Kitchen has possession of funds belonging to the company, there is no necessity for the appointment of a receiver.

On the other hand, appellee's contention is that since there has been a continuous course of fraud and mismanagement as respects the stockholders carried on by the defendant for a long period of years, and since he has concealed or destroyed the books of the corporation and covered up the assets, he will continue in this wrongful course of action if permitted to retain the management and control of the property, and that hence it should be taken from him and put into a receiver's hands.

While the enormous growth and extension of corporate affairs within the last quarter of a century has largely augmented the volume of actions in which the appointment of a receiver is prayed as regarding corporate property and corporate affairs, and while some courts have in the past been inclined to go to an extreme length in asserting the power of a court of chancery over the direction and management of the affairs of corporations, still the tendency of the more modern decisions is to return to the safe and settled principles established in the past, and to refuse to interfere by such appointment unless absolutely necessary to do complete justice. "A receiver will not readily be appointed in a suit by a stockholder to remedy the frauds or *ultra vires* acts of the directors or of the corporation itself. The court will not injure the whole enterprise in order to correct a wrong done to the enterprise. Other remedies will be applied." 3 Cook, Corporations (5th ed.), sec. 863. The officers of a corporation are trustees for the benefit of its stockholders. To them has been committed the direction of the corporate affairs. Where

fraud or mismanagement by them is charged, it is only where the ordinary remedies are inadequate, or where the assets of the corporation are liable to be squandered or dissipated, or the business of the corporation injured or destroyed, or for the purpose of winding up the affairs of the corporation that a court will be justified in taking from the owners thereof the management and direction of the corporate affairs, and assuming such management and direction itself through the hands of its receiver. Beach, Receivers (Alderson's ed.), sec. 424.

It appears from the evidence that the Kitchen Brothers Hotel Company is the owner and is engaged in the management of the Paxton Hotel in the city of Omaha, which is a large and valuable property; that this business has been successfully and profitably conducted ever since the death of Richard Kitchen and that it is at this time a profitable and going concern. No complaint is made but that the highest skill and most profitable management have been exercised so far as the hotel business itself is concerned. The property has been kept in good repair, the business has been profitable, and there is no complaint that the good will is suffering or that property of the corporation used in the business itself is being lost or destroyed. No contention is made but that the defendant Kitchen is amply able to respond financially to any judgment or decree which may be rendered against him in this action, and no claim is made in the petition that either the corporation itself or the defendant Kitchen are insolvent. The question then presented for our consideration is whether, in order to afford the plaintiff complete relief from the wrongs which he charges that he, in common with other stockholders, has suffered, it is necessary to take the management and control of the business away from the corporation itself and vest it in the hands of a receiver.

Assuming that the findings of the district court as to the actions of the defendant as an officer of the corporation show the actual condition of affairs, and taking into consideration likewise the fact that the business and property

of the corporation appear to be in a flourishing condition, and that the officers of the corporation performed their duties and administered their trust properly, so far as concern the preservation and conduct of the business and except with reference to the stockholders, do these facts warrant the appointment of a receiver? If the defendant Kitchen as an officer of the corporation has obtained property of the corporation without giving a fair equivalent therefor the court has power to order him to reconvey. If the transaction by which he sold the adjoining property belonging to himself to the corporation, and executed a mortgage of $66,000 in part payment therefor was fraudulently done—as to which the evidence is conflicting—the court may order the conveyance of the property set aside and the mortgage canceled. If he has paid to himself an excessive salary, the court has power to make him account for whatever the excess may be over a just and fair remuneration for his services. If he has absorbed the profits of the company, the court by decree in this case may make him disgorge; and if he has failed to account, an accounting may be required and enforced. These powers of the court afford ample remedy for all the wrongs the plaintiff has suffered heretofore; but it further appears that the books of the corporation, if kept at all, have been kept in a very careless and unbusinesslike method, a number of volumes apparently have been lost or mislaid by the defendant, and the system or lack of system used has been such as to fail to properly keep a true record of the business. So far as appears, however, the defendant at this time is keeping a proper account of the business, and, even if he were not doing so, the court has power to compel him to keep an accurate account of the corporate business; to compel him to allow the plaintiff and all other stockholders reasonable access to the books, and to furnish them full information as to the conduct of the business. The general principles in regard to the appointment of receivers of corporations have been clearly and succinctly stated by Mr. High as follows: "And courts of equity will not, ordinarily, by virtue

of their general equitable jurisdiction, or of their visitatorial powers over corporate bodies, sequestrate the effects of the corporation, or take the management of its affairs from the hands of its own officers and intrust it to the control of a receiver of the court, upon the application either of creditors or shareholders. And while equity may properly compel officers of corporations to account for any breach of trust in their official capacity, yet in the absence of statutes extending its jurisdiction, it will usually decline to assume control over the management of the affairs of a corporation, upon a bill filed by a stockholder alleging fraud, mismanagement and collusion on the part of the corporate authorities, since such interference would necessarily result in the dissolution of the corporation, and the court would thus accomplish indirectly what it has no power to do directly. The remedial power exercised by courts of equity, in such cases, ordinarily extends no further than the granting of an injunction against any special misconduct on the part of the corporate officers; and although the facts shown may be sufficient foundation for such an injunction, the court will not enlarge its jurisdiction by taking the affairs of the corporation out of the management of its own officers, and placing them in the hands of a receiver." High, Receivers, sec. 288. See note to *Cameron v. Groveland Improvement Co.*, 72 Am. St. Rep. 56. In line with these principles, this court has said in *Provident Life & Trust Co. v. Keniston*, 53 Neb. 86:

"An application for a receiver is addressed to the sound discretion of the trial court, and while by the statutes and by force of adjudicated cases the exercise of that discretion is to a certain extent governed by general rules, still in each case the particular circumstances must be regarded, and if, considering all the circumstances, 'the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or conveniency render the appointment of a

receiver improper or inexpedient, none will be appointed.'" *Vose v. Reed*, 1 Woods (C. C.), 657.

We have heretofore in *Ponca Mill Co. v. Mikesell*, 55 Neb. 98, and in *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222, and *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 586, considered generally the duties of a court with reference to the appointment of receivers for corporate property, and have clearly indicated the propriety of noninterference with the management of corporate affairs unless absolutely necessary for the protection of the property interests of the stockholders. In the instant case, we are of the opinion that whatever wrongs have been suffered by the plaintiff and the other stockholders of the hotel company in the past by reason of the wrongful acts of the defendant Kitchen may be as fully remedied without the appointment of a receiver as they can be if one were appointed; that on the other hand, to take the management and control of the hotel property out of the hands of the persons who have apparently managed it successfully for many years, and to try the experiment of placing it in the hands of an officer of the court, would in all probability be highly detrimental to the business. This is the more probable, since it is a matter of common knowledge that the success or failure of a hotel often depends largely upon the personal qualities and characteristics of the person or persons who may be in the control and management of the business. The personal equation often cuts a large and important figure in a business of such character.

If a receiver were appointed as the plaintiff prays, for how long should his appointment continue? The petition does not ask for a dissolution of the corporation or the winding up of its affairs, and the only purpose for which the appointment seems to be prayed is that the conduct of the business may be taken out of the hands of the officers of the corporation who may be elected by a majority of the stockholders and kept indefinitely in the hands of the court. Since the defendant holds a majority

of the stock he has the power to elect such officers as he may desire to conduct the corporate affairs. This is a right and privilege given him by law, and so long as these officers honestly and faithfully carry out their trust, neither the plaintiff nor any other stockholder has a right to complain. If a receiver is appointed there must be an end to the receivership sometime, and whenever that time should come the property would inevitably go into the hands of officers selected by the majority stockholders, and the plaintiff would be in no better condition then than now so far as control of the management is concerned. The case is not one where the corporate assets or property is being lost or destroyed. If the officers of the corporation are at this time conducting the business properly and keeping proper books of account so that the plaintiff and other stockholders may be apprised of the condition of the business, the plaintiff is in all respects as well off as he would be if the receiver were appointed. If necessary, the court may restrain the making of any deeds or conveyances affecting the property while the action is pending. If the court should find upon the trial of the main case that the defendant is indebted to the corporation and require him to pay to the corporation any amount of money, it may by proper orders compel the distribution of the same or any part of it among the stockholders by way of dividend, as justice might require, and may by proper orders control the action of the corporate officers with reference thereto. As has been said, there is no general rule applying to all cases wherein the appointment of a receiver is prayed for. Such relief is only ancillary to the purposes of the main suit, and unless it is necessary to the attainment of the principal object of the controversy it will not be granted. In the instant case, the plaintiff, so far as now appears, can be granted all the relief for which he prays without taking the property into the hands of the court by the appointment of a receiver, and it is not clear but that the interest of the plaintiff, as well as of all the other stockholders in the corporation, would be in-

jured by the court wresting from the legally elected officers of the corporation the power of control of the corporate affairs granted them by law. The power to appoint a receiver may be exercised as the occasion for that relief arises in the progress of a suit, and if that drastic remedy is needed in the future conduct of the corporate affairs of the defendant corporation, it is within the power of the court to apply it.

We are of the opinion that the facts shown did not require the appointment of a receiver, and that the judgment of the district court in that regard should be reversed.

AMES and OLDHAM, CC., concur.

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

REVERSED.

CONSERVATIVE SAVINGS & LOAN ASSOCIATION OF OMAHA, NEBRASKA, V. CITY OF OMAHA ET AL.

FILED APRIL 19, 1905. No. 13,725.

1. **Equity:** PARTIES. When two or more parties claim the ownership of a fund in the hands of a third, an action in equity may be maintained to recover the fund and to litigate and determine the ownership of it, and all persons claiming the fund are necessary and proper parties to the action.

2. **Pleading:** DEMURRER. A minor recovered a judgment against the city of Omaha, which was afterwards assigned by her guardian to the plaintiff. The guardian was removed by the county court and one Crawford appointed in his place. Crawford claimed that the assignment of the judgment to the plaintiff was void and that it still belonged to the ward. Plaintiff brought an action against the city, the first guardian and his surety, and Crawford as guardian, to quiet the title to the judgment in the plaintiff. Demurrers were filed to the petition by the surety of the first guardian and by Crawford, both of which were

sustained. *Held*, That the demurrer was rightfully sustained as to the surety, but that Crawford was a necessary party to the determination of the ownership of the fund and his demurrer should have been overruled.

ERROR to the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Reversed with directions.*

Wharton & Baird & Sons, for plaintiff in error.

Crawford & Clarke, George E. Pritchett and *Hall & McCulloch, contra.*

LETTON, C.

Naomi A. Ferguson, a minor, on April 14, 1900, recovered a judgment against the city of Omaha for $1,250 and costs, in an action for personal injuries received by her on the streets of said city. On April 18, 1900, her father, Charles T. Ferguson, filed a petition praying for his appointment as her guardian in the county court of Douglas county, and on the same day an order was entered by the county court appointing him guardian, upon his taking the oath and filing bond with security to be approved by the court. On the same day the oath of Charles T. Ferguson and a bond signed by Ferguson, as principal, and the American Bonding & Trust Company, as surety, were executed and filed, and on the 25th day of April the bond was approved and letters of guardianship issued. After the order appointing Ferguson guardian, and the execution of and filing the bond, but before its approval, Ferguson as guardian sold and assigned the judgment at its face value to the Conservative Savings & Loan Association of Omaha, plaintiff in error. On November 12, 1900, on the application of the surety on Ferguson's bond, the county court found that Ferguson held as guardian $833.35, for which, with interest, he and his bondsmen were liable, and entered an order removing Ferguson and appointing Frank Crawford as guardian.

After his appointment Crawford, as guardian, served a notice on the city of Omaha claiming to be the owner of the judgment, and in consequence the city has refused to pay the judgment to the plaintiff in error. After the refusal of the city of Omaha to pay the judgment, the plaintiff in error filed its petition in the district court for Douglas county making the city of Omaha, Ferguson and his surety, the American Bonding & Trust Company, and Crawford, as guardian, parties defendant, and alleging, in substance, the facts hereinbefore recited: That Ferguson has failed and neglected to pay over to Crawford, as guardian, the sum of $833.35 as required by the order of the county court; that Ferguson and his surety, the American Bonding & Trust Company, were liable to Crawford for said amount, and praying that it may be adjudged entitled to the full amount of the judgment against the city; that Ferguson and his sureties be declared legally liable to Crawford, as guardian, for the money of the ward in his hands; that the sale and assignment of the judgment from Ferguson to it be ratified and confirmed, and that the city of Omaha be ordered and directed to pay to the plaintiff the amount due on the judgment. A supplemental petition was also filed alleging an application upon its part to the county court of Douglas county for an order ratifying and confirming the sale by Ferguson to it of the judgment in controversy; the refusal of such order by the county court and the taking of an appeal therefrom, and praying for the ratification of said sale by this court. To these petitions Frank Crawford and the American Bonding & Trust Company filed general demurrers, which demurrers were sustained by the court and judgment of dismissal rendered. The city of Omaha and Ferguson made no appearance; their default was not taken, and no order was made relating to them in the case. From this judgment of dismissal the Conservative Savings & Loan Association prosecutes error.

The primary object of the suit was to declare the plaintiff entitled to recover the amount of the judgment from

the city of Omaha. The other relief prayed for, which was that Ferguson or his surety, the American Bonding & Trust Company, be compelled to pay Crawford, as guardian, the money remaining in his hands, was something with which the plaintiff had no concern. If it is the owner of the judgment, it has nothing to do with the relations between Ferguson and his successor, Crawford. In order to determine the question of the ownership of the fund to which the plaintiff lays claim, the only necessary parties are Crawford and the city of Omaha. The issue to determine is whether Crawford or the plaintiff is the owner of the fund which the city holds. The demurrer therefore was rightfully sustained as to the American Bonding & Trust Company. Crawford, however, is a necessary party to the determination of the ownership of the fund, and the demurrer as to him should have been overruled.

As the record stands there is no controversy between the city and the plaintiff. The city has made default in the action, and plaintiff seems to be entitled to a decree against it. If the city desires to avoid the contingency of being compelled to pay the amount of the judgment twice, it should appear and defend in the action by asking that the court determine the respective rights of the plaintiff and Crawford to the fund in its hands. There being no final judgment against the city, however, the judgment of the district court dismissing the case should be reversed and the cause remanded, with directions to dismiss the case as to the American Bonding & Trust Company, and for further proceedings as to Crawford and the city of Omaha in acordance with this opinion.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court dismissing the case is reversed and the cause remanded, with directions to dismiss the case as to the American Bonding & Trust

Company, and for further proceedings as to Crawford and the city of Omaha in accordance with this opinion.

REVERSED.

AMANDA JOHNSON V. DENNIS SONGSTER.

FILED APRIL 19, 1905. No. 13,768.

Review: MOTION FOR NEW TRIAL. When it is sought to review on error in this court the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree accordingly, but it will not go back of the verdict rendered by the jury or findings of fact made by the trial court to review anything done or any proceeding had.

ERROR to the district court for Fillmore county: LESLIE G. HURD, JUDGE. *Affirmed.*

F. B. Donisthorpe and *Curtiss & Waring,* for plaintiff in error.

Robert J. Sloan, contra.

LETTON, C.

This was a mandamus proceeding brought by Amanda Johnson against Dennis Songster, as justice of the peace in and for Fillmore county, to compel him to correct the entries upon his docket so as to show that in an action pending on the 11th day of September, 1903, before him as such justice, wherein one Robert J. Sloan was plaintiff and Amanda Johnson was defendant, the plaintiff therein did not appear within one hour after the time set for trial; that the defendant therein moved to dismiss the case for that reason, which motion was overruled; and further to require said justice to show by said docket that, though the verdict was rendered by the jury upon the 11th day of

September, yet that no judgment was entered upon said verdict until the next day. The petition for the writ of mandamus alleges the existence of these facts, application to the justice to correct his docket and his refusal so to do. An answer was filed by the justice, amounting, in substance, to a general denial. The cause was tried to the court, and a writ of mandamus refused, from which judgment error is assigned. No motion for a new trial was filed in the district court, and the only error assigned in the petition in error is that the court erred in refusing to grant the writ as prayed.

Since no motion for a new trial was filed, we cannot look into the bill of exceptions for the purpose of ascertaining whether the findings and judgment of the district court are supported by sufficient evidence, nor review the action of the court in admitting or excluding evidence. It is said in *Hansen v. Kinney,* 46 Neb. 207:

"When it is sought to review on error in this court the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree rendered; but it will not go back of the verdict rendered by the jury or the findings of fact made by the trial court to review anything done or any proceeding had." *Storey v. Burns,* 53 Neb. 535; *Holmes v. Lincoln Salt Lake Co.,* 58 Neb. 74.

This being the case, the only question before us is whether or not the answer sets up a defense to the petition. The answer alleges that the plaintiff in the case before the justice appeared before the hour set for trial, and denies that a motion was made to dismiss the case for want of the appearance of the plaintiff until the next day and after the judgment had been rendered. He further denies that a motion was filed before him as justice, or any application made to him to show the actual facts in the case, and denies that he has overruled the motion and refused to show the facts. He further denies generally all facts not admitted. These denials constitute a sufficient defense to

the allegations of the petition, and fully support the judgment of the district court refusing to issue the writ.

We recommend 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.

JAMES E. DAVEY V. NANNIE DAVEY.

FILED APRIL 19, 1905. No. 13,770.

1. **Review**: EVIDENCE. Where the testimony is conflicting and is fairly submitted to the jury, a new trial will not be granted if there is evidence sufficient to sustain the verdict.
2. **Verdict, Setting Aside.** To justify the court in setting aside the verdict of a jury because it is not sustained by the evidence, it is not sufficient that the court might have reached a different conclusion from the evidence than that reached by the jury.

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

A. W. Field, George E. Hibner and *Ricketts & Ricketts,* for plaintiff in error.

Charles O. Whedon and *J. A. Brown, contra.*

LETTON, C.

James E. Davey, the plaintiff in error, who was defendant in the lower court, is the brother-in-law of Nannie Davey, plaintiff below. Mrs. Davey was the guardian of her children and wished to loan certain funds belonging to their estate. The defendant, desiring to assist her in this, procured notes payable to her from different parties

desiring loans, and exchanged the notes for her checks, the first check being given December 14, 1894, and other checks for various amounts being given until February 23, 1895. No written memorandum was made by either party at the time as to the parties whose notes had been taken, the dates or the amounts thereof. The plaintiff complained that among the notes thus given to her were two notes signed by E. J. Otto of $90 each; that sometime in 1896 she delivered these two notes to the defendant for collection, and that he never accounted for the proceeds or returned the notes. The action was brought to compel him to pay her the amount of these two Otto notes. The defendant admits that he received checks from the plaintiff and delivered notes to her to the amount evidenced by the checks, but affirms that he never gave her any notes signed by E. J. Otto, and that he never received from her for collection any such notes. In the district court the verdict and judgment were for the plaintiff, from which defendant prosecutes error.

It is seldom that the testimony in a case is so irreconcilable and contradictory as in this case. The plaintiff testifies that she received from the defendant two notes of $90 each signed by E. J. Otto, dated November 1, 1894, and November 15, 1894; that she took the notes and kept them with her papers in a tin box; that sometime afterwards she was notified by the county judge that she must make a report of her proceedings as guardian; that at that time she procured a small blank book, which is in evidence, and with the help of a neighbor, one Mrs. Ida Bennett, she made a list of the notes in her possession; that she read the dates, amounts and names of the makers of the notes to Mrs. Bennett who wrote them in the book, and that after the writing was done they went over it again to see that the list had been made correctly. In this list appears one note of E. J. Otto for $180, dated November 1, 1895. This testimony is corroborated by Mrs. Bennett, except that Mrs. Bennett says that she did not examine the notes or papers to see whether they corresponded in

fact with the information given her by Mrs. Davey. Mrs. Davey further testifies that she took a memorandum made at the same time as the book to the county judge as a report, but was told by him that this was not a proper report, and that she had better consult a lawyer; that she then procured Judge Roscoe Pound to make a report for her; that in 1896, at the time that a reception was given the Honorable W. J. Bryan at Lincoln, Nebraska, the defendant came to her house with one Horning and stayed all night; that the next morning before leaving he told her that Otto wanted to pay the notes and asked her for them; that she then gave them to him to collect; that he kept them, and that he has failed and refused to account for them since that time. Judge Pound testifies that he drew up the guardian's report at Mrs. Davey's request. In this report the following appears: "I also hold one note to E. J. Otto, dated November 1, 1895, due in one year, with 10 per cent. interest, $180. All interest is paid on this note to November 1, 1896, and it has been extended one year." He further testifies that, while he cannot remember specially the Otto note, he drew the report from papers that were actually produced to him; that he took the notes, sorted them out in order and drew the reports from the notes themselves; that he insisted on her bringing the papers themselves, and is positive that he did not rely upon anything but the papers and notes that he had before him. This report was signed and sworn to by Mrs. Davey on the 23d day of March, 1897. Mrs. Davey's father testifies that he heard defendant ask Mrs. Davey for the notes, and that she got the notes and gave them to Mr. Davey, at the time she fixes. For the defense, Mr. E. J. Otto testifies he never borrowed any money of the plaintiff, and never gave or executed any such notes as she describes. Defendant himself positively denies ever having given Davey any note signed by E. J. Otto, or having received any such notes from her for collection. It will be observed that Mrs. Davey's testimony that she gave the notes to defendant for collection in the summer

of 1896, and that he never returned the same to her, is contradicted by herself and Judge Pound. She testifies she gave the two notes to defendant at the time of the Bryan reception in the summer of 1896, while the list made by Mrs. Bennett and the report by Judge Pound both show that she apparently was in possession of one note of Otto for $180 in 1897. The facts are clear that the plaintiff paid defendant $1,062. She testifies she received the Otto notes from the defendant, and she is corroborated more or less as to the existence of such notes or note by Mrs. Bennett, Judge Pound, Mr. Betz, her father, and Mr. Hudson. The defendant has not accounted for notes which correspond with that sum. There is a discrepancy in the accounts of the parties, not in the exact amount of the alleged notes, but yet sufficient to cast a doubt upon the defendant's account.

The evidence is not at all convincing to our minds, but the case was submitted under appropriate instructions to twelve men who are made by law the triers of fact. They saw and heard the witnesses, and were much better able to judge as to which were telling the truth in this matter than we are. The plaintiff is a woman apparently of but little, if any, business experience or ability. The defendant has been the vice president of a bank, and was apparently accustomed to business methods. Both parties trusted to memory in these transactions, and the usual result has followed. Upon this positive conflict in the evidence the jury passed, and we are unable to say that the verdict is unsupported by the evidence.

As to the assignment that the court erred in giving instruction No. 5, it is sufficient to say that no exception was taken in the district court to the giving of this instruction.

The judgment of the district court should therefore 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.

SWIFT & COMPANY V. FRANK KOUTSKY, MAYOR, ET AL.

FILED MAY 3, 1905. No. 13,863.

Appealable Order. A ruling upon an interlocutory matter is not appealable until the action itself is finally disposed of.

ERROR to the district court for Douglas county: EDMUND M. BARTLETT, JUDGE. *Motion to dismiss sustained.*

McGilton, Gaines & Storey, for plaintiff in error.

A. H. Murdock, W. C. Lambert and *Frank T. Ransom, contra.*

SEDGWICK, J.

This plaintiff began an action in the district court for Douglas county against the defendant Frank Koutsky, as mayor, and other defendants, as councilmen, of the city of South Omaha to restrain the passage of certain ordinances providing for the vacating of certain highways in said city, and entering into contract with the Union Pacific Railroad Company for the construction of viaducts and other purposes. No restraining order or temporary injunction having been allowed, it appears that while the action was pending the council proceeded to pass the ordinances which it was sought to enjoin, and the plaintiff thereupon moved the court for leave to file a supplemental petition making new parties and alleging the passage of the ordinances. Objections were filed by the defendants upon various grounds, and upon consideration the court sustained the objections and overruled the motion for leave to file

the supplemental petition. The plaintiff thereupon appealed to this court, and the defendants filed this motion to dismiss the appeal on the ground that there was no final judgment to appeal from. In *State v. Higby,* 60 Neb. 765, the court said:

"The proceeding in error must be dismissed, because no final order or judgment has been rendered in the cause in the lower court. The court refused to grant the writ, but the proceeding has not been dismissed out of the district court. So far as this record discloses, this cause is still pending in the district court, and the peremptory writ prayed for may yet be granted or allowed. Error proceeding cannot be prosecuted before a final order or judgment has been entered in a cause. Strawn, Supreme Court Practice, 86-91, and cases there cited."

Whatever appears to be the rule in other jurisdictions, this court is committed to the rule above announced in various cases referred to in the authority cited. It is urged by the appellant that the overruling of this motion to file the supplemental petition prevented the plaintiff below from obtaining any relief in the case and so virtually disposed of the action, but this is not the test stated in the foregoing quotation. Since the action is still pending in the district court, that court might become convinced of its error, if any, in overruling the motion, and might still allow a supplemental petition to be filed; so that the rule obtains in this state that, unless the main action is finally disposed of, a ruling upon an interlocutory matter is not appealable.

The motion is therefore

SUSTAINED.

SANFORD R. RAZEE V. STATE OF NEBRASKA.

FILED MAY 3, 1905. No. 13,934.

1. **Newspaper of General Circulation.** A newspaper to be of general circulation, within the meaning of section 47 of the criminal code, must circulate generally beyond the county where it is published. It is not necessary that it circulate in every county of the state, but its circulation must extend and be general beyond the county where it is published.

2. **Libel:** DEFENSE. In a criminal prosecution under the provisions of section 47 of the criminal code, for publishing an alleged libelous article, the truth of the article, when established, is a perfect defense.

3. **Information:** AMENDMENT. The court may, in its discretion, before trial, permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended charges no other crime than the one on which the accused has had a preliminary examination.

4. **Witness:** CROSS-EXAMINATION. By statute the accused is made a competent witness in his own defense; and when he avails himself of that privilege he may be cross-examined the same as an ordinary witness as to matters brought out on his direct examination. But neither the prosecuting attorney, nor private counsel assisting him, should be permitted to cross-examine the accused as to matters not brought out or provoked by his direct examination, which are wholly incompetent and immaterial, and which plainly tend to disgrace him before the jury.

ERROR to the district court for Frontier county: ROBERT C. ORR, JUDGE. *Reversed.*

J. L. McPheely and *Starr & Reeder,* for plaintiff in error.

Norris Brown, Attorney General, William T. Thompson and *J. L. White, contra.*

BARNES, J.

The plaintiff in error was convicted of criminal libel at the September, 1903, term of the district court for Fron-

tier county, and sentenced to a term of one year in the state penitentiary. From that judgment he prosecutes error.

It appears that he was the proprietor and publisher of a newspaper published at the village of Curtis in said county, called "The Curtis Courier," and on the 26th day of June, 1903, published in his said paper the article which was the basis of the prosecution. It contained an affidavit made by one Philip C. Geines, in which he stated, in substance, that he never signed the petition of the prosecuting witness to obtain a druggists' permit from the board of the village of Curtis to sell malt, spirituous and vinous liquors, and never authorized any one to sign it for him; together with the comments of the accused thereon. The information set forth the publication in full, and alleged that the newspaper in question was one of general circulation. The accused entered a plea of not guilty, and on the trial introduced evidence tending to show the truth of the affidavit, and all of the matters contained in the article complained of. He also testified in his own behalf that the article was published without malice, with a good motive and for justifiable ends, to wit, the suppression of the unlawful sale of intoxicating liquors; and this was one of his defenses.

As above stated, it was charged in the information that the newspaper in question was one of general circulation. The state attempted to prove, and the jury affirmatively found, such to be the fact. The evidence to support such finding is found in the testimony of the witness Herbert S. Moorer, who, it appears, was the foreman of the "Courier" at the time the article was published, and who testified, in substance, as follows: That approximately the circulation of the paper was between two hundred and ninety and three hundred; that as near as he could remember the entire issue, which contained the article in question, was mailed to Stockville, Maywood, Moorefield and Eustis, perhaps some to Elwood, and one or two of the smaller post offices in the county, to which they were carried by star

route. When asked, "What, if any, circulation did it have outside of Frontier county?" he answered, "Perhaps a third of the entire circulation. I would not be positive as to that." The witness further stated that the papers mailed to points outside of the state were merely exchanges. The only place designated by the witness to which papers were sent outside of Frontier county was the village of Elwood, a station on the Burlington railroad in Gosper county, to which place it was stated that "perhaps a few copies were sent." With the evidence in this condition the court charged the jury as follows: "You are instructed that to be a newspaper of general circulation, such newspaper must circulate beyond the county where it is published. To have a general circulation it is not necessary that it circulate in every county of the state, but it must extend beyond the county in which it is published to have a general circulation." The giving of this instruction is assigned as error. By section 47 of the criminal code, it is provided: "If any person shall write, print, or publish any false and malicious libel of, or concerning another, or shall cause or procure any such libel to be written or published, every person so offending shall, upon conviction thereof, be fined in any sum not exceeding five hundred ($500) dollars, or be imprisoned in the county jail not exceeding six (6) months, or both, at the discretion of the court. * * * *Provided,* That if said libel is published in a newspaper having a general circulation, the person so offending shall be punished by imprisonment in the penitentiary not less than one (1) nor more than three (3) years." So one of the most vital questions in the whole case was whether the "Courier" was a newspaper having a general circulation. The provision above quoted was construed in *Koen v. State,* 35 Neb. 676, 17 L. R. A. 821, where, after much discussion of the meaning of the word "general" and the expression "general circulation," it was held that to charge a felony the paper must be of general circulation, and that the limitation to one county merely charged a misdemeanor. It was further said:

"It is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, nor that it circulate in every county in the state, but it must extend beyond the county in which it is published and have a general circulation."

We find no other case in which the statute in question has been construed or its meaning defined, and we are constrained to follow the rule above quoted. If the circulation of a newspaper, when confined to the county in which it is published, is limited special or local only, in order to make the paper one of general circulation it must circulate generally outside of and beyond such county. It would not seem to be sufficient to prove that some copies of the paper were sent to a single town or post office outside of the county where it is published, as was attempted to be shown by the evidence in the case at bar. By the instruction complained of the jury were told that it was not necessary for a newspaper to circulate in every county in the state, but it must extend beyond the county in which it is published to have a general circulation. With this instruction applied to the evidence on that question it is quite apparent that the jury might readily find that the newspaper in question was one of general circulation; when, if the instruction had followed the rule announced in *Koen v. State, supra,* and the jury had been plainly told that the circulation of the paper must extend and be general beyond the county where it is published, an entirely different finding on that question might have resulted. Whether the "Courier" was a newspaper of general circulation was one of fact for the determination of the jury under proper instructions. And it was the duty of the court to clearly define the meaning of the words "general circulation" so that by a consideration of the evidence the jury could correctly determine that issue. So we conclude that the instruction complained of was prejudicial to the rights of the accused.

The accused having introduced evidence tending to show the truth of the article complained of, and that it was

published with good motives and for justifiable ends, requested the court to instruct the jury, in substance, that the truth of the statements contained in the article would be a good defense. This instruction was refused, and the court instructed the jury, at the request of the prosecution, as follows: "If you find that the defendant wrote, printed and published in the Curtis Courier the article alleged to be a libel, and he has shown such article to be true, this will not exempt him from liability, if you find from the evidence beyond a reasonable doubt that he acted without good motives and without justifiable ends." This instruction was excepted to, and the refusal to charge as requested, and the giving of the instruction quoted, is assigned as error. The question thus presented was considered by this court in *Larsen v. Cox*, 68 Neb. 44, which, however, was a civil action for damages instead of a criminal prosecution. Judge SULLIVAN, who wrote the opinion, said:

"The contention of counsel for plaintiff is that the truth is unavailing unless it was uttered with a good motive and for a proper purpose. His argument is grounded altogether upon the provision of the constitution which declares that '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.' Constitution, art. I, sec. 5. The provision here quoted is a substitute for section 3, article I of the constitution of 1866, which was an almost literal copy of a New York statute adopted soon after the trial of the celebrated case in which Croswell was convicted of publishing a libel on Thomas Jefferson. *People v. Croswell*, 3 Johns. Cas. (N. Y.) 336. This statute was intended to secure and safeguard the freedom of the press, and is now fundamental law in many of the states. It was a modification of the doctrine of the common law that, in public prosecution for libel, the truth of the libel is no excuse for its publication. When considered in the light of history, there is much reason to suppose that the constitutional provision upon which plaintiff relies was

designed as a sure and permanent protection, both in civil and criminal actions, to persons who have occasion, in the discharge of some legal, social or moral duty, to write and publish criticisms on the character and conduct of others, and that it was not any part of its purpose to take away from the defendant in a libel case any right given him either by the statutory law or the common law. The truth of a defamatory publication is still a complete and perfect defense in a criminal case, irrespective of the motive or object of the publisher."

Indeed, the legislature in defining the crime has made it so. It is difficult to see how any other construction can be given to section 47 of the criminal code. The language of that section defining the crime of libel and providing a punishment therefor plainly requires that the libelous article must be both false and malicious. It follows that when it is shown that the alleged libelous publication is, in fact, true, the principal element of the crime has no existence; hence, the truth of the publication must be a perfect defense to a criminal prosecution. For these reasons, we are of opinion that the court erred in refusing to charge as requested by the accused, and in giving the instruction complained of.

It is also contended that the court erred in allowing the county attorney to amend the information. It is true that the state will not be permitted to amend an indictment, and the reason for that rule is that, the grand jury having been discharged, the body that found the indictment no longer exists; that no other entity can act for such grand jury, and, of course, no amendment to the indictment can be lawfully made. This reason does not apply to an information. The county attorney who made it, being still the prosecuting officer with power to make a new information against the accused, if necessary, can amend the original, provided the amendment does not change the offense charged, and its identity is not destroyed. There can be no substantial objection urged to an amended information which charges the same offense on which the accused has

had his preliminary examination. The amendment allowed in this case embraced matters of clerical errors and punctuation only, so we conclude that the ruling of the court on that question was correct.

Lastly, it is contended that the court erred in permitting the prosecution to cross-examine the accused as to matters not testified to by him on his direct examination, and that such cross-examination was prejudicial to his rights, because it tended to discredit him before the jury. It appears that the accused, who was a man sixty years of age, was a witness in his own behalf, and after stating his age, occupation and place of residence, testified, in substance, that the affidavit which was the basis of the alleged libelous article was furnished him without solicitation by the person who made it; and that he published the article in question without malice, with good motives and for justifiable ends, to wit, for the purpose of aiding in the suppression of the liquor traffic in the village of Curtis. Thereupon, he was cross-examined by private counsel employed to assist the public prosecutor, and was asked a great many questions touching his domestic relations; the number of times he had been married; whether his first wife was living; and many other questions tending to disgrace him in the eyes of the jury. Objections to some of these questions were sustained, but many of them he was required to answer. Among other things the court permitted counsel to ask, and compelled him to answer the question: "Is it not a fact that some three years previous, when you procured your license to marry your present or last wife, you stated that you were only forty-eight years old?" None of these questions were provoked by anything that the accused testified to on his direct examination. None of them had any relation whatever to the crime with which he was charged. He had not put either his character as a law-abiding citizen or his reputation for truth and veracity in issue; he had introduced no evidence whatever as to his character, and it is apparent that the purpose of the cross-examination was to disgrace him before

the jury. This the court should not have permitted. It is provided by statute that a defendant in a criminal prosecution may testify in his own behalf. If he avails himself of that privilege, it is the duty of the court to protect him against a cross-examination which is wholly irrelevant and immaterial, and clearly tends to prejudice him before the jury. It is true that when one offers himself as a witness in his own defense, he may be cross-examined as to any matter brought out in his direct evidence. As to such matters he is on the same footing with an ordinary witness, but as to matters outside of such examination, and which would tend to show that he might have been guilty of some offense other than the one for which he is being tried, or as to any matter which would bring him into disgrace before the jury, he is certainly entitled to the protection of the court. We think the contention of the accused on this point should be sustained, and this, when considered with the other matters complained of, requires us to grant him a new trial.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

FRED GODDARD V. STATE OF NEBRASKA.

FILED MAY 3, 1905. No. 13,967.

1. **Criminal Prosecution:** INFORMATION: WAIVER. In a criminal prosecution, the accused, by demurring or pleading not guilty to the information, waives all defects or irregularities therein which may be excepted or objected to only by a motion to quash or a plea in abatement.

2. **Desertion:** INFORMATION: SUFFICIENCY. An information charging desertion of wife and child, based on the provisions of section 212*a* of the criminal code, is not bad for duplicity, and a motion to require the state to elect on which charge it will prosecute will not lie.

3. ———: ———: ———. An information which fails to state that the accused has wilfully and *without good cause* neglected and refused to maintain or provide for his wife is not sufficient to charge the crime of wife desertion. *Cuthbertson v. State*, 72 Neb. 727, followed.

4. **Evidence.** On the trial of a charge of wife desertion the state, as in all other criminal cases, is required to prove every element of the crime beyond a reasonable doubt.

5. ———. In such a case, in order to sustain a conviction, the state must prove that the accused is possessed of money, property or other means available for the support of his wife, or, if he is without such means, that he has at least some earning capacity, and his refusal, without good cause, to maintain or provide for her.

ERROR to the district court for Chase county. ROBERT C. ORR, JUDGE. *Reversed.*

W. S. Morlan and *C. W. Meeker*, for plaintiff in error.

Norris Brown, Attorney General and *William T. Thompson, contra.*

BARNES, J.

At the September, 1904, term of the district court for Chase county, an information was filed against the plaintiff in error, by which it was attempted to charge him with the crime of wife desertion. After pleading not guilty, his counsel filed a motion to quash the information, a plea in abatement, and a motion to require the state to separately state and number the two offenses, which he claimed were set forth in the information. All of these motions and objections were overruled. A trial was had, which resulted in a conviction. The accused was thereupon sentenced to the penitentiary for a period of nine months, and to reverse that judgment he prosecutes error.

It is contended that the court erred in overruling the defendant's plea in abatement and the motions above mentioned. It appears from the record, as above stated, that before filing said plea and motions, the accused had duly

entered a plea of not guilty, which had not been withdrawn. We have frequently held that, after a plea of not guilty, a plea in abatement, and motions and objections to the sufficiency and form of an information come too late. While the plea of not guilty remains on the record, neither a plea in bar, a plea in abatement nor a motion to quash can be entertained. At such a time the state is not required to answer or demur to a plea in abatement, and the court on its own motion may disregard such pleas and motions. *Davis v. State,* 51 Neb. 301; *Marshall v. State,* 6 Neb. 120; *Korth v. State,* 46 Neb. 631. In *Reinoehl v. State,* 62 Neb. 619, it was held:

"In a criminal prosecution for a felony, the accused will be taken and deemed to have waived all defects or irregularities which may be excepted or objected to by motion to quash or plea in abatement, when he demurs to the information or pleads to the general issue."

Therefore, the plea and motions were properly overruled.

It is further contended that the court erred in permitting the county attorney, over the objections of the accused, to verify the information after the plea of not guilty was entered. In *Bailey v. State,* 36 Neb. 808; *Davis v. State,* 31 Neb. 247; *Hodgkins v. State,* 36 Neb. 160, and *Johnson v. State,* 53 Neb. 103, it was held: A defect in the verification of an information is waived by a plea of not guilty. So the objection was properly overruled.

It is further contended that the court erred in overruling the motion to require the state to separately state and number the offenses charged in the information, and in overruling the motion to require the prosecutor to elect on which offense he would ask for a conviction. From an examination of the information it would seem that but one offense was attempted to be charged. The statute (sec. 212*a* of the criminal code) on which the prosecution was based, reads as follows: "Every person who shall, without good cause, abandon his wife and wilfully neglect or refuse to maintain or provide for her, or

who shall abandon his or her legitimate or illegitimate child or children under the age of sixteen years, and wilfully neglect or refuse to provide for such child or children, shall, upon conviction, be deemed guilty of a desertion and be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six (6) months." In the case of *State v. Wood,* 14 R. I. 151, which was a prosecution under a statute similar to the one above quoted, the court said:

"Under a statute which provided, 'Every person who shall abandon his wife or children, leaving them in danger of becoming a public charge, or who shall neglect to provide according to his means for the support of his wife or children * * * shall be imprisoned not less than six months nor more than three years,' a complaint charged that the defendant 'did neglect to provide according to his means for the support of his wife and children.' *Held,* * * * sufficient and not bad for duplicity. Acts forbidden disjunctively by statute may generally be charged conjunctively in one count of an indictment or complaint."

This rule seems to be supported by *United States v. Hull,* 14 Fed. 324; *United States v. Fero,* 18 Fed. 901; *State v. Gray,* 29 Minn. 142; *State v. Carr,* 6 Ore. 133; *State v. House,* 55 Ia. 466; *In re Walsh,* 37 Neb. 454. So it appears from the great weight of authority that the information in this case was not bad for duplicity.

When the state offered its evidence the defendant objected to the introduction of any testimony on the part of the prosecution, because the information did not state facts sufficient to charge him with a crime against the laws of this state; and later on, after conviction, he filed a motion in arrest of judgment, which again raised the same question. He now contends that the court erred in holding the information sufficient, and that question is thus properly presented for our consideration. In the case of *Cuthbertson v. State,* 72 Neb. 727, we held an information

like the one now in question insufficient, in that it failed to charge that the defendant had, *without good cause,* wilfully neglected or refused to maintain or support his wife. We are satisfied with our conclusion in that case, and without repeating the reasons there given, we may say that the words "without good cause" are as essential to the charge of neglect to support the wife as they are to the question of abandonment. Before the state can ask for a conviction under the statute in question, it must prove beyond a reasonable doubt that the defendant's neglect to provide for or support his wife and child, or children, must not only be wilful, but without good cause. Unless the state shall make it appear that the accused has means or property with which to support the wife, or is able-bodied, in good physical health, and has ability to earn money with which to contribute to her support, no offense is proved. Hence, it is not only necessary to charge want of good cause in the information, but the state must also prove such charge, otherwise a conviction cannot be sustained. So we hold that the information in this case is not sufficient in form or substance to charge the crime of wife desertion.

The accused further contends that the judgment must be reversed, because the evidence introduced on the part of the state is not sufficient to sustain it. It appears from the record that no evidence was introduced or offered by the prosecution tending to show that the defendant was possessed of any means whatever; no attempt was made to show that he was an able-bodied man, or capable of earning anything with which he could contribute to the support of his wife. No circumstances were shown from which the jury could assume that he left his wife without a good cause. So far as the record shows he may have had the best of cause for his absence from her, and may have been unable in any way to contribute to her support. In a prosecution under this statute, as in any other criminal prosecution, the burden is on the state to prove every element of the crime charged beyond a reasonable doubt.

With the evidence in the condition in which it appears in the record, it cannot be said that it is sufficient to sustain a conviction. It is possible that on another trial, with a new information and the introduction of additional evidence, the state may be able to make a case against the defendant, but the record before us does not support the judgment, and the defendant is entitled to a new trial.

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

CEDAR COUNTY V. MARY LAMMERS.

FILED MAY 3, 1905. No. 13,734.

Eminent Domain: ROADS. County authorities in laying out and establishing a public road may proceed against one in possession and apparent sole ownership of the land sought to be taken, and will be discharged from liability upon making compensation to such person in good faith and pursuant to a judgment of the court.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

Millard & Snyder, for plaintiff in error.

B. Ready and *J. C. Robinson, contra.*

AMES, C.

Mary Lammers is the widow and executrix of the will of John Lammers, deceased, who died in 1897. In 1898 she purchased with funds belonging to the estate a tract of land which was conveyed to her in the usual manner. In 1902 the authorities of Cedar county laid out and established a public road across the land, appropriating for that use two acres of the tract. Mrs. Lammers filed a claim with the county board for damages in the sum of $100, upon which she was allowed $40, and from the order

of allowance she appealed to the district court. Upon the trial of the appeal the evidence was uncontradicted that the land taken was worth $40 an acre, and the court directed a verdict for $80, which was returned, and upon which a judgment was entered. The county prosecutes error.

The following statement is copied from the brief of counsel for plaintiff in error. "The points relied upon for a reversal of this cause, as set forth in the motion for a new trial and the petition in error, are: First, that the court has no jurisdiction of the subject matter; second, that there is not sufficient evidence to warrant the court in instructing the jury to return a verdict for the plaintiff in any sum whatsoever; third, that the action is not prosecuted in the name of the real party in interest; and, fourth, that the court had no power, under the prayer of the petition, to grant the relief it did."

All these objections are grounded upon a single contention of counsel for plaintiff in error which, in different phraseology, amounts, in substance, to this: That the lands having been bought with funds belonging to the estate of the testator are distributable to his heirs at law in the same manner as they would have descended to the latter by inheritance if the testator had died intestate and seized of them, and that therefore the heirs and not the executrix are alone entitled to prosecute this claim for damages. Whether the heirs acquired or will acquire anything by inheritance, or whether the whole of the testator's estate was disposed of by his will, could only be ascertained by an inspection of that instrument which is not exhibited by the record; but, in any event, as it seems to us, the executrix having acquired title to the land in the manner stated is trustee of it either pursuant to the will, or *ex maleficio,* or otherwise, and is entitled to enjoy and protect it against the whole world except those, whomsoever they may be, who are beneficially entitled. And the county board having a necessity to acquire a part of it for a public use are entitled to proceed against the party having the

possession and record title, without assuming the burden of ascertaining the validity and construction of the will, and the beneficiaries under it, or of solving the problem of equitable conversion. Such a requirement would, perhaps, be intolerably expensive, and might interpose an insuperable obstacle to the attainment of an important public end.

Whether persons supposing themselves to be beneficially interested would have been entitled to intervene it is not necessary to decide. None has applied so to do. The county cannot acquire the easement without making compensation to some one, and we think it will discharge its obligation by payment to the person in possession and apparent sole ownership. If she is accountable to third persons, they, and not the county, are entitled to enforce their rights as against her by some appropriate proceeding.

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

LETTON 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.

A. HENRY ET AL., APPELLANTS, V. MARTHA E. HENRY ET AL., APPELLEES.*

FILED MAY 3, 1905. No. 13,769.

1. **Administrator:** MORTGAGE: SUBROGATION. One who has loaned money to an administrator upon a void mortgage, a part of which was used to pay a previously executed void mortgage, is not entitled to subrogation to a lien discharged with the proceeds of the latter mentioned mortgage.

2. **Public Officials:** CONTRACTS: LIABILITY. Persons contracting with public officials, deriving their authority exclusively from a statute, are charged with knowledge of the extent and limitations

* Rehearing allowed. See opinion, p. 752, *post*.

of such authority, and, in the absence of bad faith, contracts entered into in the supposed exercise of public powers and functions so derived will not impose upon the officials executing them any personal liability to the party contracted with.

3. An administrator appointed under the statute is not in any sense an agent of his intestate, but is a public trustee, of defined and limited powers.

APPEAL from the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Reversed with directions.*

E. C. and *H. V. Calkins,* for appellant Colton.

H. M. Sullivan and *Warrington & Stewart,* for appellants Henry and Loibl.

E. A. Cook, George W. Fox and *John Linderman, contra.*

AMES, C.

In 1887 Samuel Gayman died intestate in Dawson county, in this state, where he owned two tracts of land, which for the sake of brevity will be called section four and section twelve, each tract being 160 acres in extent. Section four was his homestead, occupied as such by himself and family at the time of his death. At that time both tracts were incumbered by separate mortgages, the homestead for $230 and section twelve for $600. In March, 1887, shortly after her husband's death, the widow was appointed administratrix of his estate, and also as guardian of the children of the marriage, all of whom were minors. Five years afterwards, in March, 1892, the widow, assuming to act as administratrix, executed two new mortgages on section twelve in the aggregate for $330, and with the proceeds paid off the mortgage on the homestead; but these mortgages were executed without authority of law, and are admitted by counsel to have been void. The $600 mortgage existing on section twelve at the time of the death of the husband seems to have been

previously discharged in some manner not disclosed by the record. In 1896 she executed, as administratrix and guardian, two additional mortgages aggregating $1,000 in amount and each of them covering both tracts. It is admitted by counsel that these instruments were also unauthorized and void. With the proceeds she paid off her own void mortgage on section twelve, and accumulated taxes to the amount of $281.56. The residue of the money appears to have been expended in the purchase of farm machinery and in carrying on the business of agriculture. In 1902 the children, having attained their majority, executed jointly to the widow and her bondsmen a release from liability on account of her conduct of her office as administratrix, and she and they were accordingly discharged by order of the county court. At about the same time, or shortly afterwards, all the heirs except the plaintiffs in this action, A. Henry and Sarah Loibl, executed conveyances of their undivided interests in the lands to the two latter. At the same time the widow also conveyed her estates in the lands to the plaintiffs. This action was brought for the purpose of removing the two mortgages last executed as being clouds upon the titles of the plaintiffs. The trial court granted the prayer of the petition, except as to the dower and homestead estate of the widow, upon the latter of which the mortgages were adjudged to be liens in the sum of $1,683 for principal and interest, but denying a decree of foreclosure and sale because of insufficiency of the prayer to the answer and cross-petition. Both parties appealed.

The mortgagee rests his case upon two contentions. The first is that he is entitled to be subrogated to the mortgage debt on the homestead that existed at the date of the death of the testator. But his debt was not paid with the proceeds of his mortgage, but was discharged four years previously to its execution with money derived from the void prior mortgage given to another person on section twelve. This prior mortgagee's equity, if he had one, which we do not decide, was extinguished when his demand was paid.

Counsel has cited to us neither principle nor authority that warrants us in thinking that it was kept alive, or can be revived ten years after its satisfaction, to serve as an equitable consideration for his own instrument. The principle cited by counsel from *Schlicker v. Hemenway,* 52 Am. St. Rep. (Cal.) 116, 128, that one who has furnished money to an executor or administratrix for the benefit of an estate may, in certain circumstances, be subrogated to a right of the latter to reimbursement, is without applicability to this case. What he is seeking for his client is not subrogation to any right, real or supposed, of the administratrix, who clearly has none, but to that of her prior mortgagee whom she has long ago fully paid off and satisfied. It is not seriously contended, and we suppose will not be so, that any lien or right of subrogation was created on account of moneys derived from the mortgages in suit, and expended for the purchase of farm machinery and for general uses. Such a rule would amount to a substantial subversion of the statute relative to the settlement of the estates of deceased persons. The statute prescribes for what purposes lands belonging to an intestate's estate may be incumbered by his personal representative, and it is not suggested that the mortgagee, who is, of course, chargeable with knowledge of the law, was ignorant or was misled as to any matter of fact.

Counsel urges secondly that the administratrix, in procuring the loan and executing the mortgages in suit, acted in a manner analogous to that of one who without authority assumes to contract as the agent of another, or of an agent who contracts in the name of his principal in excess of authority, and that, as the real or supposed agent obligates himself by such transactions, the administratrix ought by the same principles to be held to have charged her life estates of dower and homestead with the liens of the mortgages.

There are several difficulties with this supposed analogy. One of them is that an administrator is not an agent of his intestate, but derives his authority solely from the statute

and is with respect thereto a public officer. The rule of law as to public officers is that they are not personally liable upon their official contracts, although in excess of their powers, if they are not guilty of bad faith, and the persons with whom they contract have equal means with themselves of knowing the extent of their authority, or the latter depends upon a public statute. Persons contracting with them are supposed to know the extent and limitation of their powers. A different doctrine would be contrary to public policy. 19 Am. & Eng. Ency. Law (1st ed.), 500, and note. Another of such difficulties is that, although one may bind himself personally by an unauthorized or excessive contract as the agent of another, he does not ordinarily thereby charge the obligation as a specific lien upon his lands or estates. The dower and homestead estates of the widow were quite as distinct from the estates descendible in fee to the heirs, and over which she was given charge by her appointment as administratrix, as were any other estates in any other tracts of land of which she may have been the owner, and the instruments she executed were as destitute of reference to the former, and were as little intended to affect them, as the latter. One who without authority contracts in the name of another cannot dispute that he intended to obligate somebody, and as no one but himself can be bound, he is presumed to have intended to bind himself; but one who without authority executes a mortgage upon the land of another, although he may render himself civilly liable in damages for his fraud, cannot be presumed to have intended to create a lien upon one or upon one or more of several tracts of land belonging to himself.

In connection with both these contentions there is a persistent insistence that the plaintiffs, who are seeking the aid of equity, should be granted the relief they pray only upon condition of themselves doing equity. But it is a prerequisite to the application of this maxim that the equity which the plaintiffs are required to perform shall be pointed out. At the time these transactions were had,

the plaintiffs, as well as their brothers and sisters, were minors, and not subject to the operation of the law of estoppel. It is not pretended that the widow, or anybody connected with or representing her, was guilty of fraud or deceit, or that the mortgagee labored under any misconception not due to his own negligence or ignorance. We do not indeed know that he, or the agent through whom he transacted the business, committed or was influenced by any mistake at all. He is presumed to have known the law, and for aught that we know he may have been content to rely mainly, if not wholly, upon the honor and personal responsibility of the administratrix. He did, it is true, procure her to execute mortgages, but he knew they were not authorized by order of any court, and that the money was borrowed for uses for which a judicial order would have furnished no justification. There are, indeed, among the county judge's loose files, papers purporting to be petitions for leave to make these mortgages and copies of orders to a corresponding effect, but none such documents is spread upon the records of the court, and they are admitted by counsel to be of no legal validity. Out of these circumstances we do not understand how the court can raise an equity against the minor children or their successors in interest.

We recommend that the judgment of the district court be reversed and that the cause be remanded, with instructions to render a final decree in conformity with the prayer of the petition.

LETTON 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, with instructions to render a final decree in conformity with the prayer of the petition.

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed May 3, 1906. *Judgment modified:*

1. **Quieting Title:** EQUITY. A party seeking relief from a cloud upon the title to land created by a void mortgage may be compelled to do equity as a condition precedent to relief, even though the holder of the mortgage could not enforce the same by foreclosure.
2. **Pleading.** Where a petition alleges the rendition of a judgment, which is not denied, no proof is necessary to establish the fact.

LETTON, J.

The facts in this case are set forth in the former opinion, *ante,* p. 746. Upon rehearing it was strenuously urged by the appellant Colton that in our former consideration of this case we had not given sufficient weight to the argument that he who seeks equity must do equity, and that the plaintiffs who are seeking the removal of the cloud upon their title created by the mortgages should be required to pay such portion of the mortgage debt as was used to defray the mortgage lien and taxes upon the homestead at the time of the death of Gayman, as a condition precedent to the relief prayed. We think it clear that, under the holdings of this court upon the right to subrogation, the former opinion was correct upon that question, and that if the appellant had brought an action to foreclose his mortgage claiming by virtue of being subrogated to the mortgage made by Gayman before his death, he could not have succeeded.

A part of the money of appellant which was loaned upon the void mortgage was used to extinguish a mortgage debt which was created in part to release the homestead from the lien of a mortgage debt of $230 incurred in Gayman's lifetime. To the extent that this mortgage has been paid off the plaintiffs have been benefited, and it is no more than just that, before they ask a court of equity to relieve them from the cloud created by the void mortgage, they should refund to the appellant as much of his money as relieved

them from this burden. 2 Pomeroy, Equitable Remedies, sec. 688. The case is similar to one where an action is brought to remove the cloud created by a usurious mortgage. The plaintiff in such case would be required to pay the debt, with legal interest, as a condition of relief, though, if an action to foreclose had been begun by the holder of the mortgage, and the defense of usury maintained, he would lose either the entire debt or all of the interest, depending upon the statutory penalty imposed by the particular jurisdiction in which the debt was incurred. It will be noted that the plaintiffs in their petition pray: "That the court shall fix, ascertain and determine the amount, if any, for which the mortgages held by Colton are liens on said land, and this amount the plaintiffs are ready and willing to pay." As to the money which was used to pay taxes upon the homestead, it is impossible from the evidence to tell how much was used for that purpose, or how much was applied upon the taxes upon the land in section 12, and further, since it was the duty of the widow as tenant for life to pay the taxes, the plaintiffs were not directly benefited by their payment. In other points we agree with the conclusions of the former opinion.

In the former opinion no mention was made of the complaint of plaintiff as to the judgment in favor of Aultman, Miller & Co. The contention is that this was not supported by the evidence. The record fails to contain the transcript which it states is attached, but, since the judgment is alleged in the pleadings and no denial made, the fact must be taken as true, and the judgment of the district court therefore is not without support.

The former judgment of this court is adhered to, except so far as modified by the foregoing opinion, and the cause is reversed, except as to the judgment in favor of Aultman, Miller & Co., and is remanded to the district court, with instructions to ascertain the amount that would be due upon the original mortgages given by the deceased, Simon Gayman, upon the east half of the southeast quarter of section four, township eleven, range twenty-four, if still un-

paid, with interest, and to require the plaintiffs to pay the same to the appellant Colton, as a condition to obtaining the relief prayed in their petition as regards said eighty acre tract.

JUDGMENT ACCORDINGLY.

HUDSON D. MEAD V. STATE, EX REL. DAVID W. SPERLING.

FILED MAY 3, 1905. No. 13,783.

Cities: OFFICES. Under the statute governing cities of the second class having less than 5,000 inhabitants, the offices of the chief of police and overseer of streets are separate or separable, although both may be held by one person at the same time.

ERROR to the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

Allen G. Fisher, for plaintiff in error.

Albert W. Crites, contra.

AMES, C.

In 1903 the relator Sperling was chief of police of Chadron, a city having a population of less than 5,000. The act of incorporation provides that "all police officers appointed by the mayor and council, in accordance herewith, shall be removable at any time by the mayor." (Comp. St., ch. 14, art. I, sec. 6.) On September 3, of the year named, the mayor removed Sperling from his office. Sperling was at the time water commissioner, from which office he was not removed, and from which he was not removable except by a vote of two-thirds of the members of the council. Afterwards the council, in the absence of the mayor, passed an ordinance purporting to consolidate the offices of water commissioner, overseer of streets and chief of police, and, upon nomination by the

president of the council, also in the absence of the mayor, appointed Sperling to the consolidated office. There is a dispute as to the legality both of the manner of the passage of the ordinance and of this appointment, but we do not think the case calls for its decision. There is no express provision and no indication of legislative intent that the office of water commissioner and any other office shall be held by the same person at one time, and we think that in the absence thereof the consolidating ordinance, in so far, at least, as it assumes to unite that office with overseer of streets and chief of police, is inoperative. Section 7 of the statute above quoted, however, does contemplate the occupancy of both the office of chief of police and of overseer of streets by one person, fixing the salary of the former at $65 a month, including compensation as overseer of streets at a rate not exceeding $2 a day for services actually rendered. But the preceding section enacts that the overseer of streets shall be removable by the mayor, with the advice and consent of the council, and not by the mayor alone. Hence, it is contended that the relator, having been inducted into the last named office, can be removed therefrom only in the manner just stated, and that without ouster therefrom he still retains the office of chief of police.

This is an action in quo warranto, in which it is alleged that the respondent Mead, who, after the attempted removal of Sperling, had been appointed by the mayor temporarily to fill the vacancy, has usurped all the offices, and prays judgment of ouster from all of them. Mead answers, justifying as to the offices of chief of police and overseer of streets, only, under the above mentioned appointment by the mayor. The consent of the council is requisite to the appointment of every of the officers mentioned. The district court granted the writ, and the respondent prosecutes error.

The statute is somewhat obscure, but we think it will be treated as consistent with itself by regarding the three offices in controversy as separate and separable, even

when two of them are held by the same person, so that the mayor will not be deprived, by construction, of power to remove a chief of police at discretion, and so that the latter will continue to hold office of overseer of streets notwithstanding such removal. This view narrows the litigation down to the former office, and as the mayor has at all times insisted upon the removal of the relator therefrom, we do not think that he can rightfully be regarded as a lawful incumbent thereof. The terms of all the offices in dispute expired before this cause was docketed in this court, so that nothing but costs is directly involved herein, and, as each party demanded and attempted to retain more than rightfully belonged to him, we recommend that the judgment of the district court be reversed and the cause remanded, with instructions to dismiss and adjudge each to pay his own costs.

LETTON 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 dismiss and adjudge each to pay his own costs.

JUDGMENT ACCORDINGLY.

G. L. GODFREY, GUARDIAN AD LITEM, ET AL. V. LILLIE A. SMITH.

FILED MAY 3, 1905. No. 13,644.

1. **Review: PARTIES.** The rule that a motion for a new trial is indivisible cannot be invoked to defeat a review of a meritorious petition in error filed by a minor defendant, whose guardian *ad litem* has inadvertently joined her with a mere nominal defendant who has no rights involved in the controversy.

2. **Nuncupative Will.** A formal request from the deceased to all or

some of the three or more witnesses present to bear witness that the words spoken are his will is essential to the validity of a nuncupative will.

3. **Nuncupative wills** are not favored by the courts, and must be proved in strict conformity with the statute authorizing them.

4. **Evidence.** A nuncupative will cannot be established by witnesses having an interest in the will as the only legatees.

5. **Nuncupative Will.** Where a verbal will is made in the last sickness, of which the testator dies, when such sickness has progressed to such a point that he expects death at any time, and realizes that he is liable to die therefrom at any time; and in view of such expected death, and as preparatory thereto, makes a will near to the time of his death, such will is made in the last sickness of the testator, although a sufficient time may have intervened between the making of the oral will and the death of the testator to have permitted the making of a written will.

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

G. L. Godfrey and *Joseph Pinkham,* for plaintiff in error.

T. L. Norval, Hague & Anderberry and *J. L. McPheely, contra.*

OLDHAM, C.

Charles A. Smith, who for about 18 years prior to his death resided in, and at the time of his death was a resident of, Kearney county, Nebraska, departed this life March 4, 1903, in the city of Minden, leaving as his sole and only heirs his widow, Lillie A. Smith, and his daughter, Alta Smith, a minor of the age of seven years, and leaving an estate consisting of real estate of the value of $12,000, and personal property of the value of $1,000. Within six days after the death of Charles A. Smith, his widow, Lillie A. Smith, had reduced to writing a paper purporting to be the nuncupative will of Charles A. Smith. A petition was duly filed in the county court of Kearney county asking that this alleged will be admitted to probate. Objections to the probate of the will were filed by

Deborah A. Pinkham, mother of deceased, and Alta Smith, infant daughter of deceased, was made a party defendant and answered by a guardian *ad litem,* admitting the death of Charles A. Smith, and that Lillie A. Smith was the wife, and defendant Alta Smith the daughter, and only heirs of deceased, and denying each and every other allegation contained in the petition. On issues thus joined there was a trial in the county court, a judgment for defendants, and probate of the will was denied. The proponent appealed from the judgment of the county court to the district court, and on issues joined in the district court there was a trial had to a jury, which resulted in a verdict for proponent. A judgment and decree was entered on this verdict, finding that the paper offered was the genuine and valid last will and testament of deceased, and directing that it be admitted to probate and established as a will of the real and personal estate of deceased. A joint motion for a new trial was filed in the court below by the guardian *ad litem* of the minor defendant Alta Smith, and Deborah A. Pinkham, and likewise a joint petition in error has been filed by these defendants in this court.

It is urged by able counsel for the proponent that Deborah A. Pinkham, the mother of deceased, has no pecuniary interest whatever in the estate of her deceased son, and therefore could not legally institute or conduct proceedings to contest his will. This contention is well supported in authority, and, we think, cannot be successfully contravened. *McDonald v. McDonald,* 142 Ind. 55; *Brewer v. Barrett,* 58 Md. 587; *Taff v. Hosmer,* 14 Mich. 255; *Jele v. Lemberger,* 163 Ill. 338. This position is followed by invoking the rule, too well established in this court to require citations of authority, that a motion for a new trial is indivisible, and, when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all. And the same rule is invoked with reference to the joint petition in error filed in this court.

The question, then, arises, can this rule be invoked for the purpose of denying a minor defendant a hearing in this

court on a meritorious petition in error, because her guardian *ad litem* has inadvertently joined her in a motion for a new trial and petition in error with a mere nominal defendant who has no substantial rights involved in the controversy? It is the general rule that a minor may not be estopped by anything that he says or does while he is under age, and it would certainly seem repugnant to the principles upon which the law protects infants from civil liability or the spoliation of their estates to deny them a review in this court under a mere technical rule intended to govern the actions of litigants of full age of legal accountability. We are impressed with the reason of the rule announced in *Boerum v. Schenck,* 41 N. Y. 182, that, where the reviewing court can clearly see that an error has occurred to the prejudice of an infant, the infant will not be allowed to suffer thereby for any purely technical omission. To the same effect has been the holding in *Branch v. Mitchell,* 24 Ark. 431; *Barnard v. Barnard,* 119 Ill. 92.

The next question that confronts us is as to the sufficiency of the testimony contained in the bill of exceptions to prove the paper offered for probate was the nuncupative will of Charles A. Smith, deceased. Certain facts connected with the death and attempted distribution of the property of Charles A. Smith are not controverted, and these may be said to be clearly proved. One fact is that about 10 days before his death he called on his attorney, Honorable J. L. McPheely, and gave a memorandum from which he desired a written will to be drafted by his counsel; that for about a week before his death Charles A. Smith had been considerably indisposed and bedfast most of the time, and under the care of his family physician; that on the 3d day of March, at 8:30 o'clock A. M., the conversation relied upon to establish the alleged nuncupative will took place at the bedside of deceased in the presence of his business partner, W. C. Taylor, and his wife and little daughter. This conversation can be best discussed by setting out somewhat *in extenso* the testimony

on this question offered by each of these witnesses. W. C. Taylor, examined by Mr. McPheely:

Q. What time in the morning were you there? A. It was after eight o'clock, because I had opened up and then went down. Q. Now, what part of the house were you in that morning as compared with the room he occupied? A. Well, when I went in I just went to the door, and he was talking to Lillie and the little girl. Q. Did you go inside the room occupied by him? A. Yes, I did, but not right away—not at first. He was talking to them. Q. Where was he when you went into the room occupied by him? A. Lying there in the bed. Q. Who was in the room at the time? A. The little girl and Lillie his wife. Q. You mean Alta, the daughter? A. Yes, sir. Q. And Lillie A. Smith, his wife? A. Yes, and I went in right away. I just waited a moment. He was talking to them. Q. What was the wife doing at the time, aside from talking? A. She was crying. Q. What part of the bed was she sitting on? A. On the foot. Q. Foot of the bed? A. Yes. Q. Where was Alta, the daughter, the little girl? A. She was right by the father. Q. What did you hear Charles A. Smith, the deceased, say at that time in regard to the condition of his health? A. Why, he said he wasn't going to live any longer. Q. What did he say as to what disposition he wanted to make of his property? A. He said he wanted the little girl to have $1,000 when she was of age, and he wanted his wife to have the rest; and then he said that he wanted her to have the rest, because it cost so much to educate and raise the child that she ought to have it that way; and they talked on that way for quite a while. Q. Was there any reference, or anything said or made, to any writing made by myself, Mr. McPheely? A. He said before I went to leave—I told him I would have to hurry and get up and fix things for dinner—"Well," he says, "now you remember it and have it as Mac has it wrote down," he says, "as Mac has it." Q. What reference did he make to yourself during the conversation, as knowing what he wanted? A. Why, he

says to me: "I want you to see it goes that way, as Mac has it." Q. Who did you understand he meant by Mac? A. Who? Of course, we was talking about you in our conversation there. Q. About myself, McPheely? A. Yes, McPheely. He said he was up there, and he told me, and told her, too, for to have it fixed out, but he didn't.

Alta Smith, examined by Mr. McPheely:

Q. Do you remember of a talk with your father the morning before he died, in your house? A. Yes, sir. Q. Who was present at that time, Alta, I mean who was there? A. Mamma and me and Will. Q. Who do you mean by Will? A. Will Taylor. Q. Will Taylor, the gentleman who was just on the witness stand? A. Yes, sir. Q. Where was your father, in bed or sitting up, at that time? A. In bed. Q. Who was he talking to? A. Mamma and me. Q. And was Will Taylor present at the time—was he in the room? A. He just come in. Q. What was your mamma doing at the time, aside from talking? A. She was crying. Q. What did your father say about whether he would live or not? A. I don't know about that. Q. What did he say about what he wanted done with his property? A. He said for me to get $1,000 and mamma to get all the rest. Q. Said something to Mr. Taylor, or do you remember about that? A. I don't remember that. Q. Do you remember anything he said except— A. Only— Q. What he wanted you to have? A. He said for me to get $1,000. Q. And your mamma the balance, all the rest? A. Yes.

Lillie A. Smith, examined by Mr. McPheely:

Q. What business was your husband engaged in at the time of his death? A. Restaurant. Q. Are you acquainted with William Taylor, the witness who just testified? A. Yes, he had a home with us from the time he was nine years old, with the exception of about two years and a half he was in Wisconsin. Q. Were you present at the time of your husband's death? A. Yes, I was. Q. How long had he been confined, before his death, to his bed? A. Well, he had been in his bed, up and down, for a week,

of course, not all the time. I would get him up in the rocking chair to ease him and change him around, but he hadn't been arising from his bed at all. The day before, on Monday, the second, I got him up in his rocking chair a few minutes, a little while, that was the last time he was out of his bed. Q. That was on Monday? A. Yes, sir. Q. What day of the week did his death occur? A. On Wednesday morning, about three o'clock. Q. Was any statement made by your husband, say on Tuesday morning, in relation to his condition and his property? A. Yes, sir. Q. Who was present at that time? A. My little daughter Alta, and William C. Taylor. Q. That is the witness Taylor who was on the witness stand? A. Yes, sir. Q. What time of day was that on Tuesday morning? A. Just before the little girl went to school; possibly about half past eight or near that. Q. What did your husband say in the presence of yourself, your daughter Alta and William Taylor, in regard to his physical condition? A. Well, he said he was worse than we thought he was. He thought he was failing so, and he was worse off than I thought, or anyone thought, or the doctor. Q. What did he say in regard to whether or not he thought he would live? A. He said he didn't think he would get well. Of course, I didn't think but what he was just talking. I didn't know how bad he was. Q. What did he say in regard to the disposition that he desired to have made of his property in case of his death? A. He said he wanted the little daughter to have $1,000 when she was of age, and he wanted that I should have the balance as my own. Q. What did he say at that time, if anything, in reference to a memorandum I had made for him? A. Well, he said then that Mac knew how he wanted it, after he had told me, and he said—he looked up and saw Will Taylor in the room—and he says, "You see, Will, that it goes as I want it," and he said, "Mac has it as I want it." Q. What did he say about writing it down by myself? A. He said you had it written down as he wanted it. * * * Q. What answer did Mr. Taylor make to him when your

husband appealed to him, or stated that? A. He walked along up the bed, and said: "You will get well, Charley, and then you can see to your business yourself." Q. What did Charley say? A. He said: "I don't think I shall: I am very sick. I am worse than you think I am." Q. What did Mr. Taylor say as to seeing that it would be carried out, what Charley requested? A. He said he would do the best he could, he would.

Cross-examination. Q. Referring to the morning of the third, when the statements were made by Mr. Smith to which you have sworn, had he taken suddenly ill, or was he worse then than he had been, to all appearance, for the week back? A. Well, I didn't think very suddenly. It just gradually came on he was getting worse all the time. Q. Why was the little girl in there? A. Because it was her custom to come in and see her papa before she went to school. Q. Had she been going to school, Mrs. Smith, all the time up to this morning? A. Why, I think she hadn't missed any days that I know of. Q. Did she go to school the morning of the third after that? A. Yes, she went to school. Q. Who had been the attending physician? A. Dr. Martin. Q. When had you first sent for Dr. Martin? A. I got medicine from Dr. Martin—he didn't consider only his nerves, I supposed. I spoke to my husband that morning, and said: "I guess I had better call the doctor." And he said: "I have medicine to last today; I don't know whether you had better or not." Then he said afterwards: "I guess I had better wait," he said, "if it is my nerves I don't think it is necessary," but he said, "I am worse than you think, or the doctor." Q. How long prior to that time was his last visit to your husband? A. I don't remember the date. Q. Had it been four or five days? A. I guess it was that long. I cannot remember the date of it. Q. When did you next call Dr. Martin? A. On the third, in the evening. Q. What time about? A. I think about six, somewhere along there. I don't know the exact time, as I remember. Q. Had he said anything about the disposition he desired to make of his property before Mr. Taylor

came in? A. No, sir. Q. Nothing at all? A. No, sir. Q. What was the first word he said as to the disposition of his property? A. Well, I think the first he said was that he had it mapped out, or Mac had it written as he wanted it I cannot recall just the exact words, anyhow it was to the same effect, he had it just as he wanted it. He wanted I should have the handling of it, and Alta should have $1,000. Q. Did he at that time state to you that he wanted Alta to have $1,000. A. Yes, sir. Q. And that you should have the balance? A. Yes, he did. Q. Did he say anything about who should be appointed executor or executrix? A. Well, I don't know. He said Mac had it as he wanted it. I don't recollect that he spoke of it. Q. That is, Mac had the memorandum of the way he wanted it? A. Yes, sir. Q. He didn't intimate to you that Mac had made a will for him? A. It would seem that way. There was something of that nature. I don't know. Q. Did you at that time understand that Mr. McPheely had drawn a will for him? A. I didn't know anything about it until he commenced. Q. At that time you had no idea, in this conversation you had with him, it was a will, did you? A. Why, no; I didn't. Q. You never heard of the term nuncupative will before? A. No, sir. Q. Who was the first one suggested that to you? A. I suppose my attorney told me. Q. Mr. McPheely, after you had told him of this conversation? A. Yes, and he wanted Will to see that it went the way he wanted it. Q. You are sure that he said at that time without reference to anything that Mr. McPheely might have said, that he wanted Alta to have $1,000 and you the balance? A. Yes, sir.

Section 128, chapter 23, Compiled Statutes, 1903 (Ann. St. 4993), provides as follows:

"No nuncupative will shall be good when the estate thereby bequeathed shall exceed the value of one hundred and fifty dollars, that is not proved by the oath of three witnesses, at least, that were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or

some of them, to bear witness that such was his will, or to that effect; nor unless such nuncupative will was made at the time of the last sickness of the deceased, and in the place of his or her habitation or dwelling, or where he or she had been resident for the space of ten days or more next before the making of such will, except when such person was unexpectedly taken sick, being from home, and died before he or she returned to the place of his or her habitation."

It will be noted that this provision of the statute requires that the will be proved by the oath of at least three witnesses who were present at the making thereof, and that it be proved that the testator, at the time, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect. Under this provision of the statute it must be proved that the deceased, while uttering the words offered as a will, had not only a present testamentary intention, but also an intention to make an oral will, and that he intended that the words then uttered and no others should constitute his will. If he only gives instruction for a will that he desires to have reduced to writing, but fails to execute, the instructions cannot be sustained as a nuncupative will. 1 Underhill, Wills, sec. 174; *In re Will of Hebden,* 20 N. J. Eq. 473; *Male's Case,* 49 N. J. Eq. 266; *Porter's Appeal,* 10 Pa. St. 254; *Reese v. Hawthorn,* 10 Gratt. (Va.) 548; *Ellington v. Dillard,* 42 Ga. 361. Now which one of the witnesses to this will, from the evidence above set out, was called upon to bear witness in the presence of the others that the words then spoken were intended to be the last will and testament of Charles A. Smith? It certainly was not the minor defendant Alta Smith, for practically all she remembered of the conversation was that her father intended to give her $1,000, and let her mother have the balance. She did not remember, nor assume to remember, that he called on either Mr. Taylor or her mother to witness that any particular words were his last will, or anything to that effect. If the will offered for probate is sustained, and if it were held that

real estate may be devised by nuncupative will under our statute, the effect of this disposition of the estate of the decedent would be to practically disinherit this minor defendant, so that probably she could not be properly held an incompetent witness because of interest in the proposed will. But in view of the very tender age of this witness she would be presumptively incompetent to testify as either a subscribing witness or an attesting witness to a will in the absence of proof showing sufficient understanding to comprehend something of the nature and contents of the instrument which she was called upon to attest, and no proof of this kind is in the record. Proof of the *rogatio testium* or formal calling of witnesses to bear witness is a necessary element in this class of wills, and no matter how clear the testamentary intent may be proved, a paper offered as such will be invalid as a nuncupative will without satisfactory proof of this requisite. Page, Wills, sec. 237; *Bundrick v. Haygood,* 106 N. Car. 468; *In re Grossman's Estate,* 175 Ill. 425; *Wiley's Estate,* 187 Pa. St. 82; *Page's Will,* 23 Wis. 69; *Porter's Appeal,* 10 Pa. St. 254. While it is true that in the proof of the *rogatio testium* no particular form of words is required, and it is sufficient under the provisions of our statute if the testator, by word, sign, or token, indicate to one of the witnesses to bear testimony that the words then spoken are intended as the last will of the testator, yet such word, sign or token must have been intended by the testator as a request and must have been understood as such by the witnesses present. *Weir v. Chidester,* 63 Ill. 453; *Owens' Appeal,* 37 Wis. 68; *Bradford v. Clower,* 60 Ill. App. 55. Now, if we construe the words as spoken to witness Taylor by decedent, "I want you to see that it goes that way," as a sufficient request to bear witness to his will, proof of this request is only supported by the testimony of witness Taylor, who is disinterested, and the wife of decedent, who is the beneficiary under the will. While it is only necessary to call on one witness to bear witness, yet it must be done in the presence of the other witnesses, and such fact must be proved by their testimony.

The general rule is that a nuncupative will cannot be established by one having an interest as legatee in the will. Beach, Wills, sec. 10; *Gill's Will,* 2 Dana (Ky.), *447; *Haus v. Palmer,* 21 Pa. St. 296; *Jones v. Norton,* 10 Tex. 120. Nuncupative wills, except those of soldiers and sailors in the active military or naval service of the government, have never been looked upon with favor by the courts, and proof of such wills is required in strict conformity with the statute authorizing them. *Morgan v. Stevens,* 78 Ill. 287; *Yarnall's Will,* 4 Rawle (Pa.), 46; *Biddell v. Biddell,* 36 Md. 630; *Taylor's Appeal,* 47 Pa. St. 31; *Lemann v. Bonsall,* 1 Add. Eccl. (Eng.) 387. Section 130, chapter 23, Compiled Statutes, 1903 (Ann. St. 4995), provides as follows:

"All beneficial devises, legacies and gifts whatsoever, made or given in any will, to a subscribing witness thereto, shall be wholly void, unless there be two other competent subscribing witnesses to the same; but a new charge on the land of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will."

This section of the statute plainly declares the policy of preventing the proof of wills from being established by interested witnesses. While it is true that the words, "subscribing witnesses," used in this section, technically construed, would only apply to a witness to a written will, and not to the attesting witness of an oral testament, yet, if this narrow construction be given the section above quoted, it destroys the effect of the use of the words, "all beneficial devises, legacies and gifts whatsoever, made or given in any will," for there can only be, technically, a subscribing witness to a written will; but, if a construction be given this section in conformity with the manifest intention of the lawmakers, we will treat "subscribing witness" as having been used as synonymous with "attesting witness," or a witness by whose testimony a will must be established. We are cited by counsel for proponent to a well-written opinion from the supreme court of Georgia

in the case of *Smith v. Crotty,* 112 Ga. 905, 38 S. E. 110, in which it was held that under the statutes of that state the words, "subscribing witness," could only be held to apply to a witness to a written will. The statute construed in the case just cited is as follows: "If a subscribing witness is also a legatee or a devisee under the will, the witness is competent, but the legacy or devise is void." It will be noted that this statute does not apply to legacies and devises under any will, and it specifically makes the witness competent to testify, but renders the legacy void. Now, in the case at bar, it would be purely paradoxical to hold that two of the attesting witnesses, who are the legatees under the will and sole heirs at law of the deceased, might be permitted to testify, but could take no legacy under the will, for the effect of such a holding as this would be to leave the decedent intestate, and to admit to probate an alleged will that would neither bequeath nor devise any property to anyone. We are therefore compelled to conclude that neither of the legatees named in this will are competent witnesses to establish the will.

There is another question urged for consideration, and that is as to whether the proof is sufficient to establish the fact that the will offered for probate was made at the time of the last sickness of the deceased. The expression, "last sickness," or "last illness," occurs in nearly all American statutes providing for nuncupative wills, and is borrowed from the English statute, 29 Charles the Second, of which our own statute is a practical reenactment. The leading American case which construes the term, "last sickness," in statutes of wills was written by the learned Chancellor Kent in *Prince v. Hazleton,* 20 Johns. (N. Y.) 501, and it was there held, by a divided court, however, that the term, "last sickness," was equivalent to meaning "*in extremis,*" or an illness or sickness so violent that the testator had not time, nor opportunity, nor means at hand, after making his oral will, to make a written will in legal form. This decision is generally

commended by the text-writers, and has been followed in *Bellamy v. Peeler,* 96 Ga. 467; *Donald v. Unger,* 75 Miss. 294; *Reese v. Hawthorn,* 10 Gratt. (Va.) 548; *Carroll v. Bonham,* 42 N. J. Eq. 625; *In re Rutt's Estate,* 200 Pa. St. 549, 50 Atl. 171; *O'Neill v. Smith,* 33 Md. 567. A more liberal view, however, of the meaning of this phrase has found favor in recent decisions of the supreme courts of Alabama, Tennessee, Illinois and Kansas. *Johnston v. Glasscock,* 2 Ala. 218; *Nolan v. Gardner,* 7 Heisk. (Tenn.) 215; *Harrington v. Stecs,* 82 Ill. 50; *Baird v. Baird,* 70 Kan. 564, 79 Pac. 163. Under the decisions last cited, it is held that, where a verbal will is made in the last sickness of which the testator dies, when such sickness has progressed to such a point that he expects death at any time, and realizes that he is liable to die therefrom at any time, and in view of such expected death and as preparatory thereto makes a will near to the time of his death, such will is made in the last sickness of the testator, although a sufficient time may have intervened between the making of the oral will and the death of the testator to have permitted the making of a written will. We are inclined to think that this rule is all that a fair interpretation of the statute requires, and that a sufficient precaution to prevent imposition and fraud on the estates of decedents is taken by the courts when strict proof is required by disinterested witnesses that the words spoken were intended as the last will of the decedent, and that the witnesses present, or some of them, were called upon to bear witness of such fact. We think that the evidence was probably sufficient to sustain the verdict of the jury on the question that the will offered for probate was made in the last sickness of the deceased.

In view of the conclusion to be reached, it is not necessary to determine the question whether real estate is a subject of devise by nuncupative will under our statute. The only question involved in this controversy at the present time, and now before us for adjudication, is whether or not the will offered in the county court shall

be admitted to probate as the last will and testament of the deceased; and, because of the interest of one of the attesting witnesses and the incompetency of the other, as before set out, there is not sufficient competent evidence to sustain the judgment, and we therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and LETTON, 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.

CITY OF LEXINGTON V. WILLIAM A. KREITZ.

FILED MAY 3, 1905. No. 13,777.

1. **Trial.** While the practice of reading the petition to a jury in the opening statement by counsel is not to be commended, yet, unless prejudice is shown from such conduct, the sound discretion of the trial court over such matters will not be interfered with by this court.

2. **Action for Personal Injuries:** EVIDENCE: REVIEW. Proof by plaintiff of the filing of his claim with the council of a city of the second class, having less than 5,000 inhabitants, before instituting a suit for personal injuries alleged to have been received on a defective sidewalk, does not constitute reversible error.

3. **Question for Jury.** *Held*, That, under the evidence in this case, the question of plaintiff's contributory negligence was one of fact for the jury.

4. **Instructions** of the trial court examined, and *held* not prejudicial.

5. **Arguing to Jury.** Where an objection to improper remarks of an attorney used in an argument to the jury is promptly sustained by the trial judge, it is only for the excessive abuse of the latitude properly allowed counsel in addressing juries, by the use of peculiarly prejudicial language, that the judgment will be set aside by this court.

ERROR to the district court for Dawson county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

G. W. Fox and *E. A. Cook,* for plaintiff in error.

H. D. Rhea, contra.

OLDHAM, C.

This is an action for personal injuries alleged to have been received on a defective sidewalk in the city of Lexington. There was a trial to a jury, verdict for plaintiff for $1,100, judgment on the verdict, and the defendant city brings error to this court.

There is no dispute as to the fact that plaintiff was injured on the walk, and it is conceded that the walk was in a dangerous condition, and that the city had both direct and constructive notice of the condition of the walk a long time before the injury occurred. The only defense interposed was that of contributory negligence. The facts concerning the occurrence of the injury are undisputed, and show that at about half past eight o'clock on the morning of the 15th day of April, 1903, plaintiff was walking along the sidewalk, accompanied by another man, named De Garmo, and that De Garmo stepped on the end of a loose plank and tripped plaintiff, causing him to fall, and that when plaintiff fell on the walk he received a compound fracture and dislocation of his right shoulder, which has permanently limited the use of his arm. It shows that plaintiff was totally disabled after the injury for about four months; that he is a paperhanger, grainer and decorator by trade, and was able to earn from $2.50 to $3 a day at his trade before the accident occurred, and that the injury sustained has permanently affected his ability to decorate, grain, and hang paper. There is nothing in the quantum of the verdict that even remotely suggests excessive damages.

The first error called to our attention in the city's brief

is as to the action of the trial court in permitting plaintiff's counsel to read his petition to the jury in his opening statement. Counsel for the city contends that it is bad practice to permit the reading of pleadings to the jury in the opening statement; that the petition in cases of this nature nearly always contains an exaggerated statement of the injury, and many other immaterial allegations, and for this reason it should not be read to the jury. While we concede that the practice of reading petitions and answers to a jury as part of the opening statement is not to be commended, yet we recognize that the trial court has a sound discretion in such matters, and, unless an objection of this character is coupled with something showing actual predjudice to the party complaining, it must be held as not prejudicially erroneous.

It is next urged that the court erred in permitting plaintiff to show that he had filed a claim for his injuries with the council of the defendant city, and that the council had refused to act thereon before this cause of action was instituted. It is conceded that the city of Lexington is a city of the second class having less than 5,000 population. With reference to claims against cities of this class and villages, it is provided by statute that "no costs shall be recovered against such city or village in any action brought against it for any unliquidated claim, which has not been presented to the city council or board of trustees to be audited." Comp. St., ch. 14, art. 1, sec. 80. In *City of Crete v. Childs,* 11 Neb. 252, we held that, in an action against a city of this class for damages on a defective sidewalk, it is not necessary to present a claim to the city council for allowance, but that the presentation of such claim is essential to a recovery of costs against the city. Without any reference to the ruling in this case it was subsequently held by this court in *Nance v. Falls City,* 16 Neb. 85, that the word "claims" in section 80 of the chapter relating to cities of the second class applies alone to such claims as arise on contract and not upon tort, and that it was not necessary to file a claim with

the council of a city of this class to be able to recover costs in an action founded on tort. Later in *City of Friend v. Ingersol,* 39 Neb. 717, it is said with reference to notice: "Our statute requires all such claims to be verified by the oath of the party claimant, his agent," etc. Citing *City of Crete v. Childs, supra.* Even if the filing of this claim with the city council were not necessary to enable the plaintiff to recover his costs in the action, the proof of such fact would be, at most, error without prejudice.

It is also contended by the city that plaintiff was clearly guilty of contributory negligence in walking on the sidewalk where the injury occurred, in company with another man, and that from the evidence, if he had walked alone, he probably would not have been injured. The evidence of plaintiff, supported by his companion, tends to show that they walked on the sidewalk with abundant caution; that where the boards were out and visibly broken they stepped off the walk, and that at the place where the injury actually occurred there was eight or ten feet of the walk with no missing boards, and no visible indication that any of the boards were loose. In this state of the evidence, the question of plaintiff's contributory negligence was clearly one of fact for the jury.

It is urged generally against the instructions that they were rather vague and indefinite in the charges given. But we are pointed to no erroneous declaration of law in any of them. Counsel for the city made no requests for more specific and certain instructions on any question involved in the controversy and, consequently, is not in a position to complain of the vagueness of the instructions. There were but two questions involved in the controversy. One was the contributory negligence of plaintiff, which went directly to his right of recovery. The other was the question of the extent of the injury which he had received, if injured without any fault on his part. Both of these questions were clearly presented to the jury, consequently the instructions need no further examination.

Our attention is finally directed to the misconduct of

plaintiff's counsel in addressing the jury after the close of the testimony, and using the following language: "We have evidence of the bad condition of the sidewalks in the city here (pointing to Honorable E. A. Cook, who had heretofore been injured by falling on the walk of said city, and was then representing the city in the defense of the suit), and they (meaning the city) are now healing the injury by his (Cook's) employment in this suit." The use of this language was indeed reprehensible and deserving of severe censure from the trial judge, who did sustain an objection to the remarks. Ordinarily, when improper remarks are used by counsel in addressing a jury, an objection to such remarks, promptly sustained by the trial court, will cure the baneful influence of the language used. Where an objection has been sustained by the trial court, it is only for an excessive abuse of the latitude properly allowed counsel in addressing juries, by the use of peculiarly prejudicial language outside of the record, that the judgment will be set aside for such misconduct. In the case at bar there is nothing in the verdict returned by the jury which shows that they were in any manner influenced by the unwarranted reference of plaintiff's counsel to the serious injury which defendant's counsel had recently received on the sidewalk. As before pointed out, there is no indication of any smart money in the verdict returned, and the evidence on the question of contributory negligence so clearly preponderated in favor of plaintiff that the judgment rendered in his favor was in no probability in any manner influenced by this improper conduct. We therefore recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

HENRY C. ARMSTONG, APPELLEE, V. EDWIN P. SWEENEY, SHERIFF, ET AL., APPELLANTS.

FILED MAY 3, 1905. No. 13,645.

1. **Bankruptcy:** JUDGMENT: INJUNCTION. Where a discharged bankrupt seeks to enjoin the collection of a judgment against him which was not listed in the name of the creditor in the bankruptcy proceedings, he must plead and prove that the creditor had notice or knowledge of such proceedings in time for proof and allowance of the same before he can succeed in the action.

2. **Notice:** EVIDENCE. Under the facts in this case, *held*, that the appellee has not proved the allegations of his petition that the creditor had notice or knowledge of the bankruptcy proceedings.

APPEAL for the district court from Box Butte county: JAMES J. HARRINGTON, JUDGE. *Reversed and dismissed.*

H. M. Sinclair, W. P. Hall and *R. C. Noleman,* for appellants.

J. L. McPheely and *William Mitchell, contra.*

LETTON, C.

On the 6th day of December, 1898, W. P. Hall recovered a judgment in the county court of Phelps county against H. C. Armstrong and Swen Morrine, for the sum of $462.10, with interest and costs. On the 8th day of April, 1899, H. C. Armstrong, being then a resident of Alliance, Box Butte county, Nebraska, filed his petition in the United States court for the district of Nebraska, praying that he be adjudged a bankrupt under the bankruptcy act. On April 10, 1899, he was adjudged a bankrupt, and on August 3, 1899, he was discharged as a bankrupt. The notes upon which the judgment was rendered in favor of Hall were made to Swen Morrine, as payee, and had been indorsed and delivered to Hall by him before the recovery of the judgment. In the bankruptcy proceedings a claim was scheduled in this manner: "31. Swan

Morrise. Addressed, Bertrand, Neb. Judgment for the sum of $325. The consideration for the above debt was money loaned to petitioner at Bertrand, Neb., in 1895." The name of Swen Morrine did not appear in the schedule, and no claim was listed in favor of W. P. Hall. On the 12th day of July, 1900, Hall filed a transcript of the judgment in the office of the clerk of the district court for Box Butte county, and caused an execution to be issued on the same and placed in the hands of the defendant Sweeney, as sheriff of that county, for service. By virtue of this execution, Sweeney, as sheriff, levied on certain personal property belonging to Armstrong, and was about to advertise and sell the same on execution when Armstrong began this action in the district court for Box Butte county to enjoin W. P. Hall and E. P. Sweeney, as sheriff, from proceeding to collect the judgment by execution. The petition sets forth the bankruptcy proceedings, the discharge of Armstrong, and pleads that Hall had notice and actual knowledge of the bankruptcy proceedings in ample time to have had the judgment property scheduled among the liabilities of the bankrupt, and to have made due proof of his claim against the bankrupt. Hall answered, admitting the judgment and levy, and denying all the other allegations of the petition.

There is only one question in this case, and that is, did Hall have knowledge of the bankruptcy proceedings in time to schedule his claim for proof and allowance. Armstrong testifies that on the 10th day of June, 1899, he was in Omaha for the purpose of listing one of his creditors, named Palm, whose name he had omitted from the list by inadvertence; that he met Mr. Hall upon the street near the Paxton Hotel. He was then asked: "What conversation did you have with Mr. Hall at that time in regard to your bankruptcy proceedings?" "He said: 'I see you are going through bankruptcy.' He laughed, and there was a lot of joshing going on." Mr Hall testifies that he met Mr. Armstrong somewhere near the Paxton

Hotel sometime during the summer of 1899; his best impression was that it was after the month of June, and further testifies:

Q. At that time was there anything said by you to him or he to you about taking bankruptcy proceedings?

A. No, sir.

Q. At that time did either of you say anything about his taking the bankruptcy act?

A. No, sir.

Q. During that summer was there anything said about him taking the bankruptcy act?

A. No, sir.

Mr. Hall further testifies that he had no notice or knowledge of the bankruptcy proceedings until the fall or winter of 1899. Swen Morrine testifies that during the months of March, April and May, 1899, he lived in Kearney; that he never received any notice by mail or otherwise of the bankruptcy proceedings, and did not take a notice to Mr. Hall's office; and that he did not hear of Armstrong's filing a petition in bankruptcy until a long time afterwards. C. H. Roberts, an attorney at law, who formerly resided at Holdrege, but now resides in Boise, Idaho, testified that he was acquainted with W. P. Hall and Swen Morrine; that he had knowledge of Armstrong's instituting bankruptcy proceedings, which knowledge he obtained from W. P. Hall; that he had no actual knowledge that Swen Morrine ever had any notice of the proceedings, and never had any conversation with him regarding the same. He states further that he had a conversation with Mr. Hall about the bankruptcy proceedings; that he advised with him upon this matter shortly before he left Holdrege; that the communications were of a privileged character, and that he did not care to disclose the nature of them. He further says, however, that he cannot tell the exact date of this conversation, but it was a short time before he left Holdrege, which was in October, 1900. Sam A. Dravo, of Holdrege, testified that he knew the parties; that the first he knew of Armstrong's

taking bankruptcy proceedings was from Mr. Hall. He says: "He told me that Armstrong had taken or was taking, I don't know which, and for me not to say anything about it to Armstrong as he owned the Swen Morrine judgment or claim, I don't know which, and was either going to sue him or issue execution. I think he said he was going to issue execution; that he knew where he was running a saloon and that he would jump onto the fixtures. As to these conversations Mr. Hall testifies that he had the conversation with Mr. Roberts in the latter part of the summer or early in the fall of 1900, and that he had the conversation with Mr. Dravo just before he filed the transcript and had the execution issued, which was in June, 1900. This is all the testimony relating to the knowledge of Mr. Hall of the bankruptcy proceedings. The burden of proof was upon the plaintiff, Armstrong, to sustain the allegation of his petition that Hall had knowledge of the bankruptcy proceedings in time to file his claim. Armstrong states that Hall said to him in June, 1899: "I see you are going through bankruptcy." This is positively denied by Hall, who further swears he had no knowledge of the proceedings until after Armstrong's discharge. The conversations had between Hall and Roberts, and Hall and Dravo, were had a long time after the bankruptcy proceedings were over. Roberts fixes the time of his conversation as being after this period. Dravo is uncertain as to time, but his statement that in that conversation Hall stated to him that Armstrong was running a saloon, and he was about to jump onto the fixtures, corroborates Hall's testimony that this conversation took place just before he had the transcript filed and execution issued. It seems hardly probable that Mr. Hall, an experienced lawyer, knowing that he had a judgment of nearly $500 against Armstrong, if he knew that Armstrong was going through bankruptcy, would have taken no steps to protect his judgment. Taking the testimony as a whole, we are of the opinion that Armstrong had not sustained the allegation of his petition that Hall had notice of the

proceedings. Under the bankruptcy act, which provides that the bankrupt is discharged from all his provable debts, except such as have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice of the proceedings in bankruptcy, Armstrong was not discharged from the judgment debt and Hall had the right to have the execution issued and levied upon the goods in controversy.

We are of the opinion that the judgment of the district court should be reversed, and judgment entered in this court in favor of the appellants dissolving the injunction and dismissing the case.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and judgment is entered in this court in favor of the appellants dissolving the injunction and dismissing the case.

JUDGMENT ACCORDINGLY.

WILLIAM A. CAMPBELL, RECEIVER, APPELLANT, V. BEN P. MILLER ET AL., APPELLEES.

FILED MAY 3, 1905. No. 13,754.

Evidence examined, and *held* to sustain the judgment of the district court.

APPEAL from the district court for Johnson county: JOHN S. STULL, JUDGE. *Affirmed.*

L. C. Chapman and *George A. Adams,* for appellant.

S. P. Davidson, contra.

LETTON, C.

This was an action to foreclose a mortgage. From a decree refusing foreclosure, setting aside the mortgage, and quieting and confirming the title to the property in the defendant, an appeal has been taken.

In October, 1901, the defendant, Ben P. Miller, purchased two lots in the city of Tecumseh, upon which was situated a livery barn. He borrowed part of the money used in the purchase from the Chamberlain Banking House. Two notes were given, one for $2,000, the other for $258.60, both secured by a mortgage on the premises given to Charles M. Chamberlain, who was the cashier of the bank. The $2,000 note was discounted by the Chamberlain Banking House to the Bank of Commerce of Kansas City, while the other note has remained in the bank. The $2,000 note was afterwards renewed, rediscounted at the same bank, and paid by the Chamberlain Banking House. Upon July 30, 1902, Miller and his wife executed to Charles M. Chamberlain a note and mortgage upon the same property to secure the payment of $2,258.60, and on August 18, 1902, the previous mortgage for the same amount was released upon the margin of the record by Charles M. Chamberlain, but the old notes were never surrendered to the defendant Miller. The plaintiff, appellant, contends that the note and mortgage executed upon July 30 were given in renewal of the debt to the bank evidenced by the former notes and mortgage, and that it is still due and unpaid; while the defendants claim that the prior mortgage debt was fully paid about the 20th day of July, 1902, and that the note and mortgage in controversy were executed without consideration, and for the purpose of allowing Charles M. Chamberlain, individually, to negotiate the same for the purpose of raising money for the defendant Miller to use in his business as a dealer in horses.

The only questions presented are questions of fact. It appears that the Chamberlain Banking House became insolvent in 1902, and Charles M. Chamberlain, its cashier,

thereafter absconded. The plaintiff is now receiver of the bank. In July, 1904, an individual came to Tecumseh in possession of this note and mortgage, and the receiver procured a search warrant to be issued, and thereby obtained possession of these papers. The evidence as to the note and mortgage being given in renewal of the former debt is largely circumstantial. S. M. True, who was the teller of the Chamberlain Banking House at the time, testifies to the facts with reference to the borrowing of the money from the bank in the first place, the renewals of the $2,000 notes, and the execution of the note and mortgage of July 30. The facts which he relates, together with the entries in the books of the bank, tend to sustain the allegations of the plaintiff's petition. Corroborating testimony to some extent is also afforded by the schedule of debts filed by the defendant Miller in a bankruptcy proceeding in the United States district court for the district of Nebraska. On the other hand Miller himself, together with two other witnesses, positively testify to the payment at different times to Charles M. Chamberlain, as cashier, of money sufficient to discharge the mortgage debt to the bank, prior to the execution of the note and mortgage which it is sought to foreclose. Miller testifies, in substance, that in 1901 and 1902 he was largely engaged in the business of buying and selling horses; that he had bought a large number of horses in Idaho, and had shipped them to Nebraska in July, 1902; that one Buffam was in charge of a car load of the horses at Fairbury; that Chamberlain was pressing him for payment of the debt to the bank, and that, in consequence of this, he directed Buffam to sell the horses, regardless of what they brought, as Chamberlain wanted his money. Buffam testifies that, under Miller's direction, he sold the horses and paid to Chamberlain for Miller $1,015, directing it to be applied upon the "barn note," and that he afterwards paid $350 more between the 20th and 25th of July for this purpose. Miller testifies that with money derived from the sale of a number of horses at Firth, Nebraska, between the 17th and 22d of July, he paid to Chamberlain

$850 to apply on this debt, and that afterwards he paid him $50 more. In this he is corroborated by the witness Taylor, who details the circumstances attending the sale of the horses at Firth, his delivery of the money for the same to Miller, and his being with Miller in Tecumseh at the time the money was paid to Chamberlain. He says he asked True for the old notes, and True said Chamberlain had put them away and he could not find them. Miller further testifies that at the time he paid the debt to the bank he had contracted for several shipments of horses which were yet to come from Idaho, and that he was much in need of money to pay for the horses when they arrived, and carry on his business; that Chamberlain told him, if he would execute another note and mortgage on the property, that he believed he could negotiate the same and procure him the money to use in his business; that, relying upon this promise, he executed the note and mortgage in controversy, and never received any money therefor; and that Chamberlain soon after went away, taking the note and mortgage with him. It appears also that the note and mortgage sued upon were never entered upon the books of the Chamberlain Banking House as belonging to it, while the prior note and mortgage were properly shown thereon.

From a consideration of this evidence we believe that the judgment of the district court is supported by the evidence. Independent of the result reached by that court, we are convinced that the defendant has sustained the allegations of his answer, and that the decree setting aside the mortgage and dismissing the foreclosure proceedings is fully justified by the evidence.

We recommend 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.

LILLIAN B. MASON, APPELLEE, V. CORDELIA M. STRICKLAND ET AL., APPELLANTS.

FILED MAY 3, 1905. No. 13,782.

1. **Specific Performance.** A party to a contract of sale of real estate for cash upon the delivery of the deed is excused from performance if the other party neglects or refuses to pay when the deed is ready for delivery and requests an extension of the time for payment.

2. **Rescission.** It is optional with a vendor to rescind a contract of sale when the vendee fails to perform the same according to its terms, and a demand for the return of a deed sent to the vendor's agent, to be delivered upon payment of the money—the same person being the agent of the vendee—together with a notice that the "deal is off," is an exercise of the option and a rescission of the contract.

3. **Delivery of Deed.** Where the agent of a vendor receives a deed for the purpose of delivery upon payment of the consideration, without disclosing that he is also agent for the vendee, and places the deed upon record after he has been notified by the vendor that the contract has been rescinded for non-performance, no legal delivery of the deed has been made, and the grantee acquires no title thereby.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

Allen G. Fisher, for appellants.

Albert W. Crites and *E. M. Slattery, contra.*

LETTON, C.

This is an appeal from a decree of the district court for Dawes county enforcing specific performance of a contract for the sale of real estate. Certain property, consisting of a house and two lots in the city of Chadron, was owned by one Cordelia M. Strickland, who had formerly resided at that place, but at the time of the transaction was a resident of Joplin, Missouri. Reynolds & Slattery were real estate agents, doing business at Chadron. They had for several

years acted as agents for Mrs. Strickland in renting her property, paying taxes thereon and for the sale thereof. On January 20, 1903, they wrote her to the effect that they had received an offer of $1,500 for the property, and asking instructions. She answered asking further information, and on February 9 they wrote her that this was a cash offer, out of which their commission of five per cent. was to come. On February 21 she wrote she would take $1,500 net, and that they might have all over that amount which they might get at present. On March 4 they wrote they believed they had a deal closed, but the parties desired ten days in which to make arrangements to get the money; and on March 6 they wrote as follows: "We have closed a deal for the sale of your house to Mrs. Lillian Mason, and herewith hand you deed for execution. * * * We will prepare abstracts and net you $1,500 on this deal." On March 9 she wrote, accepting the offer and inclosing the deed; also informing them that she had sent two orders, one for $700 and one for $300, to her brother, Henry Maika, to whom she was indebted to the amount of $700, and requesting them to ask him to take only $300 cash, and a note for the balance of the $700 coming to him, as she wanted cash to fight water in a mine. On March 12 or 13, Henry Maika went to Slattery's office, and told him of the orders he had, to be paid as soon as the deal was closed, and was told by Slattery that the deed was defective in form and that he thought it would have to be sent back for correction. He was further told that the money was not there and that it would be there probably by the 1st of April; that Mrs. Mason was not in town and he would have to write to her. On March 13, apparently after this conversation, Reynolds & Slattery wrote to Mrs. Strickland, in substance, that they had been talking to Mrs. Mason in relation to the deal; that she would be able to raise the money by the first of next month; that she had loaned her money and the debtor had agreed to pay by that time, and that if need be she could get the money of the bank on the collateral. They further say: "Are you willing to wait

until the first of the month before the deal is closed?" No answer was sent by mail to this letter, but on March 16 Mrs. Strickland wrote, and her brother Henry Maika on March 19th presented, to Reynolds & Slattery a request for the return of the deed, and a notification that she "considered the deal with Mrs. Mason off, which was to be strictly for cash." Mr. Slattery, to whom this order for the return of the papers was presented, refused to return the deed to Mrs. Strickland, and placed it upon record that day. After the conversation with Slattery on March 12 or 13, Henry Maika negotiated a sale of the property to one John H. White, who was the tenant in possession, for $1,800, and notified his sister of that fact. She thereupon sent him a conveyance of the property to himself, which he placed on record on March 19 before demanding the return of the deed from Mrs. Mason. Up to this time Mrs. Mason had paid no money, but had caused to be left with Reynolds & Slattery on March 13 an unindorsed negotiable note for $1,200. Mr. Slattery testifies that he was acting as agent for Mrs. Mason in receiving the deed and placing the same on record, and that his firm had money of its own in the bank sufficient to pay for the deed.

This case is another example of that too numerous class in which a man attempts to serve two masters, and in which his duty to one is apt to interfere with the proper discharge of the obligation resting upon him to protect the interest of the other. We think it clear that the contract of sale with Mrs. Mason was never completed by payment according to its terms. The first letter told Mrs. Strickland that a cash offer of $1,500 had been made to her agent. This was rejected, and an offer made by her to accept $1,600 cash and to allow the agents all over $1,500 as their commission. Her letter of March 9 evidently answered the letter of March 6, in which they stated that the deal was closed. There can be no question that these letters indicate an offer for a cash transaction on the part of Mrs. Strickland. The evidence further shows that Mrs. Mason had made a cash offer for the property to the agents,

and this offer had been accepted. When the deed came, Mrs. Mason was not prepared to pay the cash, and an extension of time to April 1 was requested. This extension was never granted by Mrs. Strickland, but she thereupon withdrew her offer to sell for $1,600. Her brother knew of the negotiations; he also knew they had not been completed; and when he found his sister could obtain a better price for her property he notified her to this effect, and she withdrew her offer to sell at that price.

A party to a contract of sale for cash upon delivery is excused from performance if the other party at the time of performance refuses to perform, but requests an extension of time. *Beauchamp v. Archer,* 58 Cal. 431. When the deed arrived on March 13, the money was due to be paid. Instead of paying it, an extension of time was asked for over fifteen days, which was never granted. The money was not paid even then, nor at any time, until it was brought into court when this action was begun. The delivery to Reynolds & Slattery was not a delivery to Mrs. Mason, since the agency for Mrs. Mason that Slattery now asserts to have existed was not disclosed to Mrs. Strickland. Slattery could do nothing with the deed to confer any rights upon Mrs. Mason unless his acts were either authorized or ratified by his principal, Mrs Strickland. In a legal sense the deed has never been delivered, its recording was a breach of confidence, and no rights can be acquired by such a proceeding. *Patrick v. McCormick,* 10 Neb. 1; *Soward v. Moss,* 59 Neb. 71.

The petition alleges a contract to pay $1,600 in cash for the property upon delivery of a deed; that at the time of delivery to plaintiff's agents she was ready and willing to pay the consideration money, and would have done so but for the fact of the recording of the deed to Maika. But the deed was ready for delivery on March 12, and the plaintiff notified by letter to that effect; and on the 13th, so far from being ready and willing to pay, she by her agent, Obercotter, asked for an extension of time to April 1. The evidence therefore fails to sustain the allegations of the

petition, and Mrs. Strickland had a right, upon the non-performance, to sell the property to her brother or to any-one else. It was optional with Mrs. Strickland to terminate the contract upon her vendee's failure to perform the same according to its terms, and her sale to her brother was an exercise of this option and a rescission of the contract from that time on. *Eaton v. Redick,* 1 Neb. 305. The deed has never been delivered, and is a cloud on the title of the defendant, White, who apparently is entitled to the relief which he asks in his cross-petition.

Whether or not there at any time existed a valid and enforceable contract between Mrs. Mason and Mrs. Strickland we do not find it necessary to decide. We have followed in the discussion the case as presented in the briefs and argument of counsel.

We recommend that the judgment be reversed and cause remanded, with directions to enter a decree in favor of the cross-petitioner, White, as prayed in his cross-petition.

AMES 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 remanded, with directions to enter a decree in favor of the cross-petitioner, White, as prayed in his cross-petition.

JUDGMENT ACCORDINGLY.

ROBERT BUSSING V. W. E. TAGGERT.

FILED MAY 3, 1905. No. 13,790.

1. **County Court.** JURISDICTION. A county court does not lose jurisdiction in an action, not within the jurisdiction of a justice of the peace, by reason of the fact that at the hour to which such action had been continued the county judge was not present in his office and did not appear for more than one hour thereafter.

2. **Judgment:** COLLATERAL ATTACK. The fact that a county judge in an action pending before him not within the jurisdiction of a justice of the peace, was not present in his office at the hour to which such cause had been continued and for more than one hour thereafter, and that he thereafter, in the absence of the defendant, rendered judgment in said cause against the defendant as of the hour and day to which said cause had been continued, does not render such judgment void or open to collateral attack.

3. ———: REVIVOR. The fact that the transcript of a judgment rendered in a county court was filed in the office of the clerk of the district court after the judgment had become dormant did not prevent the district court from acquiring jurisdiction of the proceedings to revive the judgment. *Furer v. Holmes, ante*, p. 393.

ERROR to the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

George W. Fox, for plaintiff in error.

E. A. Cook, contra.

JACKSON, C.

On April 9, 1895, defendant in error filed his petition in the county court of Greeley county, praying judgment against the plaintiff in error for an amount in excess of the jurisdiction of a justice of the peace. Summons was duly issued and served requiring an answer on the 6th day of May following. On that date plaintiff in error filed his answer, together with an application for continuance, and the case was continued until May 18 at the hour of one o'clock P. M. From the record it appears that on the 18th day of May, 1895, at one o'clock P. M., plaintiff appeared by his attorney, and defendant appeared by his attorney, and that a trial was had to the court, which resulted in a judgment favorable to the defendant in error for the sum of $512.12. A transcript of the judgment was filed in the office of the clerk of the district court for Dawson county on the 24th day of January, 1903, the judgment having in the meantime become dormant. On the 23d day of February, 1903, defendant in error instituted proceedings in

the district court for Dawson county to have the judgment revived. A conditional order of revivor was made and served on the plaintiff in error in Dawson county, requiring cause to be shown within thirty days why the judgment should not be revived; and on the 1st day of April, 1903, plaintiff in error filed a showing in the nature of an answer, wherein the allegations material to the consideration of the case were: That on the 18th day of May, 1895, he, together with his counsel, went to the office of the county judge of Greeley county, at the hour of one o'clock P. M., and remained there and where they could see into said office continuously from that time until after two o'clock P. M. of said day, prepared and ready to try said cause; that at no time during such time was said county judge or said plaintiff, or any attorney or any agent for him, in said office, or where the plaintiff in error or his said attorney could see them or any of them; and that the judgment was not rendered or entered until after that time, but was falsely, wrongfully and wilfully entered by said county judge, and by him entered on his docket as of the date of May 18, 1895, at one o'clock P. M., and during the absence of both the plaintiff in error and his attorney, and without the knowledge or consent of either of them, and without notice thereof. It is also alleged that the answer filed in his behalf stated a meritorious defense, which he could have sustained by testimony; and that the transcript of the judgment was not filed in the office of the clerk of the district court for Dawson county until after the expiration of more than five years after the date of its pretended rendition and entry, and that no execution had ever been issued on said judgment. To this answer the defendant in error filed a general demurrer, which was sustained in the district court, and the plaintiff in error elected to stand on his answer; a judgment of revivor was duly entered, from which this proceeding in error was instituted.

Error is predicated upon the order sustaining the demurrer and the judgment of revivor. Two questions are discussed by the plaintiff in error. It is first contended

that the judgment was procured by fraud perpetrated by the county judge; that it appears from his answer in the revivor proceedings, and is admitted by the demurrer, that the judge was absent from his office at the hour of one o'clock P. M. on the 18th day of May, 1895, and for more than an hour thereafter; and that by reason of that fact the county court lost jurisdiction, and that the judgment afterwards rendered was void; second, that the judgment having become dormant before the transcript was filed in the district court for Dawson county, such court was without jurisdiction to entertain the application to revive the judgment. It does not appear that either of these contentions are well founded. County courts are by law vested with jurisdiction concurrent with the district court in civil cases in any sum not exceeding $1,000, exclusive of costs. It is the duty of the county court to hold a regular term at the county seat, commencing at nine o'clock A. M. on the first Monday of each calendar month, for the trial of such civil actions brought before such court as are not cognizable before a justice of the peace, and such term shall be deemed to be open without any formal adjournment thereof until the third Monday of the same month, when all cases not then finally determined shall be continued to the next regular term, and the provisions of the code relative to the trial docket in the district court, as far as they are in their nature applicable, apply to the calendar of the county court. By section 28, chapter 20, Compiled Statutes, 1903 (Ann. St. 4811), it is provided that when, for any cause, the probate judge fails to attend at the commencement of any regular term, or at the time when any cause is set for trial, or the time to which any cause may be continued, the parties shall not be obliged to wait more than one hour, and, if he does not attend within the hour, the parties in attendance shall be required to attend at nine o'clock A. M. of the following day, and if such judge shall not attend at that time the cause shall stand continued until the first day of the next regular term. It must be apparent from an examination

of these provisions of the statute that the failure of the county judge to appear at the time to which the cause had been continued did not divest the court of jurisdiction, and that notwithstanding his failure to appear the cause still stood for trial at nine o'clock A. M. on the following day. It follows therefore that the answer of the plaintiff in error in the revivor proceedings should not only have shown an appearance at the hour of one o'clock P. M. on the 18th day of May, 1895, and his presence there for one hour thereafter, but that he also appeared at the hour of nine o'clock A. M. on the following day, because the failure of the judge to appear at his office on the 18th day of May, 1895, was not jurisdictional, and the most that might be said of the entry of the judgment as of the hour of one o'clock P. M. on the 18th day of May, 1895, is that it was an irregularity, which might and should have been taken advantage of by the plaintiff in error in an application to set the judgment aside. It is not such an irregularity as would invalidate the judgment or subject it to collateral attack, as it is sought to do in this proceeding.

As to the contention of the plaintiff in error that, the judgment having become dormant before the transcript was filed in Dawson county, the district court for that county was without jurisdiction to entertain an application to have the judgment revived, such contention seems equally without merit. It could certainly result in no prejudice to the plaintiff in error that the application to revive the judgment was made in the county where he appears to have then resided, and where personal service of the conditional order could be made. It would seem rather to be more favorable to him, as he was thereby enabled to contest the revivor without leaving the county of his residence. The identical question, however, seems to have been determined adversely to his contention in this court. In *Furer v. Holmes, ante,* p. 393, it was held that, where the transcript of a judgment in justice court was filed in the office of the clerk of the district court after the judgment had become dormant, it did not prevent the dis-

trict court from acquiring jurisdiction of proceedings to revive the judgment.

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

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

WILLIAM F. PORTER V. STATE OF NEBRASKA.

FILED MAY 17, 1905. No. 13,776.

Review: LAW OF CASE. It is the settled doctrine in this jurisdiction that a legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case, binding not only upon the trial court, but this court as well, and will not ordinarily be reexamined in a subsequent review of the proceedings of an inferior court had in the further trial of the action.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Benjamin F. Johnson, for plaintiff in error.

Norris Brown, Attorney General, and *W. B. Rose, contra.*

PER CURIAM.

The questions herein presented for determination are essentially the same of those considered and determined in this case on a former appeal. *State v. Porter,* 69 Neb. 203. As the case was first presented, the questions considered arose on a demurrer to the petition. Upon the cause being remanded, an answer was filed, and the state moved for judgment on the pleadings. This motion was sustained.

The answer, as we construe the pleadings, presents no tion not passed upon in the consideration of the ruling on the demurrer. It is alleged in the answer that the defendant as a member of the state brand and mark committee was, under the provisions of the law, entitled to 20 per cent. of all the fees paid in for the recording of brands and marks, and that as a member of said committee he lawfully received, and for his use and benefit, 20 per cent. of all the brand and mark fees paid to said committee for the recording of brands and marks. This is the money in controversy and to recover which the action is prosecuted. It was decided on the former appeal that in receiving this money the defendant assumed to act in an official capacity as secretary of state, and to exercise a power derived from the state which he cannot now be heard to repudiate, and that he cannot now consistently with good faith deny that he so acted; that, having received the fees in controversy which he retained for services rendered by him as secretary of state and in his official capacity, the conclusion that he must account for them to the state inevitably follows. We find in the pleadings no question of estoppel not considered and passed upon on the former hearing. While it is alleged that because of the enactment of the law the state is estopped to claim these fees, this fact received attention and was included in the discussion of the validity of the law and its effect on the legal rights of the parties, and was resolved against the contention of counsel for the defendant. Whether the law be considered as valid or invalid, it is not believed that it can have the effect of annulling a provision of the fundamental law fixing the salaries of state officers. It is the settled doctrine in this jurisdiction that a legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case, binding not only upon the trial court, but this court as well, and will not ordinarily be reexamined in a subsequent review of the proceedings of an inferior court had in the further trial of the action. Applying this rule to the questions presented by the record, and it follows

that the judgment rendered below should be affirmed, and it is so ordered.

AFFIRMED.

FRED GEORGE, JR., APPELLEE, V. HERMAN PECKHAM, APPELLANT.

FILED MAY 17, 1905. No. 13,735.

1. **Nuisance:** INJUNCTION. The process of injunction cannot be availed of by a private citizen to abate a purely public nuisance from which he suffers no special or peculiar injury of a continuing nature for which an action at law will afford him no adequate remedy or redress.

2. **Jurisdiction.** It is not enough to confer jurisdiction upon equity that the plaintiff has suffered damages special and peculiar to himself and in which the public do not share, but such damages must be of such character as to be incapable of being measured and compensated in damages.

3. **Special Damages.** Damages to an individual are not rendered special or peculiar within the meaning of the above mentioned rule by the fact that they exceed those inflicted upon the general public in degree, but to have that character they must differ from the latter in kind.

APPEAL from the district court for Lincoln county: CHARLES L. GUTTERSON, JUDGE. *Reversed and dismissed.*

Wilcox & Halligan, for appellant.

Hoagland & Hoagland and *Beeler & Muldoon, contra.*

AMES, C.

The issues and facts in this case are thus stated in the brief of appellant, and, as they appear not to be in dispute, we adopt the recital. The case was submitted without oral argument.

The plaintiff in his petition alleged that there was a public highway leading south from Brady Island, across a bridge over the Platte river, to the south side of said river,

through the N. W. ¼ of section 14, T. 12, R. 27, which was free for every one to pass and repass at pleasure; that the plaintiff was a resident of Lincoln county, residing near the N. E. corner of section 15, T. 12, R. 27; that he traveled said road in going to and from Brady Island; that he had about ten car loads of hay, which it was necessary for him to haul over said road and load the same on cars at Brady Island; and that on the 8th day of April, 1903, he proceeded to haul said hay, as he had a right to do; that the defendant on the said 8th day of April proceeded to obstruct said road by the construction of ditches across the same, on or near the N. W. corner of section 14, T. 12, R. 27, which said ditches obstructed the highway and prevented the plaintiff from hauling his hay over said highway, and compelled him to take a circuitous route over boggy and stumpy lands, which had not been worked as a highway, by which cause plaintiff had been obstructed in his right to travel over said road, and had been damaged by the loss of time, causing him much trouble in having his loads of hay damaged, all to his damage in the sum of $100; that said obstruction made said highway impassable for teams, and prevented the plaintiff and others who desired to travel said highway from so doing; that the plaintiff, if said obstruction in said highway was allowed to continue, would suffer special damage, because of the fact that plaintiff had a large amount of hay which he was in process of baling, and which was necessary for him to load in cars at Brady Island, and that he must necessarily travel over the highway thus obstructed by the defendant; that unless he could haul his hay over said highway, he would be damaged in a large amount by his failure to get his hay to market, and that no adequate remedy at law existed for said damages; and that the defendant threatened to continue the said obstruction. He prayed an injunction against the defendant and for $100 damages, as aforesaid. The defendant answered, admitting his residence in Lincoln county; denied that a public highway existed where claimed by the plaintiff; denied that the de-

fendant obstructed said highway; denied the plaintiff's damage, and that he had no adequate remedy at law; and further answered that no road had ever been laid out across his place, but that he had permitted the public to use a right of way over a portion of his land, reserving to himself the right to require the public to travel in such places as were most convenient and advantageous to the defendant. He further alleged that said alleged highway ran upon his said land along the banks of the Platte river, and that the Platte river had been washing away his said land and the said highway over which the public traveled; that, in order to prevent the washing away of said land, he had prepared another road, adjoining and parallel to the road in question, over which he desired the public to travel, for the purpose of allowing the old road to grow up into trees and willows, in order that the land on which said road was situated might better resist the encroachments of the river. He alleged that the new way prepared by him was in every respect equal to the old one, and admitted that he had plowed furrows across the old road in order to compel the travel to go on the new road, and he alleged that he did this under the direction of the road supervisor. The reply was in effect a general denial, and also a plea of estoppel, claiming that the defendant was estopped to deny the existence of a public road by reason of the fact that the defendant permitted the said road to be worked by the public officials from year to year, and that the defendant himself had assisted in working the road. The testimony, both for the plaintiff and the defendant, was practically the same, the only disputed point being whether or not the new road was in good condition; the plaintiff and one or two witnesses testifying that the new road was not in good condition, and that it was impossible to haul as large loads over the new as old road, while the defendant, the road overseer, and all of his witnesses testified that the new road was in fairly good condition, and that just as heavy loads could be hauled over the new road as over the old one. The plaintiff hi-

self testified that he did not attempt to haul hay over the new road at first; that he had a load of hay that would weigh three tons, and that he drove it right down into the ditch that the defendant had plowed across the old road, and, without attempting to go over the new road, unhitched his four-horse team from the wagon, leaving the wagon in the road, took his team home, and then started for town to begin legal proceedings against the defendant. The district court, after trial, granted a perpetual injunction as prayed, and awarded the plaintiff the sum of $200 as damages, and the defendant appealed.

The wrongs of which the plaintiff complains appear to us to be divided between two distinct categories which he and the trial court seem to have confused. If it be true that the defendant, as the immediate consequence of his obstruction of the highway, if it was a highway, inflicted a special and peculiar damage upon the plaintiff by preventing him from hauling his hay to market, an action at law would have afforded speedy and adequate redress therefor. This consequence of the wrongful act, if it were such, was immediate, and did not differ materially in its alleged effect upon the plaintiff from that of an ordinary act of trespass of which equity has no jurisdiction. If, subsequently, the defendant continued to obstruct a public highway so as to render the same unsuitable for travel, the injury, if any, which the plaintiff experienced therefrom was suffered in common with the rest of the public, and was not in any sense special or peculiar to himself, and was therefore one which could be redressed only at the suit of the public. There is, happily, as little dispute between counsel about the law as there is about the facts, though a large number of authorities illustrative of its various phases are cited in behalf of each party. We do not think that it is incumbent upon us to review them here. It is familiar law that the process of injunction cannot be availed of by a private citizen to abate a purely public nuisance from which he suffers no special or peculiar injury of a continuing nature for which an action at

law will afford him no adequate remedy or redress, and that for a single injury capable of estimation in damages, although inflicted in the perpetration of a public wrong, compensation must be sought in a court of law. *Eidemiller Ice Co. v. Guthrie,* 42 Neb. 238, 254; 3 Pomeroy, Equity Jurisprudence, sec. 1349; *Shed v. Hawthorne,* 3 Neb. 179; *Ray v. Colby & Tenney,* 5 Neb. (Unof.) 151; *Hill v. Pierson,* 45 Neb. 503. To the same effect seem to be all the authorities. It is not enough to to confer jurisdiction upon equity that the plaintiff has suffered damages special and peculiar to himself and in which the public do not share, but such damages must be of such a character as to be incapable of being measured and compensated in damages. The law is equally well established that if the damages suffered by an individual are of the same nature as those inflicted upon the public at large, they are not rendered special and peculiar within the meaning of the above mentioned rule by the fact that they exceed the latter in degree. In order to be included within the rule they must differ from the latter in kind. *Jones v. City of Chanute,* 63 Kan. 243, 65 Pac. 243; *O'Brien v. Central Iron & Steel Co.,* 158 Ind. 218, 63 N. E. 302; *Gundlach v. Hamm,* 62 Minn. 42, 64 N. W. 50.

Tested by these rules, it is quite evident that the suit cannot rightfully be maintained, and we recommend that the judgment of the district court be reversed and the action dismissed.

LETTON 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 action dismissed.

REVERSED.

LININGER & METCALF COMPANY V. FRANK H. CLARK.

FILED MAY 17, 1905. No. 13,797.

Pleading: HARMLESS ERROR. New matter pleaded in a reply is constructively denied by the statute, and leave to amend an answer so as to put such matter formally in issue, although erroneous, is error without prejudice.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Mockett & Polk, for plaintiff in error.

George W. Berge, contra.

AMES, C.

This action was begun in the county court by a petition in the usual form to recover on several promissory notes executed by the defendant to the plaintiff. The answer pleaded that the notes were given for the purchase price of a threshing machine bought by defendant from plaintiff, and that a consideration of the purchase was a warranty of the machine, which had been broken, and that as a consequence of the breach the sale was by consent of the parties rescinded, and the machine returned to the plaintiff, which, in consideration thereof, had agreed to cancel and surrender the notes sued upon. The reply, besides a general denial of new matter, admitted the return of the machine, but pleaded that the consideration of the return was not a rescission of the sale, but a special written agreement copied in the pleading, authorizing the plaintiff to sell the machine at public or private sale, and apply the funds, less expenses of sale, as a payment in whole or in part upon the notes in suit. Upon the issues thus framed there was a trial and a judgment for the defendant, from which an appeal was taken to the district court.

On the trial in the district court, upon pleadings identical with those above described, the defendant offered to prove that the instrument set forth in the reply was not and had never been in fact the agreement of the parties, but that the defendant had been induced to sign it by fraudulent representations and concealment of its contents, upon the supposition that it expressed the agreement to rescind pleaded in the answer, and nothing else. The evidence was objected to by the plaintiff and excluded by the court on the ground that the matter sought to be proved by it had not been pleaded. The defendant then applied for and obtained leave to amend his answer by pleading the matter thus excluded from evidence. The trial then proceeded to verdict and judgment for the defendant, and the plaintiff prosecutes this proceeding upon the single assignment of error that the amendment changed the issues upon which the case was tried in the county court, and was therefore improperly permitted to be made.

We think there was no error. The instrument pleaded in the reply was not mentioned in the petition, and, if it was procured under the circumstances detailed by the defendant, the latter had no reason to suspect its existence or, if he did suspect it, to anticipate that advantage would be attempted to be taken of it until it was in fact pleaded by the plaintiff. He had, therefore, neither occasion nor opportunity to plead concerning it in his answer. When the instrument was set out in the reply of the plaintiff, it stood constructively denied by the statute, and the defendant was entitled to maintain that denial by any evidence tending to show that it was not in fact a contract of the parties, or intentionally or knowingly executed by himself, but had been fraudulently procured. If the plaintiff had desired that the instrument should be impeached, if at all, by formal pleadings, he should have set it forth in his petition, so as to have afforded the defendant an opportunity for so doing. He could not deprive the defendant of opportunity for impeaching it by withholding it from the issues until the reply. Hence, we think, the court erred in excluding

the evidence when it was first offered and in ordering the amendment, but that the latter error was without prejudice because it did not in fact change the issues, and the former was cured by the subsequent admission of the evidence.

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

LETTON 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.

MCCORMICK HARVESTING MACHINE COMPANY V. J. D. STIRES.

FILED MAY 17, 1905. No. 13,808.

Jurisdiction of a special proceeding is not conferred merely by calling the attention of the court to the fact that an indispensable statutory foundation is wholly lacking.

ERROR to the district court for Platte county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

O'Neill & Gilbert, for plaintiff in error.

J. J. Sullivan, contra. J. D. Stires, pro se.

AMES, C.

There is no dispute in this case about the facts. The plaintiff sued M. E. Beerbower, a married woman, in the county court of Platte county, upon some promissory notes. The defendant was then absent from the state, and she was never served with summons, either actually or constructively, and never appeared in the suit in person or by attorney. By mistake of the constable a summons was served upon her husband and returned as having been served per-

sonally upon her, and a formal judgment was rendered against her of which a transcript was filed and docketed in the office of the district clerk for Nance county. Upon the transcript execution was issued and returned unsatisfied, and proceedings in garnishment, regular in form, were prosecuted against one A. L. Stores. In this proceeding Mrs. Beerbower appeared for the especial and sole purpose of objecting that there was no judgment against her in favor of the plaintiff. The garnishee answered that he was indebted to Mrs. Beerbower in a certain sum as rent accrued or accruing under a lease of a tract of land belonging to her, which sum he was ordered to pay and did pay into court for the use of the plaintiff, and which the plaintiff received from the clerk in satisfaction of its supposed judgment. Subsequent to the service of the summons in garnishment, but before the garnishee had paid or been ordered to pay the money into court, and before Mrs. Beerbower appeared to object to the garnishment proceedings, she assigned the rents in controversy to the defendant in error, J. D. Stires. This is an action by Stires, as assignee of the rents, against the plaintiff in the garnishment for money had and received to the use of the former. The petition was in the ordinary form in such cases, and the answer pleaded the alleged judgment and the proceedings in garnishment as a defense. The reply alleged that before the proceedings were begun the county court, by which the supposed judgment was rendered, had vacated it and set it aside as having been obtained without service of summons upon the defendant therein and without jurisdiction. There was a trial upon which the matter pleaded in the reply was admitted in evidence, and the defense was disallowed, and the plaintiff recovered a verdict and judgment for the sum sued for. Proceedings in error were prosecuted in this court where the judgment was reversed by an opinion published in 68 Neb. 432, in which additional facts not pertinent to the controversy at its present stage are recited. The judgment of reversal was based solely upon the ground that the judgment of the county court of

Platte county was wholly void for want of jurisdiction, and that because it was so that court was without power to make an order vacating it, and for that reason the matter pleaded in the reply was immaterial. The opinion further held that, the judgment being void, the action for money had and received would lie, so that both these matters are now "the law of the case" and will not be further discussed. The cause was remanded with leave to the plaintiff (defendant in error) to amend his reply, which he did by pleading the invalidity of the judgment and subsequent proceedings upon it. There was a trial disclosing the facts recited in this and the former opinion, and a verdict for the plaintiff was returned in obedience to a peremptory instruction by the court. To reverse a judgment thereon this proceeding is prosecuted.

We can hardly understand how it can be supposed that anything remains to be litigated. The supposed judgment in the county court is conceded by counsel and has been finally adjudicated to have been void. Neither the defendant therein nor the defendant in error, her assignee, was a party to the garnishment proceeding, which could only have been founded upon a valid judgment, and of which, therefore, the district court for Nance county had no jurisdiction. Whether a general appearance therein by Mrs. Beerbower would have conferred jurisdiction it is needless to inquire. She appeared specially only, for the sole purpose of informing the court and the garnishee of the fact, which the plaintiff already well knew, viz., that the judgment was void and the court was without jurisdiction. It is immaterial whether her previous assignment of the rents in controversy to the defendant in error rested upon a consideration sufficient as against creditors. It was and is sufficient as between the parties, and the plaintiff in garnishment was not and is not a creditor in a position to question it. Neither principle nor authority is cited for holding that jurisdiction of a special proceeding is conferred by merely calling the attention of the court to the fact that a statutory foundation for it is wholly lacking.

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

LETTON 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.

O. O. SNYDER & COMPANY, APPELLANT, V. DARWIN J. SPARKS ET AL., APPELLEES.

FILED MAY 17, 1905. No. 13,730.

1. **Mechanics' Lien.** To enforce a mechanics' lien for material, labor, etc., used in an improvement on real estate, the evidence must show that the contract for such material or labor was made with the owner of the premises or his duly authorized agent. *Moore v. Vaughn*, 42 Neb. 696, followed and approved.

2. **Evidence** examined, and *held* sufficient to sustain the judgment of the trial court.

ERROR to the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

R. R. Dickson, for appellant.

M. F. Harrington and *A. F. Mullen*, *contra.*

OLDHAM, C.

This was an action to foreclose a mechanic's lien for material furnished and used in the construction of a cattle shed on a ranch in Holt county, Nebraska. The petition alleged that the materials were furnished to one Ed. Johnson, who purchased the same as the agent of defendant Sparks, the owner of the premises in controversy. There was personal service on Sparks and his wife, the owner of the ranch, and service by publication on his codefendant, Ed. Johnson. Johnson made default.

Sparks answered, in substance denying that he ever authorized the purchase of any lumber from the plaintiff by defendant Johnson, and alleging that he purchased the lumber used in the construction of the sheds from Johnson. On issues thus joined there was a trial to the court, and judgment for the defendant Sparks, from which plaintiff appeals to this court.

The testimony contained in the bill of exceptions tends to show that defendant Sparks was the owner of a ranch in Holt county, Nebraska, on which he resided, and was engaged in the business of raising cattle and horses; that Johnson was a relative of Sparks, and came to his place in 1889 from Wisconsin, with the intention of going into the stock business; that he had been engaged in cutting and hauling lumber in Wisconsin before coming to Nebraska; that after arriving in Holt county he had a considerable quantity of lumber and posts shipped to him from Wisconsin; that he sold some of this lumber to Sparks for the purpose of erecting a barn and shed on the ranch; that he also sold one car load of posts to the plaintiff; that he made an arrangement with plaintiff by which he was to furnish plaintiff more posts in exchange for lumber, which he desired to use in building sheds for his cattle.

That all the lumber that was used in the building of the sheds was sold and charged to Johnson is clearly established by the following evidence, offered by plaintiff:

John McManus, plaintiff's foreman, on cross-examination: Q. Sparks didn't come there and make any arrangements about lumber, did he? A. No. Q. Johnson and Snyder had some transactions about lumber before this, did they? A. Yes, sir. Q. Bought by Johnson and paid for by Johnson? A. Yes, sir. Q. And all this dealing was done by Mr. Johnson? A. Yes, sir. Q. He made the contract? A. Yes, sir. Q. You didn't charge anything to Sparks? A. No, sir. Q. You charged everything to Johnson? A. Yes, sir. Q. He was the man you were dealing with? A. Yes, sir. Q. Later on, he left the

community, and you filed a lien against Sparks? A. Yes, sir.

Mr. Snyder, proprietor of the firm, testified as follows: Q. Your dealings were entirely with Mr. Johnson? A. Yes, sir. Q. He represented to you that he could get posts, and he wanted to trade them to you for lumber? A. Yes, sir. Q. He didn't represent to you that Mr. Sparks had any interest in the posts? A. No. Q. It was his personal transaction? A. He said the parties owed him, and he had to take posts for pay. Q. And he wanted to trade them for lumber? A. Yes. He said he had several cars to trade. Q. How many cars did he give you? A. I only got one. Q. And you expected several from him? A. Yes, sir. Q. You never expected to get any posts from Mr. Sparks? A. No.

Defendant Sparks testified positively that he never authorized Johnson to purchase any material for him, and that he believed that Johnson had traded posts for all the lumber that he got from Snyder which was used in the sheds.

In this state of the testimony we think the learned trial judge was fully warranted in finding the issues in favor of the defendant Sparks. In *Moore v. Vaughn*, 42 Neb. 696, it was said by this court:

"The mechanic's lien law requires that a contract for material, labor, etc., for the improvement of real property, shall be made with the owner thereof or his agent. A tenant, as such, has no power to contract for labor or material so as to affect with a mechanic's lien the real property leased to him." Citing *Waterman v. Stout*, 38 Neb. 396.

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

AMES and LETTON, CC., concur.

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

AFFIRMED.

CATHERINE URLAU, APPELLEE, V. HERMAN RUHE ET AL., APPELLANTS.*

FILED MAY 17, 1905. No. 13,794.

Writ of Assistance. Where on an application for a writ of assistance the party in possession of the premises makes a litigable claim of ownership thereof in fee, and it appears that his rights, if any, are unaffected by the decree of foreclosure and sale sought to be aided thereby, the writ should be refused.

APPEAL from the district court for Douglas county: GEORGE A. DAY, JUDGE. *Reversed with directions.*

J. W. Eller, for appellants.

E. C. Page, contra.

OLDHAM, C.

This is an appeal from the order of the district court for Douglas county awarding a writ of assistance in a foreclosure proceeding, after the confirmation of the sale, to put the purchaser in possession of the premises described in the sheriff's deed. The writ was awarded after notice to the appellants and a hearing of their objections by the court.

The original cause was reviewed by this court in an opinion rendered by SEDGWICK, J., and reported in 63 Neb. 883. In this opinion the issues are fully set forth, and need be only summarily restated for the purposes of the conclusions about to be reached.

It appears from the opinion just cited that the action to foreclose the mortgages was prosecuted against Frederick Ruhe, who executed the mortgages—one in April, 1891, and one in April, 1893; that, when the issues were joined on the foreclosure of the mortgages, the present appellants, Herman Ruhe and his brothers and sisters, sought to in-

* Rehearing denied. See opinion, p. 809, *post.*

tervene and claim the premises as the heirs at law of their mother, Fredericka Ruhe, who had departed this life on the 30th day of October, 1888. This application, however, was denied by the district court, and it was held in the opinion of this court that the matters set up in the petition of intervention of Herman Ruhe were in no way affected by the decree in this case, and, with certain modifications not material to anything at issue, the decree of the district court was affirmed. When this mandate of affirmance was issued and filed in the district court for Douglas county, sale of the premises was had, the sale confirmed, and deed ordered. The mortgagee, who was the purchaser, applied for a writ of assistance against these apellants and others to put her in possession of the property described in the deed. Appellants resisted this application, alleging that they were the sole owners of the property as the heirs of their mother, who died in 1888, seized in fee simple of the premises; and that the death of their father, Frederick Ruhe, who departed this life on the 9th day of May, 1899, terminated his life estate in the premises. At the hearing on the application for the writ of assistance, plaintiff introduced the record of the probate of the will of Fredericka Ruhe, which purported to convey her entire estate, both real and personal, to her husband, Frederick Ruhe. This will appears to have been admitted to probate in the county court of Douglas county on the 15th day of August, 1889. Appellants filed an affidavit that such paper was not the last will of their mother, Fredericka Ruhe, and that they could establish the facts that such purported will was never executed by the mother. On this showing and counter showing the court awarded the writ.

We think that, under the rule just announced by this court in *Escritt v. Michaelson, ante,* p. 634, the court erred in granting the writ. If the purported will of Fredericka Ruhe is for any reason invalid, it is clear from the showing made that the appellants are the owners in fee of the premises, unaffected by the decree of foreclosure

against the father. And we think there is sufficient showing of apparent good faith in the existence of the claim to entitle the appellants to a day in court before being summarily evicted from the premises.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to the district court to refuse the writ.

AMES and LETTON, CC., concur.

By the Court: For the reasons given in the above opinion, the judgment of the district court is reversed and the cause remanded, and the district court is instructed to refuse the writ.

REVERSED.

The following opinion on motion for rehearing was filed October 5, 1905. *Motion denied:*

PER CURIAM: It appears that these defendants' possession of the premises has been continuous since long before the existence of the lien under which the plaintiff has acquired and now claims title. They were not made parties to the foreclosure proceeding, but on the other hand were not allowed to become parties upon their application in which they represented they had interests in the land which they desired to defend. Under such circumstances it is clear that no writ of assistance should be awarded.

Motion for rehearing

OVERRULED.

JULIA H. HERRICK V. HUMPHREY HARDWARE COMPANY.

FILED MAY 17, 1905. No. 13,809.

1. Trover will lie for the wrongful conversion of shares of stock in a corporation.

2. Conversion: SHARES OF STOCK. Any act of dominion wrongfully exercised over another's property in denial of his rights or in-

consistent with them may be treated as a conversion. And this is true of shares of stock as of any property.

3. ———: ———. When under its by-laws or under a statute it is necessary that the transfer of the stock be made on its books, and the corporation wrongfully refuses to make the transfer, such refusal is a conversion of the stock.

4. The powers of a corporation in effecting its objects are as broad and comprehensive as those of an individual, when not expressly prohibited.

5. **Lien on Shares of Stock.** A corporation has no lien upon the shares of its stockholders for debts due from them to the company, unless such lien is provided for by statute or by the charter or by-laws of the corporation.

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

Wilson & Brown, for plaintiff in error.

Charles O. Whedon, contra.

OLDHAM, C.

This was an action for damages for the unlawful conversion by the defendant hardware company of ninety-nine shares of its capital stock. The petition, after alleging the incorporation of the defendant company, charged that on the 2d day of May, 1902, the defendant executed and delivered to one Francis B. Chapman a certificate evidencing his ownership of ninety-nine shares of the capital stock of the defendant company, of the value of $100 each; that the certificate of stock was in the following language: "This certifies that Francis B. Chapman is the owner of ninety-nine shares, of one hundred dollars each, of the capital stock of the Humphrey Hardware Company transferable only on the books of the corporation by the holder hereof in person or by attorney, upon the surrender of this certificate properly endorsed"; that on the 30th day of May, 1903, the plaintiff purchased said shares of the capital stock of the defendant company, evidenced by said certificate, and became the owner thereof; that on the

same day the plaintiff presented said certificate of stock to the defendant and to its president and its secretary and treasurer, and demanded of them the transfer of said stock upon the books of the defendant, and demanded the issue of a certificate to her evidencing her ownership, and then and thereby offered to surrender to defendant its original certificate of stock that had been issued to said Chapman and by him duly indorsed to the plaintiff; that the articles of incorporation of the defendant company contained the following provision: "Transfers of capital stock shall not be notice to the corporation unless a minute of such transfer shall be entered on the stock ledger"; that the by-laws contained a provision that "the secretary shall keep a record of the transfers of the capital stock of the corporation." The petition then alleges that the defendant, its president and secretary refused to accept the surrender of the old certificate, and refused to register the transfer of the shares to the plaintiff upon the books of the company, or to issue new shares in lieu of the old, and by such wrongful act denied plaintiff the right to participate in the affairs of the corporation as a stockholder, and converted the stock evidenced by the certificate, which she had purchased from Chapman, to its own use. And said defendant and its officers based their refusal to so transfer said shares and issue to her a certificate therefor upon the sole ground that said Francis B. Chapman was indebted to said defendant in the sum of about $211, and that defendant had a lien on said stock for said sum. And the plaintiff alleges that neither the articles of incorporation of the defendant nor its by-laws provided for any such lien or contained any provision whatever on that subject. The petition prayed for a judgment for $9,900, the par value of the stock said to be converted. The defendant filed an answer to this petition, admitting that it was a corporation, and admitting that on the 2d day of May, 1902, it delivered the said certificate of stock to Chapman as alleged in the petition, and admitting that the business of the corporation was to some

extent under the direction of its president and secretary. The answer then pleads an alleged lien on the certificate of stock, purchased by the plaintiff, to secure an indebtedness of $211 owed by said Chapman to the defendant company; that this lien existed by virtue of a written instrument, as follows:

"DEC. 1, 1902.

"The Humphrey Hardware Co., Lincoln, Neb.

"I desire to place in the hands of the stockholders of the Humphrey Hardware Co. my honorable resignation as manager of this incorporation. The same to take effect immediately, Jan. 1st, 1903. All of my interest in the incorporation I turn over to Myron E. Wheeler, Secy. & Treas. of the incorporation. Thanking the stockholders in this incorporation for their consideration, and wishing them abundant success in the future, I remain,

"Very respectfully,

"FRANCIS B. CHAPMAN,
"Manager H. H. Co."

The answer further denies every allegation not specifically admitted, and also pleads defect of the parties plaintiff. Plaintiff by way of reply specifically denied any notice of the alleged lien of the defendant on the shares of stock, either at or before time of purchase, and denied each and every allegation in the answer which did not confess the allegations of the petition. On the issues thus joined a jury was impaneled, and the trial commenced. The defendant objected to the introduction of any testimony offered by the plaintiff, because the petition failed to state a cause of action in favor of the plaintiff against the defendant. The trial court sustained the objection, and ordered that the jury be discharged from further consideration of the case, and it was "considered and adjudged by the court that the action be, and hereby is, dismissed at the cost of the plaintiff. * * * To which the plaintiff duly excepts." To reverse this judgment plaintiff brings error to this court.

But one question is presented for determination by this record, and that is whether or not the petition of the plaintiff, or more properly speaking, the petition, answer and reply raise an issue which shows a right of recovery in the plaintiff against the defendant for the conversion of her shares of capital stock in the corporation by the refusal of its officers to register the transfer of such stock on the books of the company, or to issue a new certificate of stock in lieu of the old one which she offered to surrender. A certificate of stock in a corporation is not the stock itself, but rather the evidence of the holder's ownership of the stock, and of his rights as a stockholder to the extent therein specified. "They are," as said by Clark and Marshall, Private Corporations, sec. 378*a*, "muniments of title, but not the title itself; much less the real property." When plaintiff purchased the shares of stock in dispute from Chapman, and received the certificate from him properly indorsed, she then became possessed of the evidence of the right to be a stockholder in the corporation, and to enjoy all the privileges and immunities of a stockholder to the extent of the stock, and, as between herself and Chapman, she was the owner of the stock. In an early case (*Neiler v. Kelley,* 69 Pa. St. 403) it was held that, because of the fact that shares of stock are intangible personal property, trover would not lie for the conversion of the stock, although it might lie for the conversion of the certificate. The decision dealt with so many judicial niceties that it found no favor either with the courts generally or with the text-writers; and it is now almost universally held that the action will lie for the conversion of the stock itself, as well as for a conversion of the certificate which evidences it. *McAllister v. Kuhn,* 96 U. S. 87; *Anderson v. Nicholas,* 28 N. Y. 600; *Jarvis v. Rogers,* 15 Mass. *389; *Ayres v. French,* 41 Conn. 142; *Sturges v. Keith,* 57 Ill. 451; *Daggett v. Davis,* 53 Mich. 35; *Carpenter v. American B. & L. Ass'n,* 54 Minn. 403.

Any act of dominion wrongfully exercised over another's property in denial of his right or inconsistent with it may

be treated as a conversion. And this is as true of shares of stock as it is of any other property. 2 Clark and Marshall, Private Corporations, sec. 379*b*, and the cases there cited. A conversion of the stock may be by a third party or by the corporation itself. When under its own bylaws, or under a statute, it is necessary that the transfer of the stock be made on its books, and the corporation wrongfully refuses to make the transfer, such refusal is a conversion of the stock. *Bond v. Mt. Hope Iron Co.*, 99 Mass. 505; *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337; *Craig v. Hesperia L. & W. Co.*, 113 Cal. 7.

Now, it appears clearly from the allegations of the petition that under the articles of incorporation and the bylaws of the defendant company, as well as by the provisions of the stock certificate itself, the shares of stock in controversy were transferable only on the books of the corporation upon the surrender of the certificate properly indorsed, and that the company would not recognize a transfer of stock not entered on its books. It is urged, however, by the counsel for defendant in error that under the statutes and the constitution of Nebraska plaintiff was not denied any substantial right by defendant's refusal to register the transfer of the stock on its books and to reissue the stock, and he cites in support of this contention so much of section 124, chapter 16, Compiled Statutes, 1903 (Ann. St. 4117), as provides: "Every corporation, as such, has power: * * * *Fifth,* to render the interest of the stockholders transferable"; and also section 125 of the same chapter, which provides: "The powers enumerated in the preceding section shall vest in every corporation in this state, whether the same be formed without or by legislative enactment, although they may not be specified in its charter, or as articles of association." He cites so much of section 5, article XI*b* of the constitution, as declares: "The legislature shall provide by law that in all elections for directors or managers of incorporated companies, every stockholder shall (have) the right to vote in person or proxy, for the number of shares of stock owned by him,"

etc. Now, the question arises, are the condition of the certificate and the provisions of the by-laws of the defendant company, which require the assignment of stock certificates to be entered on the books of the company, in conflict with these provisions? We think that they are not. The statute provides for and authorizes corporations to make the shares of their stock transferable, and the by-laws and the stock certificates of the defendant were issued to carry this provision into effect. The constitution provides that every stockholder shall have a right to vote the shares of stock owned by him at the elections of directors, but it does not provide that every owner of stock, as distinguished from every stockholder, shall have this right. The powers of a corporation in effecting its objects are as broad and comprehensive as those of an individual when not expressly prohibited. *Thompson v. Lambert,* 44 Ia. 239. The object of having transfers of stock recorded upon the books of the company is to give the company notice of whom its stockholders are. Ordinarily the officers of the company in conducting the elections or distributing dividends will not look behind the books to ascertain who are the real owners of the stock. *Haskell v. Read,* 68 Neb. 107; *In re Argus Printing Co.,* 1 N. Dak. 434, 48 N. W. 347; *Morrill v. Little Falls Mfg. Co.,* 53 Minn. 371, 55 N. W. 547. We therefore conclude that the refusal of the defendant to register the transfer of the plaintiff's stock on its books, or to issue new stock in lieu thereof, amounted to a denial of a substantial right and was, if done wrongfully, a conversion of the stock.

While it is true that shares of stock are not, strictly speaking, negotiable instruments, yet they partake of the qualities of a negotiable security to such an extent that they pass from indorser to indorsee shorn of all secret liens against the stock in the hands of the original owner. *Keller v. Eureka Brick Machine Mfg. Co.,* 43 Mo. App. 94. It was said in the recent case of *Dempster Mfg. Co. v. Downs,* 126 Ia. 80, 101 N. W. 735:

At common law a corporation has no lien upon the

shares of its stockholders for debts due from them to the company, and, secret liens being discouraged, such a lien will not be enforced, unless created by statute, charter, or by-law.

Both our statutes and the by-laws of this company are silent on the right to create a lien for indebtedness of one of the officers to the corporation. The corporation in this case, according to the admitted allegations of the petition, has made no such provision, and, in any event, to make this defense effective it must be established that the plaintiff bought with notice of the lien. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226.

We are therefore of opinion that the trial court erred in refusing to admit any testimony offered by plaintiff under her petition, and we recommend that the judgment of the court be reversed and the cause remanded for proceedings in accordance with this opinion.

AMES and LETTON, CC., concur.

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

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. THOMAS POWERS.

FILED MAY 17, 1905. No. 13,812.

1. **Carriers: LIABILITY.** When a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier at once attaches.

2. **Delivery of Freight.** Such liability does not attach until the goods are unconditionally delivered by the shipper and accepted by the carrier.

3. ———. A railroad company which constructs yards by the side

of its track to facilitate the loading and unloading of stock is not responsible as a common carrier for stock placed in such yards for subsequent shipment, but subject to the right of the shipper to remove the stock from the pens for feed and water, before the shipment is actually made.

4. ———: LIABILITY. In such a case the liability of the company is no greater than that of an ordinary depositary, or bailee.

ERROR to the district court for Butler county: BENJAMIN F. GOOD, JUDGE. *Reversed.*

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

Matt Miller, contra.

OLDHAM, C.

This was an action for damages originally instituted in the county court of Butler county. The petition alleged, in substance, that on the 11th day of October, 1898, the plaintiff purchased from one George Higgins and others 294 head of cattle which were, at the time of purchase, in the cattle pens of the defendant in the town of Thedford, Nebraska, awaiting shipment to South Omaha; that the pens were composed of rotten posts and decayed lumber, and were unfit for the purpose of keeping and maintaining cattle during the time that they were held in such yards awaiting shipment; and that on the night of the 11th day of October, 1898, the cattle broke out of said yards between the hour of midnight and four o'clock next morning. The petition then alleges that the plaintiff was put to great annoyance and trouble in pursuing the cattle, and was forced to expend considerable money in employing herders to search for and drive back the said cattle; and that he was delayed from Wednesday until Saturday in procuring the shipment of the cattle to South Omaha. He prayed for judgment for $1,000. Defendant answered, specifically denying that the cattle had ever been delivered to and accepted by it for purposes of shipment. On issues thus

joined there was a trial to a jury, a verdict for plaintiff for $250 and judgment on the verdict. To reverse this judgment defendant brings error to this court.

The only allegation in the petition in error necessary to be examined is that the evidence is not sufficient to sustain the judgment. The facts underlying the controversy are that on the 11th day of October, 1898, plaintiff Powers came to the village of Thedford for the purpose of going to a ranch on which part of the cattle in controversy were kept to see if he could purchase them. He inquired of the station agent of the defendant railroad company if he could get a stage out to the ranch. The agent told him that the stage had gone, but that the owners of the cattle were driving them to town that day, and that they would be in Thedford in the evening for shipment the next day to South Omaha. Powers got a conveyance, and went to meet the owners of the cattle. He began negotiating for the purchase of the herd, which was owned by three different men of the names of Higgins, Edinger and Spencer. He had not succeeded in effecting the purchase when the cattle arrived at Thedford, and the owners had put them in the stock pens of the defendant, near its railroad tracks. After the cattle were yarded, Powers consummated a purchase of the entire herd from the different owners, and notified the station agent of the defendant that he would ship the cattle the next day, as the others had intended to do. Plaintiff seems to have looked after his stock from time to time until about 12 o'clock at night. At about sunrise in the morning Higgins, one of the former owners of the cattle, went down to the pens, as he says, to let the cattle out, and feed, water and range them. He discovered that the side of the pens furthest from the track had been broken through, and the herd all gone and scattered over the range. In the panel of the fence that was broken, Higgins and plaintiff each testify that they found three posts that were rotted below and up to the surface of the ground. They made no claim of any rotten or decayed boards on the sides of the pen, but concluded from

the fact of three posts being rotted that the fence was insecure and unfit to hold cattle yarded for shipment. Defendant, on the other hand, introduced evidence, which was undisputed, tending to show that the pens had been thoroughly repaired by the repair foreman of the company but 30 days before the escape of the cattle. New and strong posts had been firmly set in the ground between each of the posts which had rotted below the surface of the ground, and the boards, all of which were sound and sufficient, had been firmly nailed to these new posts. The evidence of the defendant further tended to show that the herd of cattle had been taken from the range, and had been stampeded by fright at a passing train, and had surged with such violence against the sides of the pen that they had broken new boards on the fence and pushed the new posts out of the ground.

Now, the question to determine is whether or not there is any competent evidence in the record to show that defendant company had received the cattle unconditionally for immediate shipment on the evening of the 11th day of October, 1898. That defendant's station agent permitted the owners of the cattle to yard them in the pens of the defendant company is beyond dispute. But, it is also beyond question that the owners knew, when they put the cattle in the pens, that there would be no engine to take the cars to South Omaha until about 11 o'clock next day. It is also clearly shown that the owners of the cattle intended to take the stock out of the pens in the morning, to feed, water and range them until about 10 o'clock. We think the rule well established that, when a shipper surrenders the entire custody of his goods to a common carrier for immediate transportation, and the carrier so accepts them, the liability of the carrier as a practical insurer of the safe delivery of the goods at once attaches. *Kansas City, P. & G. R. Co. v. Barnett,* 69 Ark. 150, 61 S. W. 919. But, we think it equally well settled that such liability does not attach until the goods are unconditionally surrendered by the shipper and accepted by the

carrier. And, where a railroad company constructs yards by the side of its tracks to facilitate the loading and unloading of stock, it is not responsible as a common carrier for stock placed in such yards for the convenience of the owner, who intends to ship on a subsequent day, and reserves the privilege of taking the stock from the pens for the purpose of feeding and caring for them before the shipment is made. In such a case the liability of the company is no greater than that of an ordinary depositary or bailee. *St. Louis, I. M. & S. R. Co. v. Murphy,* 60 Ark. 333, 30 S. W. 419; *Missouri, K. & T. R. Co. v. Byrne,* 100 Fed. 359.

We are therefore of opinion that the evidence is insufficient to sustain the judgment, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

AMES and LETTON, CC., concur.

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

REVERSED.

OMAHA STREET RAILWAY COMPANY V. NELS MATHIESEN.

FILED MAY 17, 1905. No. 13,799.

1. **Negligence:** QUESTION FOR JURY. If the driver of a vehicle who arrives at a street intersection and who sees an approaching car is justified in believing that there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, he cannot be said as a matter of law to be guilty of negligence in attempting to cross, and the question is a question of fact for the jury to be determined from all the evidence before it.

2. **Evidence:** REVIEW. The exclusion of testimony to show that the car might have been seen at a greater distance is not erroneous,

since the question was not whether the plaintiff might not have seen the car at a greater distance, but whether he was guilty of negligence in attempting to cross with the car at the distance it actually was when he saw it.

ERROR to the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

John L. Webster and *W. J. Connell,* for plaintiff in error.

Weaver & Giller and *Frank T. Ransom, contra.*

LETTON, C.

The facts in this case are set forth in the opinion by Mr. Commissioner AMES in *Mathiesen v. Omaha Street Railway Co.,* 3 Neb. (Unof.) 743. At that time the judgment of the district court at a former trial was affirmed. Upon a rehearing (3 Neb. (Unof.) 747) the judgment was reversed and a new trial ordered. At the new trial a verdict and judgment were rendered against the defendant, from which it prosecutes error.

At the former hearing before this court its attention was directed to the question whether or not the evidence on the part of the plaintiff was sufficient to warrant the court in giving a peremptory instruction for the defendant at the close of the plaintiff's case, and it was held error to so direct. At the last trial evidence was introduced by the defendant as to the speed of the car, which was not produced at the former trial, and it is now contended that, taking all the evidence together, it is not shown that the defendant was guilty of actionable negligence. There is a conflict in the evidence with reference to the rate of speed at which the car was running. It was held upon the rehearing that there was sufficient evidence given by the plaintiff himself at the former trial to render it necessary to submit the question as to whether or not the defendant was operating its car at a negligent rate of speed to the jury, and the fact that the defendant has produced addi-

tional evidence upon its side of the controversy, while the plaintiff's testimony is substantially the same as on the former trial, does not change the effect of this adjudication. This is the law of the case and will not be reexamined.

The principal ground upon which the defendant now seeks to reverse the judgment of the district court is that the evidence shows that the plaintiff was guilty of contributory negligence. It appears that Leavenworth street from 21st street to 20th street has a down grade of three per cent. It seems that it is 17 feet from the south curb of Leavenworth street at 20th street to the south rail of the street railway track; that the plaintiff was driving north upon 20th street at a rate of between three and four miles an hour. He testifies that he looked east and saw no car, then looked west and saw the headlight of a car opposite where he knew certain flats to be, a distance of about 200 feet; that he immediately whipped up his horses in order to get across the track, but that the car struck the wheel of his wagon before he cleared the track. The question, then, is presented whether or not he was guilty of contributory negligence in attempting to drive across the tracks at a time when his horses' feet were at the track, and when he saw a street car at a distance apparently of from 150 to 200 feet. He testifies that his wagon and horses were 18 feet 4 inches long, consequently, in order to clear the track, he would have been compelled to move forward more than that distance. The ordinances of the city of Omaha prohibit the street car company from operating its cars at a speed greater than 15 miles an hour, and the testimony on the part of the defendant is that the usual running speed is from 8 to 10 miles an hour, and that this was the speed of this car. If the street car had been distant 150 feet at the time Mathiesen first saw the car and his horses reached the railway track, his team, traveling at the rate of 3 miles an hour, would have moved forward 45 feet while the street car was traversing the 150 feet at the rate of 10 miles an hour; while, if the car was moving at the rate of 8 miles an hour, he would

have moved a distance of 56 feet while the car was traversing this distance. Even if the car had been running at the highest rate of speed permitted under the ordinance, and he had not urged his team forward with increased speed, he would have moved forward 30 feet while the car was traveling 150, and been safely across the tracks. Mathiesen was familiar with the running of street cars in the city of Omaha. He is corroborated to some extent as to the distance of the car by the evidence of the motorman. Mathiesen says that as his ponies were stepping onto the track he heard the bell of the car, and the motorman testifies that he struck the gong when he was just east of the alley in the middle of the block, so that, according to the motorman's testimony, the car ran from just east of the alley in the middle of the block to the point east of the curb on the west side of 20th street, a distance of about 150 feet, before Mathiesen traveled 21 feet. A computation will show that if Mathiesen was driving at the rate of 3 or 4 miles an hour the car must have been traveling at the rate of over 20 miles an hour in order to traverse this distance in that space of time, and, since the motorman tried to stop the car as soon as he saw the team, and did stop it within six or eight feet after it struck the wagon, these facts would warrant the jury in believing that it must have been traveling at a much greater rate before its speed was checked in the endeavor to avoid the collision. From these considerations, we are convinced that it would invade the province of the jury for a court to say that a man of ordinary prudence, traveling at the rate Mathiesen was at the time he saw the car, would not have been justified in attempting to cross the street railway track in front of the approaching car with the car at the distance that it was when he saw it, and that the matter was properly left to the jury to determine. We have already said in this case that issues of primary and contributory negligence are, ordinarily, questions of fact for the jury, and we find nothing in the evidence in this case to take it out of the ordinary class. The facts in this

case are not unlike those in *Omaha Street R. Co. v. Cameron,* 43 Neb. 297, and the principles of law therein enunciated apply.

This court has refused to adopt the rule that persons traveling upon a public highway along or across a street railway are held to the exercise of the same degree of care as when traveling across an ordinary steam railroad. The streets of a city are made for public travel, as well that portion of the public which travels with ordinary vehicles as for that portion which travels in the cars of a street railway company. The driver of an ordinary vehicle has the same right to use the street as the street railway company, but he cannot shut his eyes to the dangers incident to the ordinary and reasonable operation of the cars of such company. If the driver of a vehicle who arrives at a street intersection and who sees an approaching car is justified in believing that there will be sufficient time for him to cross the track before the car, if run at its usual and ordinary rate of speed, will reach the point of crossing, he cannot be said as a matter of law to be guilty of negligence in attempting to cross, and the question is a question of fact for the jury, to be determined from all the evidence before it. What an ordinarily prudent and cautious person would do under like circumstances is peculiarly a question for the jury. *Metropolitan Street R. Co. v. Slayman,* 64 Kan. 722, 68 Pac. 628.

Plaintiff in error further complains of the exclusion of certain evidence offered for the purpose of showing that the plaintiff could have seen an approaching car before he reached Leavenworth street from the south, and that a certain church building which stood on the south side of the street did not interfere with his view to such an extent as to prevent him from seeing the car at a greater distance than that at which he swears he saw it. Ordinarily, where it is a material question whether certain objects can be seen from certain points under certain conditions, it is entirely proper and competent to prove by witnesses who have gone to the spot for the purpose of making ob-

servations with reference to the disputed fact to testify as to what may be seen in that locality, providing that all the surrounding conditions and circumstances are substantially the same as when the event to be investigated occurred; but in this case we doubt whether this testimony was material. The question was not whether the plaintiff might not have seen the car at a greater distance, but whether he was guilty of negligence in attempting to cross the tracks with the car at the distance at which it actually was. Besides, the error, if any, was cured, because the jury were permitted to inspect the locality, and in all probability they were fully as competent to observe any obstructions to the view as the witnesses whose testimony was offered. We think the defendant suffered no prejudice by the exclusion of this testimony.

Complaint is made of the instructions given and refused, but they seem to be as favorable to the defendant as it was entitled to, and the issues were fairly submitted to the jury thereby.

It is further urged that the damages are excessive, but from an examination of the evidence we think this assignment is not well taken.

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

OLDHAM and AMES, CC., concur.

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

AFFIRMED.

MARTIN BLECK, APPELLEE, V. DINA KELLER ET AL., APPELLANTS.

FILED MAY 17, 1905. No. 13,819.

Highway: PRESCRIPTION. To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land. *Engle v. Hunt*, 50 Neb. 358.

APPEAL from the district court for Kearney county: ED L. ADAMS, JUDGE. *Reversed.*

H. M. Sinclair and *M. D. King*, for appellants.

Lewis C. Paulson and *Hamer & Hamer*, *contra.*

LETTON, C.

This was an action by a road overseer for an injunction to prevent the defendants from obstructing a public highway. The existence of the highway is disputed. The defendant Dina Keller is the owner of the north half of section 23, township 8, west of range 16, in Kearney county, Nebraska, which tract is bounded upon the north by the main channel of the Platte river. The road which it is alleged that defendants obstruct lies along the bank of the Platte river upon the north boundary of this tract. It appears that for over 20 years the public travel coming and going from the west toward the bridge across the Platte near the city of Kearney, on the south side of the Platte river, has been across the lands of the defendant, Dina Keller. The land was open and unfenced until 1887, when a slight fence was erected three or four rods from the river bank, along the north side of the land, by one Williams who was then the owner of the land; but this fence was not maintained, and was soon broken down, destroyed and much of it carried away. It remained open

and uncultivated until after the defendant Dina Keller purchased it in 1893. It seems that during the dry seasons of 1893 and 1894 large quantities of sand were blown from the bed of the Platte river over and upon the strip of land which is in controversy. This sand toward the west end has made this strip difficult of travel in the summer time, and in the winter time large quantities of snow drift from the river bed and pile upon the bank. Owing to these conditions, the public have, since 1894, been in the habit of traveling along this strip for a short distance on the east end of defendants' land, and then breaking or cutting the fence, and driving through to the south side of the fence, a distance varying from 4 to 15 rods, and thence traveling westward entirely across the defendants' land without returning to the strip between the fence and the river. The testimony is somewhat conflicting as to there being travel to any extent along this strip for the whole length of the defendants' land, but it clearly shows that the travel from the east, for the most part, has kept between the fence and the river for a distance varying, according to different witnesses, from 40 to 100 rods; thence breaking through the fence and traveling the remainder of the distance to the defendants' west line in various tracks over the defendants' land. The travel south of the fence, since 1894, has not been confined to any settled track or line, but has moved from one point to another as dry weather or wet weather affects the sand or soil over which the tracks run. It appears that there is a slough to the south of the fence some 10 or 15 rods, and that the travel has mainly been confined to the space between the fence and the slough. For over half the distance across the defendants' land the bulk of the travel has been inside the fence, and the plaintiff relies upon this fact to establish a highway by prescription outside of the fence. No public work has been done upon the alleged road within the limits of the defendants' land, but at some distance east of it, and between the land and the road running south from the bridge, a culvert has been put in

and maintained by public authority. It is contended by the plaintiff that a highway by prescription exists upon the strip of land between the defendants' fence and the bank of the river, which is denied by the defendant. The burden of proof is upon the plaintiff to establish the existence of such highway.

We are of the opinion that the evidence fails to establish a continuous and uninterrupted use of the strip of ground by the public for ten years, adverse to the rights of the owner of the land. Prior to 1887 the land was uninclosed, and the public had been accustomed to travel at will over the premises. This travel was permissive, and could not ripen into a prescriptive right. *Shaffer v. Stull,* 32 Neb. 94; *Graham v. Hartnett,* 10 Neb. 517. The slight fence that was erected in 1887 was soon removed, and the public continued, as before, to go across the land in the same general direction without confining itself to any single and definite highway. It was not until the fence was rebuilt in 1894 that the strip of the land in controversy was exclusively traveled over, and the evidence shows that the travel was only confined thereto for a very short period of time, and that the main portion of the travel since that time has been for the greater distance on the south side of the defendants' fence. Before the erection of the defendants' fence the travel varied from place to place north and south, and was in no definite, particular way or track; and the lands being open and uncultivated no prescriptive right could accrue. This action was begun on September 11, 1903. At that time ten years had not elapsed since the time when the defendants erected the fence, and, as we have seen, no prescriptive right could accrue before that time. But, even conceding, for the purpose of argument, that the land was not open and uninclosed in 1894, the evidence fails to disclose that there had been a user of the strip of land in controversy, or of any particular or defined way or track, uninterruptedly and without substantial change for ten years prior to the beginning of the action. This being so, no highway has

been created by prescription over the strip of land in controversy. *Shaffer v. Stull, supra; Engle v. Hunt,* 50 Neb. 358; *Hill v. McGinnis,* 64 Neb. 187.

We recommend that the judgment of the district court be reversed and the cause dismissed.

AMES and OLDHAM, CC., concur.

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

REVERSED.

MAMIE KENNELL ET AL., APPELLANTS, V. MYRON G. RANDALL, APPELLEE.

FILED MAY 17, 1905. No. 13,785.

Appeal: REVIEW. Alleged erroneous rulings in the trial of a case in the court below regarding the rejection or admission of evidence will not, in proceedings by appeal, be reviewed in this court.

APPEAL from the district court for Nemaha county: JOHN S. STULL, JUDGE. *Affirmed.*

Ed M. Tracy and *Neal & Quackenbush,* for appellants.

George W. Cornell, contra.

DUFFIE, C.

In the month of November, 1847, one Judson Brown died intestate in the state of Wisconsin. He was possessed of 120 acres of land, and left surviving him Ellis Brown, a son, and Polly M. Brown, his widow. The widow afterwards married one M. G. Randall, and is hereafter spoken of as Polly M. Randall. After her second marriage she gave birth to Myron G. Randall, the appellee. Sometime after the death of her first husband, a life interest in 40 acres of the land of which he died possessed was as-

signed to her as her dower in his estate, the son Ellis Brown being entitled to the remainder after her death. The petition alleges that the widow was anxious to dispose of the 40 acres of which she was endowed, and that she made an oral agreement with her son, Ellis Brown, that if he would consent to a sale of this 40 she would invest a portion of the consideration received in cheap Nebraska lands, taking a life interest to herself in the lands so purchased, with remainder over to her son; that on this agreement the son consented to a sale of the Wisconsin 40, and that the widow purchased the northeast quarter of section twenty-three (23), township four (4) north, range fourteen (14) east of the 6th P. M., in Nemaha county, Nebraska, taking the deed in her own name; and that she continued to hold said land until November, 1900, and a short time prior to her death, when she made a voluntary conveyance to Myron G. Randall, the appellee. It is further alleged that the appellants are the children and only heirs at law of Ellis Brown, and the prayer of the petition is for a finding and decree that Mrs. Randall held the land above described in trust for Ellis Brown and his heirs, subject to her life estate, and that the appellants be declared the owners thereof.

The answer, among other matters, alleges that Mrs. Brown sold her dower interest in the Wisconsin land to her son Ellis Brown for the sum of $1,000, which she took to her own use and benefit as her own individual money; that prior to her death Mrs. Randall deeded to her two children Thyrza E. Fryer, *nee* Randall, and to the appellee all of her real estate, and that the northeast quarter of section 23, with other lands, was deeded jointly to appellee and his sister; that afterwards they divided said land, he becoming the owner of the northeast quarter, paying his sister $1,250 as the difference in the value of that tract over what he had quitclaimed to her, and that Mrs. Randall left a last will bequeathing to him and his sister all her real estate and personal property, to be divided between them, share and share alike, subject to certain

legacies mentioned in the will. There is also a general denial in the answer.

In support of the allegations of the petition the appellants called as a witness Mrs. Mary Tyson, the mother of the appellants and widow of Ellis Brown, who, since the death of her first husband, has intermarried with one Tyson. After stating that the 40 acres of which Mrs. Randall was endowed in Wisconsin had been sold, that she was a party to the sale, and that a deed had been made which closed the transaction, she was asked to tell the court what the transaction was; and, upon the court sustaining an objection to the question, the appellants made the following offer: "Plaintiffs offer to show by this witness that at the time of the transfer of the dower interest of Polly M. Randall in the Wisconsin land it was a part of the transaction, and this witness signed the deed finally conveying the premises involved therein upon the express understanding and agreement upon the part of the said Polly M. Randall that a portion of the proceeds of the sale of said premises was to be invested in Nebraska land for the benefit of Ellis Brown and his heirs, in case he should die before said Polly M. Randall; and that the money arising from the proceeds of said premises to the extent of $1,000 was to be taken by said Polly M. Randall and invested in such Nebraska lands, of which she was to have the life use as representing her dower interest in the Wisconsin land, the ultimate interest and title to said land going to said Ellis Brown and his heirs; that said Ellis Brown was the owner of the remainder after the life estate of said Polly M. Brown in said Wisconsin lands as alleged in the petition; that said Ellis Brown never transferred, released or discharged his interest in said lands or either tract thereof; that said agreement was not in writing and rested solely in parol, and, contrary to the terms thereof, said Polly M. Randall purchased said Nebraska lands and took title in her own name, and said contract was the sole inducement and consideration for the transfer of said land upon which the dower interest rested in the state of Wisconsin, with-

out which the transfer would not have been made; that said Ellis Brown, remainderman, died several years prior to the decease of said Polly M. Randall, and that this witness claims no interest in said land." Objection was made to this question, and sustained by the court, and complaint is made of this ruling.

For many years the rule has obtained in this state that alleged erroneous rulings in the trial of a case in the court below regarding the rejection or admission of evidence will not, in proceedings by appeal, be reviewed in this court. *Ainsworth v. Taylor,* 53 Neb. 484; *McLain v. Maricle,* 60 Neb. 353. This rule is based upon the theory that the party appealing is content to retry the case in the supreme court upon the evidence actually considered by the district court. Aside from the offer of evidence which was rejected by the trial court there is nothing in the record to support the claim of the plaintiff, and, even if the rejected evidence had been received, it lacks one material element to support the claim of the plaintiffs, viz., that the proceeds of the Wisconsin land was invested in the land in controversy in this action. From anything that appears in the offer of proof made by the appellants, it may well be presumed that this particular 160 acres in controversy was purchased with money obtained by Mrs. Randall from her second husband, or from resources of her own which had no connection with the Wisconsin land.

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

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

CHARLES T. DURKEE V. GUSTAVE KOEHLER.

FILED MAY 17, 1905. No. 13,796.

1. **Mechanics' Liens.** Section 4 of the act relating to mechanics' and laborers' liens contemplates a judgment in an action brought thereunder giving the plaintiff the benefit of his lien and a sale of the property therefor.

2. **Foreclosure:** DEFICIENCY JUDGMENT. Where the holder of a mechanic's lien commences an action in equity to foreclose the same, or where he is made defendant in a chancery proceeding involving the property against which he holds such lien and his lien is foreclosed in such action, he is entitled to a deficiency judgment against the party liable for the debt, where a sale of the property does not satisfy the amount of his claim, if his petition or cross-bill asks such relief. *Commercial Nat. Bank v. Grant*, *ante*, p. 435.

3. **Limitation of Action.** In such case the application for a deficiency judgment should be made within the time that the statute would bar an action on the note or account on which the lien is based, counting from the date of confirmation of the sale of the property.

ERROR to the district court for Hall county: JOHN R. THOMPSON, JUDGE. *Reversed with directions.*

F. Dolezal, for plaintiff in error.

W. H. Thompson, contra.

DUFFIE, C.

In an action to foreclose a mortgage on what is known as the Koehler Hotel property in the city of Grand Island, Charles T. Durkee and more than twenty other lienholders were made parties defendant. Durkee filed an answer and cross-petition showing that he had furnished certain material and done labor in the erection of the hotel, and had taken the necessary steps to secure a mechanic's lien therefor. He asked that the amount due him be ascertained; that the property be sold and the proceeds applied to the satisfaction of his lien, and that he have personal

judgment for any deficiency. A decree was entered in the case on February 29, 1896, which, among other things, established the lien of Durkee, but placed him in the third class. An appeal was taken, and the judgment of the district court affirmed. See *Grand Island Banking Co. v. Koehler*, 57 Neb. 649. The decree of the district court did not contain any finding on the question of the right of any of the lienholders to a personal judgment against Koehler in case of a deficiency, and but two or three of the lienholders asked for such a finding. The property was sold June 14, 1900, and the proceeds of the sale distributed among the lienholders having priority over Durkee. The sale was confirmed June 30, 1900, and on October 31, 1902, Durkee filed a motion for a deficiency judgment, which was overruled by the court by an order entered December 14, 1903, from which order Durkee has appealed to this court.

It is insisted by the appellee, and the district court apparently proceeded upon the theory, that a deficiency judgment could not be entered against the owner of the property upon the foreclosure of a mechanic's lien by action brought upon the chancery side of the docket. It is said in brief of appellee that "our statute governing mechanics' liens provides but two modes of enforcement: First, under section four, to obtain a judgment on the account in civil action, continuing the lien and sequestering, by reason thereof, the rents and profits of the lands; and, second, by a petition in chancery as in other cases of liens; that, the plaintiff in error having elected to pursue the course in chancery, he is not entitled to a personal judgment against the defendant, but simply to a decree finding the amount due, ordering a sale of the property, and application of the proceeds, as is the practice in such courts." We are not inclined to agree with the appellee in this position. An examination of the statute relating to mechanics' liens clearly shows, as we think, the intention of the legislature to allow a personal judgment against the owner of the property on which the lien is

claimed for the amount due upon the account of the lienholder, whatever the proceedings taken to enforce the lien.

Section 1, article I, chapter 54, Compiled Statutes, 1903 (Ann. St. 7100), the act giving mechanics' and laborers' liens, defines who are entitled thereto and for what a lien may be claimed. Sections 2 and 3 provide the proceedings to secure a lien. Section 4 is as follows: "Every person holding any lien under this chapter may proceed to obtain a judgment for the amount of his account thereon by civil action. And when any suit or suits shall be commenced on such accounts within the time of such lien, the lien shall continue until such suit be finally determined and satisfied." When we consider that courts of equity have no power to enforce this statutory lien unless expressly authorized by law, or unless, perhaps, there exists some impediment or difficulty which would render the remedy given by the statute unavailing, it seems to us clear that section 4 was designed by the legislature as one of the methods of enforcing the lien given by the statute and by a sale of the property. The general rule is that when, by the statute, a new right is given and a specific remedy provided, or a new power and also the means of executing it are provided by statute, the power can be executed and the right vindicated in no other way than that prescribed by the statute. *Coleman v. Freeman*, 3 Ga. 137; *Quimby v. Sloan*, 2 E. D. Smith (N. Y.), 594, 615; *Otley v. Haviland*, 36 Miss. 19; Phillips, Mechanics' Liens (3d ed.), sec. 2.

A statute of Wisconsin, substantially like section 4, was given this construction by the supreme court of that state in *Dewey v. Fifield*, 2 Wis. 55. The court said:

"The statute under which the suit was brought, creates a lien upon any building erected, in favor of any person who shall perform labor upon it, or who shall furnish materials used in its construction, and provides a mode in which the lien can be enforced. The statute also creates a lien upon the interest of the owner of the building in the

land upon which it is situated, not exceeding one acre, if within the limits of any city, town or village plat, and not exceeding forty acres, if without those limits. In order to enforce the lien, a 'petition or claim for the same' must be filed, and an action instituted within one year from the time the work was done, or the materials were provided. The 8th section of chapter 120, above referred to, is as follows: 'In all cases of lien created by this act, the person having a claim filed in accordance with its provisions, may proceed to recover it by personal action against the debtor, his executors or administrators, or, when the plaintiff is a subcontractor, by a *scire facias* against the owner of the building.' In this case, the plaintiff brought an action against the debtor, who was the owner of the dwelling house. By the words 'personal action,' as used in the section of the statute above quoted, we do not suppose the ordinary action *in personam* for recovery of a sum of money or damages, against the debtor, is intended, because such an action is not at all calculated to give the plaintiff the relief which the statute provides. The judgment in such an action would bind the real estate of the debtor only from the time it was rendered, whereas he seeks to make the building, and the interest of the owner of it in the land upon which it is situated, liable from the time the labor was performed, or the materials were provided. But we think that while the action is personal, it must be adapted to the object to be accomplished; the declaration should therefore contain the necessary averments to show not only that a sum of money is due the plaintiff, but that the debt was created by the performance of labor upon, or materials furnished for the building; it should state, also, that the claim or petition was filed within the time limited by the statute, and it should contain a description of the building, and of the premises upon which it is situated. All these facts are material, and unless they are all proved on the trial, the plaintiff cannot obtain a judgment under the statute. The declaration is in all cases a statement of the facts upon which the plaintiff relies, and

must allege all the circumstances necessary for the support of the action."

This is not only a satisfactory construction of such a statute, but the only construction which, in our judgment, will carry into effect the intention of the legislature. The claimant, in proceeding under the provisions of section 4 of our mechanics' lien law, sues upon his account, alleging at the same time the facts which entitle him to a mechanic's lien upon the property of the defendant, and the judgment should be for the amount found due, with an order for a sale of the property, the proceeds to be credited upon the judgment much as is the case in an action where property has been attached. This view is strengthened by other provisions of the act, section 5 providing for the completion of the building by the workmen in cases where the owner has suspended work thereon, and section 6 providing for a lease of the building by the court where the title of the owner is defective. Section 7 is in the following language: "In all other cases of judgment or judgments obtained in favor of any lienholder or lienholders, if the property bound by such lien will not sell on execution as provided by law in other cases having been once duly offered, the court before whom such judgment or judgments may be obtained may direct the officer aforesaid to lease the same in the same manner and for the same purpose pointed out in the preceding section, and the officer giving such lease shall therein require the payment to be made to him or his successors in office," etc. To our minds this section clearly contemplates offering the property for sale to satisfy any judgment that may be obtained under the provisions of section 4 above quoted, and the lien of such judgment dates from the time that the labor or material for which the lien is given was furnished. Thus far the statute clearly contemplates a personal judgment against the party to whom the labor or material was furnished, but the legislature undoubtedly understood that many cases might arise in which it would be necessary for a court of equity to adjust and determine the priority

existing between mortgage and other liens existing on the property against which mechanics' liens were filed, and by the provisions of section 14 of the act it was provided: "Any person who shall hold a lien under the provisions of this chapter may, in addition to the remedy herein provided for, proceed by a petition in chancery as in other cases of liens against the owner or owners of, and all other persons interested, either as lienholders or otherwise, in any such house, mill or manufactory, or other building or appurtenance, in the first section of this chapter mentioned, and the lot or lots of land on which the same shall stand, and obtain such final decree therein for the rent or sale thereof, as justice and equity may require, anything in this chapter to the contrary notwithstanding."

It is insisted by appellee that where the claimant proceeds under this section of the statute he is not entitled to a personal judgment against the owner of the building, and that the only relief he may have in such an action is to obtain a decree for a sale of the property, the proceeds to be credited upon the amount of his claim. This view is supported by a brief which contains a collection of the authorities, and in which the position taken is strongly urged. It is true that under the old chancery practice no personal judgment in an action to foreclose a mortgage could be had in the foreclosure proceedings unless provided for by statute or a rule of the court, and it is probably true that our statute prior to 1897 recognized this as the prevailing rule in foreclosure proceedings, by providing that a deficiency judgment might be entered against those liable therefor upon the confirmation of the sale and it being ascertained that a deficiency existed, and by the act of 1897 which repealed that provision of the statute relating to foreclosures of real estate mortgages. But we cannot believe that the legislature, which specially provided for a personal judgment in proceedings to obtain the benefit of a mechanic's lien, intended or contemplated that, because the circumstances were such that the claimant was compelled to go into equity or, as in this case,

was forced into an equity proceeding, he thereby abandoned his right to a personal judgment against the party to whom the labor or material which entitled him to his lien was furnished. The chancery proceeding under section 14 of the act is, in the language of the section, an additional remedy, and by adopting it, or, as in this case, by being brought into it by another lienholder, the party is not deprived of any right or benefit which the proceeding under section 4 would give him. The better practice undoubtedly would be to ask for a personal judgment for the amount of his account and for the court to enter such judgment in the first instance; but we cannot say that the claimant in this case, by failing to ask for a personal judgment in the first instance and in asking the court to enter such a judgment after it was found that the property would not sell for enough to satisfy his claim, waived his right to have such judgment entered in his favor. He prayed for a personal judgment, and the fact that such judgment was not asked to be entered until after a sale of the property, and the amount of the deficiency had been ascertained, does not, in our opinion, deprive the court of jurisdiction to enter such judgment after a sale of the property, and after the amount of the deficiency has been ascertained. This being so, the only question remaining is the time within which an application for such deficiency should be made.

In *Weir v. Field,* 67 Miss. 292, it was held:

"Under section 1935, code 1880, which provides that upon confirmation of the sale of property sold under decree of foreclosure the chancery court upon motion of complainant may render a personal decree against a defendant for the balance found by the record to be due, the right to move for such personal decree is not confined to the term at which the sale is confirmed, but may be exercised at any time before the decree becomes barred by limitation."

In this state a decree of foreclosure is not barred by limitation, and the question of when an application for a

deficiency judgment must be made has not been determined. That it cannot always be made at the same term at which a sale is confirmed is apparent from the fact that many sales are confirmed by the judge in vacation. The right to the judgment where it exists accrues upon the confirmation of the sale, and, following by analogy the rule adopted by the Mississippi court, we are of the opinion that, if a deficiency is moved for within the time within which the claim out of which the deficiency grows would be barred after confirmation of the sale, it is within sufficient time.

We recommend the reversal of the order appealed from, and that the cause be remanded to the district court, with directions to enter a judgment for the appellant for the amount found due him on the foreclosure proceedings, with interest and costs.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order appealed from is reversed and the cause remanded to the district court, with directions to enter a judgment for the appellant for the amount found due him on the foreclosure proceedings, with interest and costs.

REVERSED.

IN RE ESTATE OF JOHN C. OWEN.

FILED MAY 17, 1905. No. 13,806.

1. **Evidence** examined, and *held* not only sufficient to sustain a verdict finding a testator mentally capable of making a will, but to require such verdict.

2. **Will Contest:** EVIDENCE: REVIEW. Where the verdict is the only one which could be sustained under the evidence both admitted and offered by the contestants of a will, and also excluding from consideration all evidence admitted by the court on behalf of the proponent to which contestants objected and on which error

is predicated in this court, the court will not discuss alleged errors of the trial court in receiving evidence offered by the proponent or in rejecting evidence offered by the contestants.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

John H. Barry and *John L. Sundean,* for plaintiff in error.

H. Gilkeson and *Simpson & Good, contra.*

DUFFIE, C.

John C. Owen, the testator, died February 23, 1903. The subject of this controversy is a will which he executed July 12, 1902. The testator left surviving him five sons and three daughters, his youngest child being thirty-five years of age. There were also nine grandchildren, the issue of his son Albert and of a daughter, Alzena German, both of whom died prior to the testator. The will in controversy was offered for probate by Thomas Owen, a son, and objections were filed by the grandchildren who were of full age, and upon their application a guardian *ad litem* for the minor grandchildren was appointed by the county court, and also for an incompetent daughter, Emma. The county court admitted the will to probate, and from his decision the guardian *ad litem* took an appeal to the district court. The adult grandchildren did not appeal. In the district court the case was tried on the pleadings filed in the county court, and resulted in a verdict sustaining the will. The objections urged against the will were that the testator did not possess sufficient mental capacity to make a last will and testament at the time the purported will was executed; that it was procured by undue influence exercised upon the testator by his wife and three of his sons, and that the testator's mind had been poisoned toward the contestants by the wife and sons of the testator so that he did not possess sufficient mental capacity to compre-

hend his duties and relations toward the contestants nor his obligations to them.

The first objection urged is that the proponent rested without proof of the testator's death, and relating to this objection we have to say that we will not presume that the contestants were expending their time and energy in objecting to the probate of the will of a person not deceased, and calling upon the court to appoint a guardian *ad litem* for the minor heirs who certainly had no interest unless the party in whose estate they claimed a share was dead at the time. Conceding that the objection filed against the probate of the will, so far as it related to the undue influence exercised by the wife and children of the testator in procuring it, was sufficiently specific, of which we have grave doubts, a careful perusal of the evidence fails to disclose any evidence which, in our judgment, has a tendency to support it.

Coming now to the mental capacity of the testator, there are but two or three circumstances detailed by the witnesses for the contestants which could be considered as tending in any degree to raise a doubt that the testator at the time of making the will was not in full possession of his faculties, and these circumstances have mostly been explained away. It is conceded that he omitted forty acres of his land from the will. The attorney who drew the will was called to the house of the testator for that purpose. He testified that the old gentleman gave him a full description of his property, having the same in mind without reference to any notes or memorandum, and that the forty acres omitted from the will was given him with directions to have it equally divided among his heirs, but that in drafting the will he overlooked this particular forty, and its omission from the will was not caused by oversight or forgetfulness on the part of the old gentleman, but was his own oversight. It is shown also that on one occasion, on going home from a political meeting, he got lost in a cornfield and had to call for assistance to take him to the house. The testator lived in the village of

Memphis which was laid out on his land. He occupied a block not far distant from the schoolhouse where the meeting was held. The night was dark, and, in order to avoid the teams coming from the meeting, he left the road and got into the cornfield, and there lost his way, which might well occur to anyone. It is also said that he drove the chickens from the pig pens when feeding his hogs; but it is shown that some of the chickens which entered the pens were killed and eaten by the hogs, and that his efforts to keep them away thereafter was to prevent them from being killed. It is said that at one time he complained of being followed by a ghost, and on another occasion he upbraided a sick son for lying in bed while there was so much work to do, and that this occurred but a short time previous to the son's death. Considerable was said also about his wearing felt boots during the summer season, and a plush or velvet cap through the year. It was explained that for some years previous to his death he was afflicted with corns and bunions on his feet, and that felt boots were the only foot-wear that he could use with any comfort, and even these had to be cut to accommodate the bunions. His reason for wearing the plush or velvet cap does not appear. There were other circumstances which it is claimed tended to show the incapacity of the testator, but these matters were all submitted to the jury under instructions which presented very fairly the whole case, and the verdict not only had sufficient evidence to sustain it, but, as we view it, it called for the verdict which was rendered. The banker with whom the testator did business and his physician who attended him in his last illness testify to his capacity. Of the ten witnesses called by the contestants, but two or three give an opinion that he was of unsound mind, and these opinions are based on such trivial considerations as in our opinion to be without weight. In a careful examination of the evidence we find nothing that impresses us with the idea that the testator was not perfectly capable of transacting business, or that he did not attend to his own business in a capable manner

up to the date that this will was made, and for some time thereafter. His neighbors and friends regarded him as of sound mind, and some of them speak of him as a man of unusual mental capacity and strength. He had lived in Saunders county for thirty years or more. If he was so mentally unsound as not to be capable of making a will, there would seem to be little difficulty in procuring evidence to establish that fact to the entire satisfaction of a court and jury. It is true that under the provisions of his will an incompetent daughter, Emma, was left entirely unprovided for, as were some of the grandchildren; but the record shows that his wife was possessed of property; that they consulted each other relating to the matter of their wills, and that it was fully understood between them that, while the old gentleman would provide for some of his heirs from his own property, his wife would provide for the others. That such an arrangement was fair and equitable and will probably be fully carried out by the wife must be presumed, and under these circumstances, and with this explanation for the reason of not distributing his property more equally among his heirs, it would require a much stronger showing of incapacity of the testator than here appears to justify a court in interfering with the verdict.

It would be useless to spend time in discussing the errors alleged on the rulings of the court in the admission and refusal to receive evidence. If we take into consideration all the evidence offered by the contestants which was rejected by the trial court, and exclude from consideration all evidence offered by the proponent and received by the court on which error is now predicated, still we think that the verdict of the jury could not be different from that returned, and that any other verdict should be set aside.

We recommend therefore that the order of the district court admitting the will to probate be affirmed.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

JOHN A. REEDER, ADMINISTRATOR, V. CITY OF OMAHA.

FILED MAY 17, 1905. No. 13,814.

Cities: NEGLIGENCE. The cases in this state have established the rule that there must be some direct and immediate connection between the negligence of a city and the damage complained of to entitle a party to recover in an action for damages on account of such negligence.

ERROR to the district court for Douglas county: CHARLES T. DICKINSON, JUDGE. *Affirmed.*

Bowes & Hodder, for plaintiff in error.

C. C. Wright and *W. H. Herdman, contra.*

DUFFIE, C.

Block 66, in Credit Foncier Addition to the city of Omaha, is bounded on the east by Sixth street, on the north by Center street, on the west by Seventh street and on the south by Cedar street. A deep ravine enters said block near the southeast corner, extending across the same and, as we understand, across Seventh street into the block west. Some 20 years ago or more the city graded Sixth and Cedar streets, filling the ravine at the intersection of these two streets at the southeast corner of block 66. Because of a failure on the part of the city to make adequate provision for a discharge of the water, a large pond was formed which, after a heavy rain, extended into the street at the intersection of Seventh and Center streets from 5 to 15 feet, but at no time did the water come nearer than 2 or 3 feet of the foot of the slope made by grading

Sixth street, and ordinarily the edge of the water on the east side of the pond and nearest Sixth street was about 60 feet from the west line of said street. It further appears that the bank formed by the grade of Cedar street, and adjoining the pond on the south, was very abrupt; that this bank was about 60 feet above the level of the water in the pond, and the pond was surrounded with weeds and willows which made it difficult of access from either Cedar or Sixth street except by a path which extended from about the middle of block 66 on Sixth street in a southwesterly direction to the edge of the pond, the distance from the point where the path left Sixth street to where it reached the pond being from 60 to 70 feet. In July, 1900, Austin Reeder, the plaintiff's intestate, was playing with some other boys on Howard or Jackson street, a mile or more northwest of this pond. One of the boys suggested going to the pond for the purpose of taking a swim. The Reeder boy, aged about 9 years, with two other of his companions thereupon proceeded along Tenth, Eighth and Sixth streets to the point where the path above spoken of diverges from Sixth street, running southwesterly to the pond, and followed this path down to the water's edge. After playing in the water for some time, they came out and started to dress, when the Reeder boy went back to take a slide down the bank into the water, and getting beyond his depth, was drowned. It is further shown that at the time of the accident there was no sidewalk extending along the west side of Sixth street for a half block north of Cedar street, which would be at a point on Sixth street directly east of the pond. After the plaintiff had rested, the court gave a peremptory instruction to the jury to return a verdict for the defendant, and the only question argued on the submission of the case was the correctness of this instruction.

In *Richards v. Connell,* 45 Neb. 467, it was held: "The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young,

who may resort to said premises not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity." This rule was referred to with approval by Judge SEDGWICK in an elaborate opinion in *Tucker v. Draper*, 62 Neb. 66, where it is said: "We have no doubt that under the facts in that case the law was correctly applied."

It may be considered settled therefore that in this state the owner of property is under no obligation to guard a pond situated thereon against trespassers, or to provide for the safety of any who resort to the premises for their own satisfaction, and not by the invitation, express or implied, of the owner. Where the owner extends an invitation to the public to make use of dangerous premises, he will be liable for damages arising from his neglect to take such proper precautions against accidents as would occur to the ordinary mind; and if the evidence is conflicting on the question of an invitation to use the premises, it should be submitted to the jury. This rule is well illustrated and explained in the opinion of Judge SEDGWICK above referred to.

A municipal corporation cannot ordinarily be made liable for damages sustained in consequence of its neglect unless made so by statute. The charter of the city of Omaha places upon the city the duty of keeping its streets and alleys in safe condition, and there can be no question that where damages are incurred in consequence of a neglect of this duty the city is liable. Had the accident in this case occurred to the Reeder boy from a use of Seventh street or Cedar street where the water overflows the same, then, under the holding in *City of Omaha v. Richards*, 49 Neb. 244, and *City of Omaha v. Bowman*, 63 Neb. 333, the liability of the city would be beyond dispute. The evidence, however, is undisputed that the accident did not occur from a use of the streets of the city. While the pond extended over Seventh and a part of Cedar street, the boy did not use these streets, nor did he enter the pond from either street. At the point where he left Sixth street

to reach the pond, he was as safe as at Howard or Jackson streets, before a visit to the pond had been suggested. In *City of Omaha v. Richards, supra,* it was said:

"It is quite immaterial whether he was drowned in the water in the street or on the adjacent premises, in close proximity to the street, since the negligence of the city caused the accumulation of the water, consisting of a single body extending nearly one-fourth the distance across the street to the abutting properties, and further, the raft containing the deceased floated from the street upon properties abutting thereon. * * * It would have been different if the pond had been entirely upon private property and not in close proximity to a street. In such case there would be no liability upon the city, since it would have been guilty of no breach of duty. It is undisputed that this pond of water extended into the street, and the city cannot escape liability merely because the drowning occurred upon the adjacent premises."

The entire thought of the opinion is that the boy used the street and the water overflowing the street to reach the point where the accident occurred and where the drowning took place, and it is quite evident that the city could not escape liability because the death of the boy did not occur in water covering the street, if such water was made use of to reach the point where the fatality finally occurred.

The record first presented to this court in *City of Omaha v. Bowman*, 52 Neb. 293, discloses that young Bowman, with some boy friends, took up part of a sidewalk laid on Davenport street and launched it on a pond which was about seven feet from the sidewalk, and the level of the water some feet below the sidewalk. Under this state of the record this court held that the city was not liable for the accident which occurred, it not appearing that the water from the pond overflowed the street or was in dangerous proximity thereto. An amended petition was filed in the district court covering this defect, and on error taken from an order sustaining a demurrer to said peti-

tion it was held that a municipal corporation is liable for the death of a child who was drowned in a pond of water situate in part on a public street and in part on abutting lots, when shown that the accumulation of water was occasioned by the negligence of the city in filling in the street with earth; that no fence or barrier was erected, and that the child entered the pond from the street. The case being remanded for a trial, and judgment going against the city, it was again brought to this court, and the judgment affirmed, the court saying that the evidence supported the allegations of the petition, which the former opinion held alleged facts stating a cause of action against the city.

Our examination of these cases leads us to the conclusion that they establish the rule that some direct connection between the injury complained of and the negligence of the city must be shown in order that the plaintiff may recover. That the street of a city may be overflowed with the waters of a pond created by the act of the city could matter nothing to those who had no occasion to use the street, or to those using it at a place distant from the point of overflow; but where the water covering the street is used by one who has not attained the age of discretion, and whose tender years preclude the charge of contributory negligence, to reach a dangerous place in the pond where the water is beyond his depth, the case is different, and the city should answer for its neglect.

Because there was no direct connection between the negligence charged against the city and the accident to the boy, the district court properly directed a verdict in the case, and we recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

ALFRED H. DAVIS, APPELLEE, V. BEACH I. HINMAN, APPELLEE, FANNIE CHAMBERS, APPELLANT.

FILED MAY 17, 1905. No. 13,818.

1. **Illegal Contract.** A contract intended to facilitate the procuring of a divorce at the suit of either of the parties thereto is void.

2. ———: ACTION. Where an illegal contract has been executed, and the parties thereto are *in pari delicto*, no action lies to recover back money paid under it or for restitution of property delivered in pursuance of its terms.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Hoagland & Hoagland, for appellant.

A. H. Davis and *Wilcox & Halligan, contra.*

Beach I. Hinman, pro se.

DUFFIE, C.

Frank and Fannie Chambers were husband and wife. In July, 1899, Mrs. Chambers bought of Beach I. Hinman three acres of land for $190, taking a contract of purchase therefor. The purchase price has been paid, with the exception of about $36, when, in September, 1901, and during the pendency of an action for divorce brought by Fannie Chambers against her husband, she assigned the contract of purchase to her husband, and thereafter he assigned the same to the appellee, Alfred H. Davis, an attorney, as security for fees and expenses in defending the divorce action. After that action had been determined, and on a settlement between Davis and Chambers, Davis accepted the contract in full satisfaction for his services and expenses, and thereafter tendered to Hinman the amount due upon the contract, and demanded a deed, which Hinman refused to make. Thereupon Davis brought this action against Hinman to enforce the mak-

ing of a deed, and Mrs. Chambers intervened, alleging, among other matters, that during the pendency of her action for divorce, which was being bitterly contested by her husband, an agreement was entered into between them that, in consideration of the assignment of this contract and of the transfer to her husband of a span of horses, he would abandon his defense, and allow her to take a decree for a divorce and for the custody of her two children; that he failed to keep such agreement, but prosecuted his defense with renewed activity after securing an assignment of the contract and possession of the horses.

One phase of the case which was apparently overlooked in the trial below, and which has not been urged upon the appeal, cannot be ignored by this court. The object of the agreement entered into between Mr. and Mrs. Chambers, and in consideration of which she assigned the contract, was to bring about a dissolution of the marriage contract, and to put an end to the various duties and relations resulting therefrom. Any contract having any such purpose, object or tendency cannot be sustained, but must be regarded as being against sound public policy, consequently illegal and void. The marriage relation is one to be encouraged and maintained when formed. Such is the well-settled policy of the law; and its dissolution or determination is not to be left to the caprice of the parties. If dissolved, it must be done in accordance with some positive enactment of law and in due course of judicial proceeding. The good order and well-being of society, as well as the laws of this state, require this. *Sayles v. Sayles,* 21 N. H. 312; *Smith v. Smith,* Wright (Ohio), 643; *Beard v. Beard,* 65 Cal. 354; *Wilde v. Wilde,* 37 Neb. 891.

It is equally well settled that, where the general public is affected by a contract violating the law, the courts will refuse their aid to the parties and leave them as they found them, although the contract has been performed by one party, so that the other has received the benefits thereof without giving anything in return. *Brower v. Fass,* 60 Neb. 590.

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

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

OSCAR SAMUELSON, APPELLEE, V. JOHN H. MICKEY ET AL., APPELLANTS.*

FILED MAY 17, 1905. No. 13,793.

1. **Deed as Mortgage.** The test whereby to determine whether a deed absolute on its face should be held to be a mortgage is whether the relation of the parties to each other as debtor and creditor continues. If it does, the transaction should be treated as a mortgage, otherwise not. *Riley v. Starr*, 48 Neb. 243.
2. **Evidence** examined, and *held* insufficient to sustain a finding that a deed absolute on its face was intended to operate as a mortgage.

APPEAL from the district court for Polk county: ARTHUR J. EVANS, JUDGE. *Reversed.*

F. I. Foss, King & Bittner and *R. D. Brown,* for appellants.

E. E. Stanton, Mills & Mills and *C. A. Robbins, contra.*

ALBERT, C.

This suit was brought by Oscar Samuelson, the appellee, to have a certain deed, absolute in form, given by himself and wife to John H. Mickey, one of the appellants, declared a mortgage, and a subsequent conveyance, also absolute in form, from said appellant to Arthur A. Smith, of the same premises, a mere assignment of said mortgage. The first deed was given on the 26th day of March, 1897.

* Rehearing denied. See opinion, p. 856, *post.*

At that time the appellee was indebted to the Connecticut Mutual Life Insurance Company in the sum of $1,200; to Arthur A. Smith, $1,500; to a local bank, of which the said grantee was president, $75; and to Oscar A. Johnson, $700; and these several debts were secured by mortgages on the premises, which were liens thereon in the order stated. The first mortgage was past due, and the debt was drawing interest at 9 per cent. Default had been made in the payment of $120 interest on the second mortgage, which by the terms of said agreement made the whole amount due at the option of the holder. The third mortgage was also past due, and was drawing interest at the rate of 10 per cent. In addition to the foregoing, taxes levied against the premises amounting to $40 were past due and unpaid. The holder of the first mortgage was threatening foreclosure, and the appellee, being unable to renew or raise the money to discharge it, made the conveyance hereinbefore mentioned to avoid foreclosure.

It is not claimed by any of the parties to the suit that the conveyance to Mickey was intended to vest him with both the legal and beneficial title to the land. The testimony of the appellee is to the effect that at the time he made the conveyance it was understood and agreed that Johnson, the holder of the fourth mortgage should have a certain time in which to pay the prior mortgages, or a certain portion thereof, and assume the balance of the mortgage indebtedness, and, upon his doing so, Mickey should convey the land to him. He further testified that after the expiration of the time fixed for such payments, and after Johnson had failed to make them, he, the appellee, called on Mickey, who in these transactions also represented Smith, and told him of such failure, and that he would now take hold of the land himself, and that Mickey said: "All right, you are entitled to the land if anybody is." And from that time on it was fully understood between him and Mickey that upon the payment of the mortgage indebtedness the land was to be reconveyed to the appellee.

Mickey was the principal witness for the appellants, and his version of the transaction is substantially the same as that of the appellee, down to and including the terms upon which the land was to be conveyed to Johnson, and his failure to comply with such terms. But he testifies that it was further understood and agreed that, in case Johnson should fail to make such payments and assume the first and second mortgages, Smith, the second mortgagee, should take an assignment of the first mortgage, Johnson and the bank were to release their mortgages, and the land was to be conveyed to Smith in payment of the amount due on the first and second mortgages. The appellee in his testimony covering the terms on which the land was to be conveyed to Mickey makes no mention of a conveyance to Smith. But he was again called to the stand after Mickey had testified and after he had been fully apprised of the appellant's claim in that behalf, and made no denial of Mickey's testimony on that point, nor was he interrogated with reference to it. Besides, shortly after the conveyance to Mickey, Smith took the assignment of the first mortgage, released it as well as the second mortgage, and returned the papers to the appellee, who took and retained them without protest or objection. Furthermore, after Mickey had conveyed the land to Smith, the appellee took and held the premises under a written lease from Smith's administratrix. From these circumstances it seems to us the only reasonable inference is that at the time of the conveyance it was understood and agreed that Mickey was to convey to Johnson, in case Johnson brought himself within the terms of the agreement, and that upon the failure of Johnson to do so Mickey was to convey to Smith, in payment of the first and second mortgages, and that the land was conveyed to Smith in pursuance of that agreement. By the terms of the agreement upon which the land was conveyed to Mickey, the conveyance to Smith was clearly not intended as security, but as a payment.

But the appellee lays great stress upon an alleged agreement between himself and Mickey, the latter acting for

Smith, and entered into after Johnson's default, that the appellee should be permitted to redeem. Conceding the validity of such agreement, if made, the evidence is insufficient to show that it was ever made. The appellee testifies to it, and, according to his testimony, it was made some months before Mickey conveyed to Smith. Although the appellee had knowledge of this conveyance, we fail to find that it excited any inquiry or provoked any protest on his part. Mickey in positive terms denies that any such agreement was made, and as positively affirms that the conveyance to Smith was intended by all parties concerned as payment of the first and second mortgage debts, and not as security for them. His testimony on this point is so strongly corroborated by appellee's silent acquiescence in the conveyance to Smith, his acceptance and retention of the evidences of the payment of the mortgage debts, and his holding the land as tenant of Smith's administratrix, that it should be taken as true on a trial *de novo* in this court. The rule in this class of cases is stated by POST, C. J., with his usual clearness and brevity in *Riley v. Starr,* 48 Neb. 243:

"A safe and perhaps the most satisfactory test, in all such cases, is whether the relation of the parties to each other as debtor and creditor continues. If it does, the transaction will be treated as a mortgage, otherwise not." Citing *Robinson v. Cropsey,* 2 Edw. Ch. (N. Y.) 138; *Wilson v. Giddings,* 28 Ohio St. 554; 1 Jones, Mortgages (6th ed.), sec. 258.

From the facts and circumstances shown in evidence it is clear to us that the transaction was intended to terminate the relation of the parties as debtor and creditor, and that it did end it. The finding of the trial court to the contrary is so clearly against the weight of evidence that it should not stand.

It is therefore recommended that the decree of the district court be reversed and the cause remanded for further proceedings accordingly to law.

DUFFIE and JACKSON, 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 motion for rehearing was filed January 3, 1906. *Motion denied:*

Deed: ACTION TO REDEEM. Where a tract of land has been conveyed by a deed absolute in form to satisfy and pay the mortgage liens existing thereon, a subsequent parol promise to reconvey it to the grantor, without any consideration to support it, will not sustain an action to declare the deed a mortgage and redeem from the liens which have been canceled and treated as paid.

BARNES, J.

This case is again before us on a motion for a rehearing, and after oral argument we are of the opinion that our former judgment should be adhered to.

Our former opinion, written by Mr. Commissioner ALBERT, and reported *ante*, p. 852, contains a full and accurate statement of the facts, and no other or further statement is required. In addition to what is there said, it is proper to quote the evidence of the plaintiff as to what the agreement was, and what took place between himself and the defendant Mickey at the time the deed was executed, which is as follows: "Well, John H. Mickey asked me if I would deed the land to him, and I told him I would deed it in one way; Oscar Johnson, the man I bought it of, should have a right to get a deed of the land if he wanted it, so as to pay all my debts against the land. If I deeded him the land it would save foreclosure on the land, and be the most saved by it. I said I would do that one way, so Johnson would get the land, and that would pay all my debts against the land." It cannot be seriously contended that such an agreement would amount to a defeasance, and convert a deed absolute in form into a mortgage. It seems clear that the land was deeded

to Mickey in payment of the debts secured by the mortgages thereon, and the subsequent conduct of the parties fully confirms that view of the case.

It is claimed, however, that when Johnson failed to pay off the mortgages, Mickey agreed to convey the land to the plaintiff. The burden of proof was on him to establish that fact, and thus convert the deed into a mortgage. The plaintiff testified that such an agreement was made, but that fact was strenuously denied by Mickey. There are some things in the record which corroborate the plaintiff, while on the other hand Mickey's testimony is fully corroborated by the manner in which all parties afterwards treated the matter. So it may be said that the evidence on that question is sufficient to support the finding of the district court. However, there is no evidence in the record showing any consideration for the alleged promise, and if it may be said that such a contract may rest in parol, there must be a consideration to support it. Without such a consideration it would possess no binding force whatever. The want of consideration for the alleged promise is fatal to the plaintiff's right to recover in this action, and our former conclusion must be adhered to.

The motion for a rehearing is therefore overruled, and the former judgment remanding the cause for further proceedings is modified, and the same is remanded, with directions to dismiss the action.

JUDGMENT ACCORDINGLY.

WESTERN TRAVELERS' ACCIDENT ASSOCIATION V. LENA MILLER MUNSON.

FILED MAY 17, 1905. No. 13,807.

1. **Pleading:** DEMURRER. The rule that permits conclusions of law to be disregarded when the sufficiency of the facts pleaded to constitute a cause of action or defense is called in question, has no application to conclusions of fact.

2. ———: SUFFICIENCY. When thus assailed the pleading is good if the ultimate facts constituting a cause of action or defense are alleged. If the facts thus alleged do not make the pleading sufficiently definite and certain the remedy is by motion.

3. **Witness:** CONFIDENTIAL COMMUNICATIONS: WAIVER. The prohibitions in section 333 of the code against a physician's testifying to confidential disclosures made to him in the course of his professional employment, are for the benefit of the patient, who, by the express provisions of section 334 of the code is permitted to waive them.

4. **Waiver.** It is not necessary that such waiver be made at the time of the trial, it may be included in and made a part of the contract sought to be enforced in the action in which such testimony is offered.

5. ———: INSURANCE CONTRACT. A stipulation in a contract of life insurance to the effect that the proofs of death shall consist in part of the affidavit of the attending physician, which shall state the cause of death and such other information as may be required by the insurer, constitutes a waiver within the meaning of said sections, and renders the attending physician a competent witness as to the confidential disclosures made to him by the assured concerning his last sickness.

6. **Evidence.** Statements of fact fairly indicative of a relevant bodily condition of the declarant at the time of the declaration are admissible as evidence of the existence of such condition, although made a considerable time after the injury was received.

7. ———: HARMLESS ERROR. The admission of the testimony of the wife as to communications made to her by her husband in his last sickness, *held* not prejudicial error under the circumstances disclosed by the record in this case.

ERROR to the district court for Douglas county: JACOB FAWCETT, JUDGE. *Affirmed.*

O'Neill & Gilbert, for plaintiff in error.

Wright & Stout, Watt G. Sheldon and *Frank T. Ransom, contra.*

ALBERT, C.

The terms plaintiff and defendant will be used herein with reference to the title of the cause in the court below. The defendant is a fraternal insurance association. Charles J. Munson, deceased, was a member thereof, and held a membership certificate therein insuring him, among other things, against death "through external, violent and accidental means." The plaintiff is the widow of the assured, and the beneficiary named in the certificate. The constitution of the association, which is a part of the contract of insurance, provides that no claim shall be valid unless notice in writing of the accident is received in the office of the association within 15 days from the date thereof, and affirmative proofs in writing of said claim, as required by the executive board, are received within 30 days after the loss occurs; such proof in case of death of the assured to consist of the affidavit of the beneficiary and the attending physician, which "shall state the cause of death, giving dates of the accident and particulars thereof, and also the date of death, and such information as may be required by the association." In the petition upon which the cause was submitted to the jury, among other things, it is alleged: "That at all times subsequent to becoming a member of defendant association, as aforesaid, and up to the time of his death, as hereinafter set forth, he, the said Chas. J. Munson, continued a member thereof in good standing, and while so in good standing, and within three months immediately prior to his death, was accidently cut, wounded, bruised and injured by external, violent and accidental means, the exact time, place and manner of receiving said accidental cuts, wounds, bruises and injuries, as aforesaid, is unknown

to the plaintiff; and that the said Chas. J. Munson, after receiving said injuries, and on, to wit, August 27, 1902, and by reason thereof, and independently of all other causes, died." It is further alleged, that the assured had fully kept and performed all the terms and conditions of said contract of insurance on his part to be kept and performed, and that the plaintiff has fully kept and performed her part thereof, except to furnish or file the proofs of death hereinbefore mentioned; but that the furnishing and filing of such proofs had been waived by the association within 30 days from the death of the assured. In the answer to said petition the allegations as to the cause and manner of death, notice to the defendant of the accident as required by the constitution, and a waiver of formal proofs of death, are denied. The answer also contains allegations to the effect that no such notice was given or proof made, and that the death of the deceased was due to natural and not to accidental causes. There was a verdict for plaintiff and judgment accordingly.

It is claimed by the defendant that the petition does not state facts sufficient to constitute a cause of action, in that it fails to show that the injury was received through accidental means. In making this claim counsel do not overlook the positive averment of the petition, hereinbefore set out at length, that the assured "was accidentally cut, wounded, bruised and injured by external, violent and accidental means, the exact time, place and manner of receiving said accidental cuts, wounds, bruises and injuries, as aforesaid, is unknown to the plaintiff," but insists that the allegation that "the exact time, place and manner of receiving said accidental cuts, etc., are unknown to the plaintiff," negatives the allegation that such injuries were accidental, and destroys its force and effect. We do not believe that the language will bear that construction. There is a positive allegation that the injuries were received through accidental means. That plaintiff afterwards disclaims knowledge of the exact time, place and manner of receiving such accidental injuries in nowise

negatives her allegation that they were accidental. For example, a man is found crushed and dying between the rails of a railroad track in the wake of a passing train. In the absence of any explanation of the circumstances, that his injuries were due to accidental means would be a reasonable inference. This inference, though slightly weakened, would not be negatived by the fact that "the exact time, place and manner" of receiving the injuries were unknown.

It is also urged that the allegation that the injuries were received through accidental means is a mere conclusion. It is an elementary rule that a bare conclusion of law adds nothing to the value of a pleading, and should be disregarded when the sufficiency of the facts pleaded to constitute a cause of action or a defense is called in question. But this rule does not extend to conclusions of fact, such conclusions do not render a pleading vulnerable to a demurrer. Ordinarily, it is only necessary to plead the ultimate facts upon which the pleader relies. Such facts, of necessity, are conclusions drawn from intermediate and evidential facts. If the ultimate facts are not stated with sufficient certainty, the remedy is by motion. Whether the injuries were received through accidental means is purely a question of fact, and the allegation that they were thus received is a conclusion of fact, and does not fall within the rule invoked by the defendant.

The court directed the jury that the question for their determination was whether the assured died as a result of an injury received while traveling as a passenger on a freight train on the Burlington and Missouri River Railroad, near the town of Brush, Colorado; and the defendant insists that the evidence is insufficient to show that the assured received any injury by accidental means at that time. The evidence shows that on the 20th day of August, 1902, the assured left his home in Denver. Two days afterwards he was seen in Akron, Colorado, where, at 11:30 P. M., he boarded the caboose of a freight train on

the Burlington and Missouri River Railroad. At about 1:30 the next morning, when the train was near Brush, in that state, and while it was running about 40 miles an hour, an axle on one of the freight cars broke, one end of which was driven through the car; the other struck the track, tearing up the ties for some distance. The evidence sufficiently shows that the assured was in good health when he left home, and remained in that condition to the time of the accident to the train. He was the only passenger on the train, and there is no direct testimony that he was injured by the accident. After the accident the assured was taken on the engine to Brush, and there took passage on a train for Sterling, Colorado, where he arrived about 6 o'clock the same morning. His appearance on his arrival there indicated that he was ill, and he at once sought a hotel and retired. In the afternoon a physician called to treat him found him in bed, apparently suffering and complaining of pains in his back. The physician continued to treat him, and some two or three days after his first visit examined his back, and found bruises in close connection with the lower lobe of the left lung and at or about the place where the assured located the pain. The assured died the fourth day after his arrival at Sterling. The testimony of the attending physician is to the effect that the assured died of pneumonia or congestion of the lungs, produced by the injury indicated by the bruises, and that such injury was the primary cause of his death. From these facts it is reasonably clear, we think, that the assured up to the time of the accident was in good health, within a few hours thereafter suffering from injuries peculiarly likely to result from the accident to the train on which he was a passenger; and that within four days thereafter he died of such injuries. It is true the conductor of the freight train testified that he was in the cupola of the caboose when the accident occurred, and that the assured was lying on one of the seats, apparently asleep; that the accident caused no sudden stopping of the car, and no

unusual jolt or jar, and, apparently, did not awaken the assured, or cause him to change his position. He also testified that as a result of the accident the engine separated from the cars and the air brakes were immediately set. He was the only witness present with the assured on the caboose, and the defendant insists that his testimony absolutely negatives the theory that the assured was injured in that accident. We do not think so. The jury were not bound to accept his testimony at its face value. He was not wholly a disinterested witness. He was conductor of the train, and, to some extent, was responsible to his employer for its proper management and the safety of his passengers. His home is in Denver, and he attended as a witness at the request of his employer. As against his testimony as to the effect of the accident on the caboose is the evidence of another trainman to the effect that the caboose, under such circumstances, would stop or slacken its speed suddenly, and with a jolt or jar. Taking into account the nature of the accident, this evidence is more in accord with reason and common knowledge, and the jury had a right to accept it as true. Taking the evidence as a whole, we are satisfied that the inference drawn by the jury therefrom that the assured died of injuries received while riding on the train at the time of the accident related is a reasonable one. Proof amounting to a demonstration is never attainable and never required in cases of this kind. All that is required is to establish a reasonable probability. *Western Travelers' Accident Ass'n v. Holbrook,* 65 Neb. 469. That, in our opinion, was done in this case.

It is also insisted that the evidence is insufficient to show that such injuries, independently of all other causes, caused the death of the assured. Whether such injuries did thus cause his death is peculiarly a question of fact. *Modern Woodmen Accident Ass'n v. Shryock,* 54 Neb. 250; *United States Mutual Accident Ass'n v. Barry,* 131 U. S. 100; *Fetter v. Fidelity & Casualty Co.,* 174 Mo. 256, 61 L. R. A. 459. It was submitted to the jury on con-

flicting evidence sufficient to sustain a finding either way, and under the settled rule of law the finding of the jury thereon under such circumstances is conclusive.

The cause was tried on an amended petition. In her original petition the plaintiff instead of alleging, as in the amended petition, that the injuries causing the death of the assured occurred within three months preceding his death, and that the exact time, place and manner of receiving such injuries were unknown to her, alleged that they occurred August 23, 1902, while he was traveling in the caboose of a freight train going from Akron to Brush, Colorado, and that by reason of the accident to the train hereinbefore related he "was violently thrown against the floor, roof and walls of said caboose, and was thereby accidently cut, wounded, bruised and injured by external, violent and accidental means," etc. The defendant insists that the amended petition amounts to an admission that the allegations in the original petition as to the time, place and manner of receiving the injuries were untrue, and that such injuries were received at some other time and place, and in a different manner. Hence, it is argued that the notice of the accident which gave the time, place and manner of receiving the injuries as alleged in the original petition was not notice of the accident relied upon in the amended petition. One answer to this is that, while the original petition states the facts with greater exactitude, it does not purport to give the exact time, place and manner of receiving the injuries. If in the amended petition the plaintiff had averred that she was unable to give the time, place and manner with greater exactitude, there would be some ground for holding that the allegations of one pleading or the other must be untrue. But in the amended petition she merely avers that she cannot state what she did not state in the original petition, namely, the exact time, place and manner of receiving the injuries. The evidence shows that the defendant had due notice that the assured was injured in the accident on the train near Brush. The court limited the proof to that accident, and

we are all of the opinion that the defendant's claim of a want of notice is unfounded.

It is also claimed that the evidence fails to show a waiver of proofs of death. This claim is based on the same line of reasoning as that of a want of notice, and what we have said with respect to that claim applies here. The question of waiver was duly submitted to the jury, and the finding of the jury thereon is abundantly sustained by the evidence.

The physician, who attended the assured in his last sickness, was permited to testify, over the objection of the defendant, as to the nature of such illness, and other matters of a confidential nature relating thereto, intrusted to him in his professional capacity. The defendant now assigns the reception of this evidence as error. Section 333 of the code provides that "no practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." Section 334 provides that the prohibition in the preceding sections do not apply where the party in whose favor they apply waives them. The secrecy enjoined upon physicians by section 333 is for the protection of the patient, and from the provisions of section 334 it is quite clear that when the patient is willing to waive that protection, and to permit a disclosure of the secrets of the sick-room, he may do so. It has been held that the patient may waive the protection of the statute, even though there is no provision for such waiver. *Carrington v. City of St. Louis,* 89 Mo. 208; *Grand Rapids & I. R. Co. v. Martin,* 41 Mich. 667. It is not necessary that such waiver should be made at the time the testimony is offered, but it may be made a part of a contract, and is available in an action brought to enforce such contract. *Adreveno v. Mutual Reserve Fund Life Ass'n,* 34 Fed. 870, was an action

to recover the amount due on a benefit certificate. In the contract of insurance the assured in express terms had waived the benefit of provisions of a statute of Missouri similar to section 333. In passing on the effect of such waiver, the court said:

"The statute is construed in this state as conferring a privilege merely, that may be waived; it is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect the courts of this state follow the rulings in New York and Michigan, under a similar statute, as appears by the cases of *Cahen v. Continental Life Ins. Co.*, 41 N. Y. Super. Ct. 296; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667. As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on anyone who claims under the contract, whether it be the patient himself or his representative."

This case was followed in *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621. See also *Alberti v. New York, L. E. & W. R. Co.*, 118 N. Y. 77; *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578. *In the matter of Coleman*, 111 N. Y. 220, an attorney of the testator who had signed the attestation clause of the will as a witness was called as a witness, and his testimony was objected to on the ground that it was prohibited by a statute similar to the one under consideration. The court said:

"The act of the testator, in requesting his attorneys to become witnesses to his will, leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the

office assigned them, unrestrained by any objection which he had power to remove."

In the present case the constitution of the association expressly requires the affidavit of the attending physician as a part of the proofs of death, and that such affidavit shall state the cause of death and such information as may be required by the association. This provision was a part of the contract of insurance, and was assented to by the assured when he became a member of the association and accepted his certificate of membership. By assenting to those provisions, it seems to us the assured clearly and unequivocally waived the benefits of section 333, *supra*, and agreed that the attending physician should be permitted to disclose the cause of death and such other facts and circumstances as might be disclosed to him in his professional capacity while in attendance on the assured in his last sickness. In other words he expressly stipulated that the secrecy enjoined by section 333 upon his attending physician should not be observed. The proper treatment of a patient often involves an intimate knowledge on the part of his physician of facts of a delicate nature, and which the patient would object to having disclosed to third persons. The common law protects the patient against the voluntary disclosure of such facts, and the statute protects him against their involuntary disclosure by his physician. But where the patient himself not only consents, but expressly stipulates, that such disclosures be made in order to give force and effect to his contract, it would be a harsh and unwarranted application of a salutary rule to hold that the plaintiff could not avail herself of such stipulation for the enforcement of the contract made for her benefit. The case in principle is much like the *Coleman* case, *supra*, and, in our opinion, the testimony of the attending physician was properly received. See also *McKinney v. Grand Street, P. P. & F. R. Co.*, 104 N. Y. 352.

It is further claimed that the plaintiff in this case was permitted to testify to communications made to her by her

husband in his last sickness, contrary to the provisions of section 332 of the code. It is conceded by both sides that the assured died of congestion of the lungs, or pneumonia; the only controversy on this point being whether it was brought on by external injuries received through accidental means or otherwise. The testimony of the plaintiff, the reception of which is now criticised, simply detailed the complaints of suffering made by the assured on his death-bed. The ground had been substantially covered by the testimony of the attending physician, whose evidence as to these particulars is uncontradicted; the complaints and symptoms described were such as would be the natural concomitants of congestion of the lungs, or pneumonia, whether the disease was brought on by the accident alleged or otherwise. The reception of this evidence, if erroneous, would seem to be error without prejudice.

Another error assigned is that the court permitted a witness to testify, over objection, that when he entered the sick-room of the assured the assured said: "I am badly shaken up. No bones broken, old fellow, and it might have been worse." The testimony was given in response to the following question: "State, now, the words that he used in expressing his then condition." This was objected to as incompetent, calling for hearsay, and for matter no part of the *res gestæ*. The court then instructed the witness as follows: "Give his words that he used at that time about the condition you found him in, as to his condition at that time." The attorney for the defendant added: "And not what caused it. Is that correct?" The court then said: "Must give his words as to his condition." The witness then answered by giving the words of the assured as above quoted. We do not think that there was any error in the reception of this evidence. It was not offered as part of the *res gestæ*, but as a statement of the assured of his then physical condition. This statement was made a few hours after his arrival at the hotel in Sterling. The statement was not an inapt description of his then bodily condition, although somewhat figurative. The rule is well settled

that statements of fact fairly indicative of a relevant bodily condition of the declarant at the time of the declaration will be received as circumstantial evidence of the existence of that condition, although made a considerable time after the injury was received. *Bacon v. Inhabitants of Charlton,* 7 Cush. (Mass.) 581; *Bredlau v. York,* 115 Wis. 554, 92 N. W. 261; *Elmer v. Fessenden,* 151 Mass. 359, 5 L. R. A. 724.

The defendant complains of an instruction of the court, hereinbefore referred to, relating to the time and manner of receiving the injury alleged as the cause of the death of the assured. The argument on this point proceeds on the theory heretofore noticed that the plaintiff by filing an amended petition had abandoned the claim that the assured came to his death as a result of an injury received on the railroad train near Brush. We have already noticed that theory in a former part of this opinion, and what is there said, we think, disposes of the criticism of this instruction.

The defendant complains of another instruction of the court, given at the request of the plaintiff, wherein the question, whether the assured at the time of receiving the injury alleged was free from actual existing disease and bodily infirmity which might naturally produce death, was submitted to the jury, on the ground that the evidence is conclusive that the deceased at the time of the alleged accident was affected with bodily infirmity in the form of pleural adhesions of the lungs and curvature of the spine. Whether at the time of receiving such injuries the assured was suffering from the bodily infirmities just enumerated is one of the questions embodied in an instruction which the defendant itself tendered. By tendering that instruction it impliedly asked the court to submit that question to the jury, and it cannot now be heard to complain of its submission.

The defendant complains of some of the special findings, but, as the judgment was rendered on the general verdict, we do not think the discussion of the special findings at this time will be productive of any good.

The petition in error contains 212 assignments, some of which were abandoned on argument. Not all of those argued have been specifically noticed in this opinion, but we think the points involved therein are covered by what has already been said. In our opinion the record contains no reversible error.

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

DUFFIE and JACKSON, 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 v. CHARLES H. WHITE.

FILED MAY 17, 1905. No. 13,798.

Instruction: BURDEN OF PROOF. Where in an instruction to a jury a court defines what is meant by the burden of proof, and states a certain fact or facts which the plaintiff is required to establish within the rule, and omits from such statement a fact necessary to be established by the same degree of proof in order to entitle the plaintiff to recover, a verdict for the plaintiff will be set aside unless the evidence requires a finding adverse to the defendant on the issue as to such fact.

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

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

W. M. Morning and *John J. Ledwith, contra.*

JACKSON, C.

This is a proceeding in error to reverse a judgment of the district court for Lancaster county. The defendant

in error, hereinafter styled the plaintiff, brought an action against the plaintiff in error, hereinafter styled the defendant, claiming damages, which it is alleged he sustained by reason of his having been forcibly ejected from a railroad train by the servants of the defendant while the train was running at a dangerous rate of speed. The defendant answered, denying the allegations of the petition, and alleged contributory negligence. The evidence discloses that plaintiff boarded a moving freight train on the defendant's line at Hastings, Nebraska, with the intention to ride to the city of Lincoln without paying fare; that he was discovered by one of the company's brakemen and compelled to leave the train; that in so doing he fell and sustained some injuries. The testimony of the plaintiff at the trial tended to prove that at the time he was compelled to leave the train it was running at a rate of speed that made it dangerous for him to get off the train, and that by reason of that fact, when he alighted from the train, he was thrown to the ground and sustained the injuries complained of. This evidence on behalf of the plaintiff was controverted by the testimony of the trainmen, tending to show that he might have left the train in safety at the time when he was first directed to do so, but that he parleyed with the trainmen, and continued on the train for some distance after he was first required to alight, and that at the time when he did leave the train the speed was such that he might, with the exercise of ordinary care, have left the train without danger of injury to himself. The trial to a jury resulted in a verdict in favor of the plaintiff for the sum of $160.41. Upon motion for a new trial the district court required a remittitur of $60.41, and entered judgment against the defendant, upon the remittitur being made, for $100 and costs. From the judgment the defendant brought the case to this court by a petition in error.

Upon the trial the court instructed the jury as follows: "You are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the

evidence all the material allegations of his petition not admitted in its answer; that is to say, that while defendant's train was running at a dangerously high rate of speed the defendant, through its agent, violently and forcibly ejected or put the plaintiff off its train, whereby he was thrown to the ground and hurt, and that the injury, if any, was caused in that way; that is that he must show by the more convincing and greater weight of evidence that the trainmen put him off the train by force; and if the evidence on this point is evenly balanced, or is more convincing that he was not put off by force, or if he got off by his own motion in some other way, then the railroad company is not liable, and your verdict should be for the defendant. The plaintiff would also be required to show by a preponderance of the evidence that he sustained damages alleged in his petition as a result of such act of the defendant, and the amount of the same. On the other hand, when the plaintiff has so established such facts he would be entitled to a verdict, unless the defendant shall prove by a preponderance of the evidence the material allegations of its defense alleged in its answer; that is to say, if the evidence produced on the part of the plaintiff does not show carelessness, or fault, or misconduct on the part of plaintiff contributing to the injury he received as a proximate cause thereof, then the burden is upon the defendant to prove that the plaintiff's injuries resulted from his own carelessness, fault or misconduct as alleged in its answer."

It is the contention of the defendant that this instruction is wrong as applied to the facts testified to by the plaintiff himself, because it ignores the rule in that class of cases where the jury might reasonably infer from the testimony of the injured party himself that his injury was due to his own negligence and carelessness. That question, however, seems to have been fairly submitted to the jury in the instruction complained of.

It is also contended that the instruction is erroneous because of the qualifying language used by the court in that portion of the instruction intended to inform the jury

of what material facts the burden was upon the plaintiff to establish. This objection presents a more serious question. In *City of South Omaha v. Hager,* 66 Neb. 805, it was held: "Where a jury is told that the defendant is liable upon a given set of facts, and a fact in issue, necessary to such liability, is omitted, a verdict for the plaintiff will be set aside, unless the evidence requires a finding adverse to the defendant upon the issue as to such fact."

In the case at bar the trial court correctly informed the jury that the burden was upon the plaintiff "to establish by a preponderance of the evidence all the material allegations of his petition not admitted in its answer; that is to say, that while defendant's train was running at a dangerously high rate of speed the defendant, through its agent, violently and forcibly ejected or put the plaintiff off its train, whereby he was thrown to the ground and hurt, and that the injury, if any, was caused in that way." It is probably that had the instruction stopped with the part just quoted no complaint could have been made against its correctness, but the court, out of a superabundance of caution and an evident desire to still further impress upon the jury the importance of the burden cast upon the plaintiff, added this qualifying sentence: "That is, he must show by a more convincing and greater weight of evidence that the trainmen put him off the train by force; and if the evidence on this point is equally balanced, or is more convincing that he was not put off by force, or if he got off by his own motion in some other way, then the railroad company is not liable, and your verdict should be for the defendant." This portion of the instruction is faulty in that it omits from the statement of facts which the plaintiff was required to prove "by a more convincing and a greater weight of evidence" the question of the dangerous rate of speed at which the train was moving. The question of the rate of speed was one controverted both by the pleadings and the evidence, and the plaintiff was as much required to prove that the train was moving at a dangerous rate of speed as he was required to prove that he

was ejected from the train by force. He was a trespasser, and the defendant had a right to eject him by force under proper circumstances. Whether such circumstances existed in this case was a question of fact to be determined by the jury, and the court, having in an attempt to define the burden of proof singled out a single fact which the plaintiff was required to establish within the rule, left the jury to infer that the same weight of evidence was not required of the plaintiff to establish another important fact.

Because of the error in the giving of this instruction, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and ALBERT, 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.

HARRY B. RIDGLEY V. UNITED STATES FIDELITY & GUARANTY COMPANY.

FILED MAY 17, 1905. No. 14,052.

Law of Case. Where the supreme court has, in a proper proceeding declared a rule of law applicable to the facts, such holding will ordinarily be treated as the law of the case in all subsequent proceedings involving the determination of that question.

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

L. C. Burr and *Charles L. Burr,* for plaintiff in error.

O. B. Polk and *R. S. Mockett, contra.*

JACKSON, C.

This is a proceeding in error brought to reverse a judgment of the district court for Lancaster county, and is

the second appearance of the case in this court. A complete statement of the case will be found in the former opinion, 70 Neb. 622. In that case it was held:

"A fidelity bond for the indemnity of an employer against the dishonesty of an employee, issued on the application of the latter who pays the premium, and by him delivered to the former, which contains on its face, in addition to the contract of an indemnity, an undertaking of the employee to the obligor, and a provision that it shall not be binding on the obligor unless signed by the employee, is not binding on the obligor unless thus signed, in the absence of a showing that the signature of the employee had been waived by the obligor."

Upon the reversal of the judgment in that case in favor of the plaintiff, because of the fact that the bond was not signed by the principal as required by the conditions of the bond itself, the plaintiff filed in the district court an amended petition in which certain additional facts are pleaded, which it is claimed are established by the evidence, and are sufficient to show that the signature of the employee (the principal) on the bond was waived by the surety, and create an estoppel as against such surety from now asserting as a defense that provision of the bond which made the signature of the principal essential to its validity; and it is seriously contended by plaintiff in error that the obligation between the plaintiff and defendant in error was separate from the one between defendant in error and the principal on the bond; that it arises by reason of the employer's statements to certain inquiries submitted on behalf of the defendant in error to the plaintiff in error before the bond was executed, and that such questions and answers should be taken as the basis of the bond. These inquiries, however, all relate to the date and amount of the bond, to the personal acquaintance of the plaintiff with the principal on the bond, and the character of the duties to be performed by such principal. An examination of the opinion in the former hearing of this case will disclose that these questions and an-

swers were all before the court at the former hearing, and were fully considered in the opinion. The bill of exceptions allowed and considered at the former hearing of this case is made a part of the record in this hearing, and a careful examination and comparison of that bill of exceptions with the one settled and allowed at the second trial leads us to conclude that the entire issue was settled and determined by the former opinion of this court, and that the rule announced at the former hearing has become the law of the case, so that, whatever may be the personal opinion of the writer, it must be governed and controlled by the former adjudication.

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

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

INDEX.

Abandonment. See CRIMINAL LAW, 4, 5.

Adulteration.

1. The sale of adulterated milk is made a misdemeanor under ch. 99, laws 1897. *Lansing v. State* 124
2. Information under "Pure Food Act" *held* sufficient. *Lansing v. State* 124
3. The allegation that defendant sold milk "as and for pure milk, an article of food," *held* a sufficient allegation that it was sold as an article of food. *Lansing v. State* 124
4. It is not a violation of ch. 99, laws 1897, to sell adulterated food as a sample for the purpose of analysis; but that the purchaser intended to analyze it will not bring the transaction within the provisions of sec. 4 of that act. *Lansing v. State* 124
5. A dealer who puts poison into food which he sells cannot defend on the ground that he did not know such substance contained poison. *Lansing v. State* 124

Adverse Possession. See RAILROADS.

1. Prior to the passage of ch. 79, laws 1899, title by adverse possession could be established in lands owned by a municipal corporation. *City of Wahoo v. Nethaway* 54
2. Where the owner of two contiguous lots conveys one to A, and the other to B, *held* that, in a contest concerning the boundary line, A cannot tack his own possession to that of the common grantor to establish title by adverse possession. *Sluyter v. Schwab* 370

Agistment. See ANIMALS.

Alimony. See DIVORCE, 1, 4.

Amendment. See PLEADING, 3, 4.

Animals.

1. An agreement by an agister to take good care of cattle is equivalent to a contract to take such care of them as an ordinarily prudent man would. *Darr v. Donovan* 424
2. Contract of agistment *held* to require ordinary care. *Mattern v. McCarthy* 228

Animals—*Concluded.*

3. When a contract requires an agister to care for cattle "as he would for similar property of his own," he must give them such care as an ordinarily prudent man would. *Mattern v. McCarthy* 228
4. "Just remuneration" in a contract of agistment is the value of the cattle lost by negligence. *Mattern v. McCarthy* 228
5. Where the contract of an agister is for the care and feeding of a particular herd of cattle, evidence descriptive of that herd is admissible without special reference to the subject in the pleading. *Darr v. Donovan* 424

Appeal and Error. See CRIMINAL LAW, 15, 16. HUSBAND AND WIFE. MORTGAGES, 5, 9. PLEADING, 1, 11, 13. TRIAL. WILLS, 8.

Appeal.

1. In appeal cases rulings on the rejection or admission of evidence will not be reviewed. *Kennell v. Randall* 829
2. Upon an appeal where there are special findings of fact, but no bill of exceptions has been preserved, only such findings will be considered as are embraced within the issues. *Kupke v. Polk* 590
3. An appellee may, by complaint in the nature of a cross-appeal, be relieved from unjust conditions imposed by the decree. *Kupke v. Polk* 590
4. On appeal, where there are special findings of fact and the evidence is not preserved, the sole question is whether the decree is supported by the pleadings and the special findings. *Kupke v. Polk* 596
5. Any proceeding in equity that may be brought to the supreme court for review may be brought by appeal. *Williams v. Miles* 193
6. A ruling upon an interlocutory matter is not appealable until the action itself is finally disposed of. *Swift & Co. v. Koutsky* 730
7. An order granting a writ of assistance in foreclosure is a final order and appealable; but it cannot be superseded under subd. 3, sec. 677 of the code. *Escritt v. Michaelson* .. 640

Bond.

8. A bond on appeal from an order awarding a writ of assistance in foreclosure, conditioned for payment of rent, is valid, where the obligor has retained possession pending appeal. *Escritt v. Michaelson* 634
9. A court making an order for a writ of assistance in foreclosure may allow it to be superseded on condition that appellant give bond for payment of rent for use of the premises pending appeal. *Escritt v. Michaelson* 640

Appeal and Error—*Continued.*

Evidence.

10. In an action on an insurance policy, exclusion of evidence, *held* not reversible error. *Johnston v. Phelps County F. M. Ins. Co* 50

11. In an action for injuries at a street railway crossing, the exclusion of evidence to show that the car might have been seen a greater distance, *held* not erroneous. *Omaha Street R. Co. v. Mathiesen* 820

12. In personal injury action, exclusion of evidence *held* not reversible error. *Lindgren v. Omaha Street R. Co* 628

13. Admitting evidence in ejectment *held* not prejudicial. *Smith v. Curtice* 169

14. Proof by plaintiff of the filing of his claim with the council of a city of the second class before suit for personal injuries *held* not reversible error. *City of Lexington v. Kreitz* 770

Instructions.

15. Giving and refusing instructions in ejectment *held* not prejudicial. *Smith v. Curtice* 169

16. One cannot complain of an instruction more favorable to him than he deserves. *Darr v. Donovan* 424

17. Instructions in an action for damages *held* correct. *New Omaha T.-H. E. L. Co. v. Rombold* 259

18. Instructions objected to for indefiniteness *held* not prejudicial. *City of Lexington v. Kreitz* 770

19. Objections to instructions *en masse* will not be considered where any is correct. *Mattern v. McCarthy* 228

Law of Case.

20. Issues of law decided upon error or appeal cannot be relitigated in another trial of the case. *Curtis v. Zutavern* 45

21. The decision of a law question on first appeal of a cause will be adhered to upon a second appeal. *Williams v. Miles*, 193

22. Questions determined on a former appeal will not be reexamined unless clearly erroneous. *New Omaha T.-H. E. L. Co. v. Rombold* 259

23. Where the supreme court has declared a judgment of the district court valid, such holding is the law of the case in subsequent proceedings. *Parrotte v. Dryden* 291

24. A legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case. *Porter v. State* 792

25. Where the supreme court has declared a rule of law applicable to the facts, it becomes the law of the case in subsequent proceedings. *Ridgley v. United States F. & G. Co* 874

Appeal and Error—*Continued.*

Practice and Review.

26. After the death of a party, acceptance of service of summons in error by his attorney of record in the district court will not confer jurisdiction. *Omaha Nat. Bank. v. Robinson,* 351
27. Where summons in error is placed in the hands of the proper officer for service, who informs plaintiff's attorney that he has served the same, he is not guilty of negligence in failing to further investigate the service. *Parker v. Parker,* 4
28. Where a cause is submitted upon a brief by the plaintiff in error alone, recitals of fact not obviously erroneous and not contradicted will be taken as true. *Arla Cattle Co. v. Burk* 39
29. A defendant in foreclosure who has disclaimed, and against whom no judgment has been rendered except to bar him of the subject of the action, is not entitled to a review on error or appeal. *Rock v. Huff* 162
30. A joint assignment of error not good as to all will be overruled as to all. *Kupke v. Polk* 590
31. A proceeding in error may be prosecuted against the personal representative of a deceased party. *Ritchey v. Seeley,* 164
32. On error, no motion for new trial having been filed, the supreme court will only ascertain if the pleadings state a cause of action or defense and support the judgment. *Johnson v. Songster* 724
33. Failure to file motion for new trial is not fatal to appellate jurisdiction. *State v. Shrader* 618
34. On error from an order granting a new trial, the grounds for sustaining the motion not appearing in the record, plaintiff in error must show affirmatively that none of the grounds was sufficient. *City of Omaha v. Crocker* 240
35. The rule that a motion for a new trial is indivisible cannot be invoked to defeat a review on error by a minor, whose guardian *ad litem* has inadvertently joined her with a nominal defendant. *Godfrey v. Smith* 756
36. It is the practice of the supreme court on reversing a judgment at law for want of evidence to remand the case to the district court for further proceedings. *Chicago, St. P., M. & O. R. Co. v. McManigal* 585
37. It is only for excessive abuse of latitude allowed counsel in addressing the jury that the judgment will be set aside. *City of Lexington v. Kreitz* 770

Verdict.

38. Where the evidence is conflicting, a new trial will not be granted if there is evidence to sustain the verdict. *Davey v. Davey* 726

Appeal and Error—*Concluded.*

39. That the court might have reached a different conclusion will not justify it in setting aside the verdict of a jury because not sustained by the evidence. *Davey v. Davey*.... 726

40. Where the verdict is the only one the evidence will uphold, the court will not consider alleged errors. *First Nat. Bank v. Dye* 300

41. A verdict upon sufficient evidence will not be disturbed. *Ball v. Beaumont*..... 174

42. Inconsistent findings on conflicting evidence nullify each other, and will not support a judgment. *Chicago St. P., M. & O. R. Co. v. McManigal*..... 585

43. Where in an action on a note defendant sets up a counterclaim, the fact that the jury find for him, but fail to allow his counterclaim, affords no reason for setting aside the verdict. *Harwood v. Breese*..... 521

Waiver.

44. A motion to dismiss petition in error for failure to file motion for a new trial is a waiver of objections to sufficiency of summons in error. *State v. Shrader*..... 618

Assault and Battery.

In an action for assault and battery, where there is no evidence of provocative words, it is error to instruct the jury that words of provocation may be considered in mitigation of damages. *Langdon v. Clarke*..... 516

Attorney and Client.

1. Where an attorney procures the sale of his client's land to a third party, for whom he is acting as attorney, for an inadequate price, and takes a half interest therein, equity will set aside the conveyances on repayment of the purchase price, with interest. *Levara v. McNeney*..... 414

2. This rule is based on public policy, and prevails although the attorney intends to act in good faith. *Levara v. McNeney* 414

3. In such a case the vendor may set off the rents and profits, if any, against the purchase price required to be repaid. *Levara v. McNeney*..... 414

4. Where an attorney appears in an action, the presumption is that he was authorized to appear. *Ebel v. Stringer*..... 249

Bailment. See CARRIERS, 9.

Where a bailment is reciprocally beneficial the law requires ordinary diligence of the bailee. *Mattern v. McCarthy*.... 228

Bankruptcy.

1. Where an insolvent debtor within four months of bankruptcy transfers to one of his creditors with notice sufficient property to satisfy his debt, a preference will be presumed. *Raley v. Raymond Bros. Clarke Co* 496
2. Under subd. E, sec. 67 of the bankruptcy act (U. S. St. at Large, vol. 30, p. 564, ch. 541), all transfers of a bankrupt made within four months of filing the petition in bankruptcy, for a past consideration and with intent to defraud creditors, are void. *Raley v. Raymond Bros. Clarke Co* 496
3. Where a discharged bankrupt seeks to enjoin a judgment he must plead and prove that the creditor had notice of the bankruptcy proceedings in time for allowance of his claim. *Armstrong v. Sweeney* 775
4. In suit to enjoin a judgment, *held* that a creditor had notice of bankruptcy proceedings was not proved. *Armstrong v. Sweeney* 775

Banks and Banking. See JUDGMENT, 5, 6. PRINCIPAL AND SURETY, 2.

1. Payment may be made by a transfer of credits upon the books of a bank. *Patterson v. First Nat. Bank* 384
2. Where a depositor claims that a check was given to change her general deposit into a time deposit, and the only controversy is whether a certain time check signed by the president of the bank alone was fraudulently delivered in exchange for the check, instead of a certificate of deposit, or whether the check was paid and the money loaned to the president individually, it is error to instruct the jury that before plaintiff can recover she must prove that the check was fraudulently procured, where she does not claim fraud in its procurement. *Patterson v. First Nat. Bank* 384
3. Where an officer of a bank engages in litigation in which his individual interests are in conflict with those he represents in a fiduciary capacity, actual fraud is not essential to avoid the proceedings. *Gund v. Ballard* 547
4. Where a check was drawn by a depositor payable to the bank, its indorsement by the bank and return to the drawer as paid is *prima facie* evidence of the receipt by the bank of the amount evidenced by the check. *Patterson v. First Nat. Bank* 384
5. Where a depositor draws a check to change a deposit subject to check into a time deposit, and the check is returned indorsed paid, and the bank seeks to avoid liability by a plea of payment, the burden is on the bank to show that the check was paid at the depositor's request to a third party. *Patterson v. First Nat. Bank* 384

Bills and Notes.

1. Where the time of payment of a note is extended by an independent contract, such extension does not continue the note as unmatured negotiable paper. *Swan v. Craig*..... 182
2. The maker of a nonnegotiable instrument may make payment to the original payee. *Swan v. Craig*..... 182
3. Payment made to the original payee by the maker of a note *held* to operate as a discharge of the indebtedness. *Swan v. Craig*..... 182
4. Under the facts, *held* that the principle of equitable estoppel precludes a note holder, as against the maker without notice, from denying the authority of the payee to receive payment. *Swan v. Craig*..... 182
5. Persons who write their names in blank on the back of a note payable to the order of the maker become liable as indorsers, and their liability cannot be varied by parol evidence. *Harnett v. Holdrege*..... 570
6. Parol evidence of a custom of the maker is not admissible for the purpose of showing, inferentially, that persons indorsing notes were joint makers. *Harnett v. Holdrege*..... 570
7. Where there is no evidence of the date of an indorsement on a note, the presumption is that it was made before maturity and that the holder is a *bona fide* holder for value. *Haslach v. Wolf*..... 658
8. Where a material alteration is made in a note, and assumpsit is brought against the makers, whether the money was paid to one of the defendants for his sole benefit or to a partnership is a question for the jury. *Ball v. Beaumont*.. 174

Bounties.

Ch. 1, laws 1895, offering a bounty for the manufacture of sugar and chicory, is unconstitutional because of lack of power in the legislature to appropriate money for such purpose, and that manufacturers paid larger prices for products relying upon this statute will not create in favor of such manufacturers any obligation against the state. *Oxnard Beet Sugar Co. v. State*..... 66

Burglary.

In a prosecution for burglary, if the evidence shows beyond a reasonable doubt that it was committed in the night time it is sufficient. *Keeler v. State*..... 441

Carriers.

1. Street railway companies are common carriers and liable as such. *Lincoln Traction Co. v. Webb*..... 136
2. In an action for damages for injury received while being

Carriers—*Concluded.*

transported by a carrier, proof of injury alone does not raise the presumption of negligence. *Lincoln Traction Co. v. Webb* 136

3. In such case the burden is on plaintiff to prove that he was a passenger, was injured, the extent of his injuries, and circumstances imputing negligence. *Lincoln Traction Co. v. Webb* 136

4. Where negligence is proved a carrier is required to show that it was in nowise at fault, or that plaintiff was guilty of some negligent act which contributed to the injury complained of. *Lincoln Traction Co. v. Webb* 136

5. Instruction as to burden of proof *held* erroneous. *Lincoln Traction Co. v. Webb* 136

6. When a shipper surrenders custody of goods to a carrier, the liability of the carrier at once attaches. *Chicago, B. & Q. R. Co. v. Powers* 816

7. The liability of a carrier does not attach until goods are unconditionally delivered by the shipper and accepted by the carrier. *Chicago, B. & Q. R. Co. v. Powers* 816

8. A railroad company is not liable as a carrier for stock placed in its yards for shipment, subject to the right of the shipper to remove it for feed and water. *Chicago, B. & Q. R. Co. v. Powers* 816

9. In such a case, the liability of the company is that of a bailee. *Chicago, B. & Q. R. Co. v. Powers* 816

Checks. See BANKS AND BANKING, 4, 5.

Constitutional Law. See BOUNTIES. STATES.

1. Ch. 1, laws 1895, an act for the encouragement of the manufacture of sugar and chicory, *held* to contravene sec. 11, art. III of the constitution. *Oxnard Beet Sugar Co. v. State* 57

2. Ch. 1, laws 1895, is unconstitutional. *Oxnard Beet Sugar Co. v. State* 66

3. Ch. 115, laws 1901, contravenes secs. 1, 8, art. VIII of the constitution. *State v. Tanner* 104

Contempt. See COURTS, 3.

Contracts. See DIVORCE, 2.

1. A contract to deliver corn to be grown is an executory contract, and no title passes until separation and delivery. *Robinson v. Stricklin* 242

2. In determining the validity of a contract in restraint of trade the test is whether the restraint affords protection

Contracts—*Concluded.*

to the party in whose favor it is given, and does not interfere with the interest of the public. *Roberts v. Lemont*.... 365

3. A contract in restraint of trade which is not limited either in time or space is void. *Roberts v. Lemont*..... 365

4. Limitations relative to actions on written contracts apply to a suit in equity to reform a policy of fire insurance and to recover on the instrument. *Grand View B. Ass'n v. Northern Ass. Co*..... 149

5. Such suit may be maintained after an unsuccessful action at law. *Grand View B. Ass'n v. Northern Ass. Co*..... 149

6. Where an illegal contract has been executed, and the parties are *in pari delicto*, no action lies to recover money paid or property delivered thereunder. *Davis v. Hinman*..... 850

Conversion. See TROVER.

Corporations. See RECEIVERS. TROVER.

1. The powers of a corporation in effecting its objects are as broad as those of an individual, when not expressly prohibited. *Herrick v. Humphrey Hardware Co*..... 809

2. A corporation has no lien on the shares of its stockholders for debts due it from them, unless such lien is provided for by statute, or by the charter or by-laws of the corporation. *Herrick v. Humphrey Hardware Co*..... 809

Costs.

The discretion conferred by sec. 623 of the code in taxing costs is one to be exercised on legal and equitable principles. *In re Clapham's Estate*..... 492

Counties and County Officers. See EMINENT DOMAIN, 3.

1. Where an appeal is taken from an order of a county board, and a bond is approved by the county clerk, who indorses his approval as clerk of the district court, *held* not to defeat the appeal. *Hitchcock County v. Brown*..... 254

2. Appeals from county boards should be entered and tried in the district court the same as appeals from justices of the peace. *Loup County v. Wirsig*..... 505

Courts. See DOWER.

1. A county court does not lose jurisdiction in an action, not within the jurisdiction of a justice of the peace, because not present at the hour to which such action is continued, nor for more than one hour thereafter. *Bussing v. Taggert*, 787

2. Jurisdiction of a special proceeding is not conferred by calling the attention of the court to the fact that an indispensable statutory foundation is lacking. *McCormick Harvesting Machine Co. v. Stires*..... 801

Courts—*Concluded.*

3. A court may not punish for criminal contempt, without formal complaint and trial, except in cases in which the contemptuous conduct is in the presence of the court. *Gordon v. State*..... 221

4. Commissioners' opinions published officially are the opinions of the court. *Lancaster County v. McDonald*..... 453

5. The determination of a matter involved in the litigation and discussed at the bar is not mere dictum, though it is only indirectly involved in the decision of the case. *Lancaster County v. McDonald*..... 453

6. The supreme court will not overrule a former decision unless convinced that the case was wrongly decided, and that less injury will result from overruling than from following it. *City of Wahoo v. Nethaway*..... 54

Criminal Law. See ADULTERATION. BURGLARY. INDICTMENT AND INFORMATION. LARCENY.

Evidence.

1. Where the fact that the crime charged was committed is proved beyond all doubt, it is still not sufficient to prove that the defendant had opportunity to commit it, but the evidence must exclude all reasonable doubt of his guilt. *Keeler v. State*..... 441

2. If it appears from the whole evidence, beyond a reasonable doubt that the crime charged was committed in the county of the trial, the venue is sufficiently proved. *Keeler v. State*, 441

3. A mere charge against a deceased person in an account book offered to show that he was alive on the date corresponding to such charge is not competent evidence. *Barker v. State*.. 469

4. On the trial of a charge of wife desertion the state is required to prove every element of the crime beyond a reasonable doubt. *Goddard v. State*..... 739

5. To establish wife desertion the state must prove that the accused is possessed of means available for the support of his wife or that he has earning capacity, and his refusal without good cause to provide for her. *Goddard v. State*... 739

6. Evidence in a prosecution for larceny *held* sufficient to sustain the verdict. *Crockford v. State*..... 1

7. Evidence in a murder case *held* sufficient to support the verdict. *Barker v. State*..... 469

Instructions.

8. Instructions defining the crime of cattle stealing, where the taking is of an animal running at large, *held* properly given. *Crockford v. State*..... 1

Criminal Law—*Concluded.*

9. The rule that objections to instructions will not be regarded unless excepted to and called to the attention of the trial court by a motion for a new trial is relaxed in cases of capital punishment. *Barker v. State* 469

10. Error cannot be predicated on a single clause of an instruction if the instructions as a whole state the law correctly. *Junod v. State* 208

11. Instruction defining a reasonable doubt criticised. *Junod v. State* 208

12. An instruction defining a reasonable doubt criticised. *Keeler v. State* 441

13. It is not error to refuse a requested instruction if the same matters are substantially covered by instructions given. *Keeler v. State* 441

Local Custom.

14. A local custom cannot suspend a criminal statute, nor overthrow rules of evidence. *Crockford v. State* 1

Review.

15. Assignments of error which involve questions often determined will not be further considered. *Barker v. State* 469

16. The supreme court has no jurisdiction to review a judgment in a criminal case, unless proceedings in error are instituted within six months after its rendition. *Kock v. State* 354

Sentence.

17. Where two or more defendants are tried together for the same offense, and different penalties are inflicted, and it appears that they are equally guilty, the supreme court may determine whether the punishment of some of them should be reduced. *Keeler v. State* 441

Verdict.

18. If the meaning of the verdict in the light of the whole record is clear, beyond any reasonable doubt, it is sufficient. *Keeler v. State* 441

19. If the record shows that T. Blankenbeckler was a member of the jury, and the verdict is signed "T. P. Blankenbeckler, Foreman," it will be presumed that the person so signing was the same person as T. Blankenbeckler impaneled. *Keeler v. State* 441

Damages. See HIGHWAYS. NUISANCE, 3. VENDOR AND PURCHASER.

Under sec. 315 of the code, in an action for injuries, a verdict for nominal damages should not be set aside. *Langdon v. Clarke* 516

Deeds. See MORTGAGES, 1, 2, 11.

Where the agent of a vendor receives a deed for delivery upon payment of the consideration, and places it on record after notice by the vendor that the contract has been rescinded for nonperformance, *held* not a legal delivery. *Mason v. Strickland* 783

Demurrer. See PLEADING.

Descent and Distribution. See EXECUTORS AND ADMINISTRATORS.

Dower.

1. The district court has jurisdiction to assign dower. *Swobe v. Marsh* 331
2. The county court has jurisdiction to assign dower only when the right is not disputed. *Swobe v. Marsh* 331

Divorce.

1. In awarding alimony the court should consider the situation of the parties, the duration of their marriage, the amount and value of the husband's estate, the source from which it came and how far, if at all, the wife contributed thereto. *Metcalf v. Metcalf* 79
2. A contract to facilitate procuring a divorce at the suit of either of the parties thereto is void. *Davis v. Hinman* 850
3. Evidence in a suit for divorce *held* to support judgment of dismissal. *Loomer v. Loomer* 359
4. Alimony awarded *held* excessive. *Kimbro v. Kimbro* 171

Ejectment.

In ejectment, plaintiff must recover, if at all, on the strength of his own title. *Smith v. Curtice* 167

Elections.

1. A trial judge cannot exclude any part of the record of an election from evidence in the trial of an election contest. *Griffith v. Bonawitz* 622
2. On appeal in a contested election the entire record should be brought up, and it will be considered *de novo*. *Griffith v. Bonawitz* 622
3. On appeal from the decision of a county court in a contested election, it is not requisite to file new pleadings. *Griffith v. Bonawitz* 622
4. On the trial of a contested election, ballots will not be treated as void because of unauthorized markings innocently made. *Griffith v. Bonawitz* 622
5. Irregular markings of a ballot, the result of innocent awkwardness or ignorance, and not made for identification, will not justify the rejection of such ballot, if the intent of the voter can be ascertained therefrom. *Bingham v. Broadwell* .. 605

Elections—*Concluded.*

6. A voter who has complied with the statute by obtaining from the election board a ballot indorsed with the names of two members of the board will not be deprived of his vote by the fact that one of such names is that of a clerk of the election. *Bingham v. Broadwell*..... 605

7. Minor irregularities by members of an election board, voters and bystanders, unaccompanied by fraud, will not operate to quash the election. *Bingham v. Broadwell*..... 605

8. In the absence of a special provision in the election laws the general statute applies, and the eight days' time should be computed by excluding the day of filing the certificate of nomination and including the day of election. *State v. Dewey* 396

9. If all parties interested agree to a change of candidates for election, and the declination of the first nominee and the nomination of his successor are both filed eight days before the election, it is a compliance with sec. 136, ch. 26, Comp. St. 1903. *State v. Dewey*..... 396

Electricity.

1. In the absence of municipal ordinance or statute, a fireman who enters on property without special authority or invitation is a bare licensee. *New Omaha T.-H. E. L. Co. v. Anderson* 84

2. A fireman who assists to hoist a ladder with metallic corners against an electric light wire cannot, in the absence of invitation or permission of the owner, complain that the wires were not properly insulated. *New Omaha T.-H. E. L. Co. v. Anderson*..... 84

3. A claim for injury by an electric shock cannot be sustained by a claim that such shock was only rendered possible by a ground current, in the absence of negligence of defendant. *New Omaha T.-H. E. L. Co. v. Anderson*..... 84

4. A city ordinance *held* to impose no duty on defendant except to furnish a competent lineman to act under the city authorities' direction in disconnecting wires. *New Omaha T.-H. E. L. Co. v. Anderson*..... 84

5. An electric light company is not an insurer against all dangers from its wires. *New Omaha T.-H. E. L. Co. v. Anderson*... 84

6. In an action for damages, *held* that neither allegation nor proof shows that defendant, after knowledge of the dangerous position of deceased, negligently omitted to turn off its electric currents. *New Omaha T.-H. E. L. Co. v. Anderson* 84

Eminent Domain. See HIGHWAYS.

1. After 30 years, the record of proceedings in eminent domain, in the absence of evidence to the contrary, will be presumed to have existed. *Roberts v. Sioux City & P. R. Co.,* 8
2. Where a city by eminent domain acquires a strip of mortgaged land for a street without making the mortgagee a party, and pays the condemnation money to the mortgagor, it is discharged from its obligation, but takes the land subject to the lien of the mortgage, if of record. *Rieck v. City of Omaha* 600
3. County authorities in establishing a road may proceed against one in possession and apparent sole ownership, and will be discharged from liability upon making compensation to such person. *Cedar County v. Lammers* 744

Equity. See JUDGMENT, 1, 2. MORTGAGES, 5.

Evidence. See APPEAL AND ERROR, 1, 10-14, 38, 39, 41. BANKRUPTCY, 4. BANKS AND BANKING, 4, 5. BILLS AND NOTES, 5. BURGLARY. CRIMINAL LAW, 1-7. HABEAS CORPUS, 1, 2. JUDGMENT, 14. MORTGAGES, 10, 11. PLEADING, 2. WILLS.

1. Evidence of collateral facts corroborative of the statement of one party with respect to the main issue is admissible. *Farmers State Bank v. Yenney* 338
2. Evidence *held* to show that the inadequacy of a sewer was caused by the growth of the city. *Shannon v. City of Omaha,* 507
3. Exclusion of an agreement void under the statute of frauds and against public policy, *held* proper. *Graham v. Hiesel* ... 433
4. Evidence in a suit for alimony *held* to sustain the amount of alimony awarded. *Metcalf v. Metcalf* 79
5. Evidence in a suit to reform an insurance policy *held* to uphold the findings and judgment. *Grand View B. Ass'n v. Northern Ass. Co* 149
6. In an action on a life insurance policy, statements of a relevant bodily condition are admissible, though made a considerable time after an injury was received. *Western Travelers' Accident Ass'n v. Munson* 858
7. Evidence in an action for damages for breach of contract to convey land *held* not to sustain the judgment. *Nolde v. Gray* 373
8. Evidence in an action to recover damages for personal injuries *held* to justify a peremptory instruction of a verdict for the defendant. *Huber v. Chicago, B. & Q. R. Co* 478
9. Evidence in an action for damages for personal injuries *held* to show no actionable negligence of defendant. *Lindgren v. Omaha Street R. Co* 628

Evidence—*Concluded.*

10. Evidence in forcible entry and detention *held* sufficient to sustain the judgment. *Graham v. Hiesel* 433
11. Evidence in a suit to foreclose mechanics' lien *held* to sustain the judgment. *Snyder & Co. v. Sparks* 804
12. In an action against a bank for money had and received, evidence as to other transactions *held* properly rejected. *Patterson v. First Nat. Bank* 384
13. Evidence in an action on a note *held* sufficient to support the verdict. *Harwood v. Breese* 521
14. Evidence in replevin *held* insufficient to support the verdict. *Arla Cattle Co. v. Burk* 39
15. Evidence in an action in trover *held* not to support the verdict. *Bagwill v. Wroughton* 298
16. Evidence in a suit to set aside fraudulent conveyances of deceased grantor. *held* to support the decree. *Lesieur v. Simon* 645

Execution.

An execution issued on a satisfied judgment is void. *Yeiser v. Cathers* 317

Executors and Administrators. See SUBROGATION.

1. An executor may recover costs and attorney's fees expended in good faith for the estate. *McDowell v. First Nat. Bank* .. 307
2. Where an executor advances money for his own benefit, he cannot recover against his estate. *McDowell v. First Nat. Bank* 307
3. Pleadings *held* insufficient to warrant a personal judgment against the executor. *McDowell v. First Nat. Bank* 307
4. Order setting aside administrator's sale of real estate sustained. *Rohlff v. Estate of Snyder* 524
5. A county court ought not to permit a claim to be filed against an estate which is presented more than eight months after the expiration of the time fixed for that purpose, except for unavoidable mistake, accident, or fraud. *Nebraska Wesleyan University v. Bowen* 598
6. An administrator is not an agent of his intestate, but is a public trustee, of defined and limited powers. *Henry v. Henry* 746

Forcible Entry and Detainer. See EVIDENCE, 3, 10.

Foreclosure. See MORTGAGES. PLEDGES.

Fraudulent Conveyances. See EVIDENCE, 16.

Gaming.

Sec. 214 of the criminal code, which provides for the recovery of money lost at gambling, applies to such kinds of gambling only as are mentioned in that section. *Bowen v. Lynn*.... 215

Garnishment.

A fund in the hands of the clerk of the court, obtained by a void garnishment, should be returned to the garnishee. *Yeiser v. Cathers*..... 317

Guaranty.

Contract *held* to be a guaranty of payment and not of collection merely. *McCague Bros. v. Irey*..... 602

Habeas Corpus. See NEW TRIAL, 8.

1. Evidence in action by father for possession of children *held* to sustain judgment of restitution. *Terry v. Johnson*..... 653
2. Right of parent to custody of child should not be denied where forfeiture of such right is not clearly established. *Terry v. Johnson*..... 653
3. A prisoner will not be set at liberty by *habeas corpus* because the complaint states an alleged offense so defectively that it may be subject to demurrer or motion to quash. *State v. Shrader*..... 618
4. A prisoner set at liberty by *habeas corpus* may, on reversal of the order by an appellate court, be remanded to custody. *State v. Shrader*..... 618

Highways.

1. A landowner who has united in a petition for a public road, waiving compensation for damages, may withdraw such waiver. *Ashley v. Burt County*..... 159
2. A purchaser of land, pending proceedings to appropriate the same for a public use, may prosecute a claim for damages for such appropriation in his own name. *Ashley v. Burt County*..... 159
3. To establish a highway by prescription there must be continuous, adverse user under claim of right of a defined way for ten years. *Bleck v. Keller*..... 826

Homestead.

1. Where a mortgage on a homestead is paid with the proceeds of a new mortgage thereon, a judgment entered while the old mortgage was in force is not a lien superior to the new mortgage. *France v. Hohnbaum*..... 70
2. Where a creditor files a petition for the appointment of appraisers to set aside a homestead, it is not error to allow the homestead claimant to file an answer and to contest his homestead exemption before appraisers are appointed. *France v. Hohnbaum*..... 70

Homestead—*Concluded.*

3. A mortgage placed on a homestead after the rendition of a judgment against the claimant, for the purpose of paying off a prior mortgage, is superior to the judgment. *France v. Hohnbaum* 74

Homicide. See INDICTMENT AND INFORMATION, 4.

Husband and Wife. See CRIMINAL LAW, 4, 5. INDICTMENT AND INFORMATION, 3. MORTGAGES, 4.

Admission of testimony of wife as to communications made to her by her husband in his last sickness, *held* not prejudicial error. *Western Travelers' Accident Ass'n v. Munson* .. 858

Incumbrances.

An outstanding lease for a period of years is an incumbrance. *Albin v. Parmele* 663

Indictment and Information. See ADULTERATION, 2.

1. The accused, by demurring or pleading not guilty to the information, waives all defects therein which may be objected to only by motion to quash or plea in abatement. *Goddard v. State* 739
2. An information charging desertion of wife and child, based on sec. 212*a* of the criminal code, is not bad for duplicity, and a motion to require the state to elect will not lie. *Goddard v. State* 739
3. An information which fails to state that accused has wilfully and *without good cause* neglected and refused to provide for his wife is insufficient to charge the crime of wife desertion. *Goddard v. State* 739
4. Information *held* sufficient to charge the accused with the crime of murder in the first degree, and to sustain a conviction of that offense. *Barker v. State* 469
5. The court may, in its discretion, before trial, permit the amendment of a criminal information, where the identity of the offense charged is not changed. *Razee v. State* 732

Infants. See APPEAL AND ERROR, 35.

Injunction. See BANKRUPTCY, 3, 4. NUISANCE, 1, 2.

1. A valid agreement in restraint of trade must be clearly established to warrant a court in restraining its breach by injunction. *Roberts v. Lemont* 365
2. Where a judgment in replevin is entered after the death of the plaintiff, the sureties in the replevin bond may enjoin its enforcement. *McBrayer v. Jordan* 483

Instructions. See APPEAL AND ERROR, 15-19. ASSAULT AND BATTERY. BANKS AND BANKING, 2. CARRIERS, 5. CRIMINAL LAW, 8-13. EVIDENCE, 8.

Insurance. See APPEAL AND ERROR, 1. CONTRACTS, 4, 5. EVIDENCE, 6. WITNESSES, 3-5.

1. An untrue answer in an application for life insurance in reference to matters of opinion or judgment will not avoid the policy, if made in good faith. *Royal Neighbors of America v. Wallace* 409
2. An untrue answer in an application for life insurance in regard to matters which are within the knowledge of the applicant and material will avoid the policy. *Royal Neighbors of America v. Wallace* 409
3. If an applicant believes he is afflicted with a fatal disease when he makes his application, his statement that he is free from disease will be presumed to be fraudulent. *Royal Neighbors of America v. Wallace* 409
4. Judgment on the pleadings in an action on a life insurance policy approved. *Bankers Union of the World v. Favalora* .. 427

Irrigation. See WATERS.

Judgment. See COURTS, 4, 5. INJUNCTION, 2. PRINCIPAL AND SURETY, 1.

1. In a suit to set aside a judgment and for a new trial, the petition should allege that a motion for a new trial was overruled, when the assignments relied on are of errors at the trial. *Parker v. Parker* 4
2. If the evidence shows that such motion was filed and the case is tried as if the petition contained such allegation, it will be treated as sufficient. *Parker v. Parker* 4
3. Before plaintiff may have a judgment and an order overruling a motion for a new trial vacated at a succeeding term for irregularity, it must be adjudged that he has a cause of action. *Gavin v. Reed* 237
4. That the county judge was not present at the hour to which an action was continued, and that he thereafter, in the absence of defendant, rendered judgment against him, does not render such judgment void or open to collateral attack. *Bussing v. Taggert* 787
5. In a suit among stockholders of a bank in process of voluntary liquidation over its assets, a judgment in an action by the corporation against the president, who was a director and one of the trustees to wind up its affairs, by which the amount due from him was adjudicated, may be impeached by the other stockholders. *Gund v. Ballard* 547
6. The stockholders of a bank in liquidation *held* not concluded by a judgment in its favor against its president. *Gund v. Ballard* 547

Judgment—*Concluded.*

7. A final judgment on demurrer to a petition is a bar to another action on the same grounds and between the same parties. *Parrotte v. Dryden* 291
8. A decree establishing the validity of a will is not conclusive upon the question of a constructive trust. *Smullin v. Wharton* 705, 710
9. A judgment rendered by a court without jurisdiction of the parties is void. *Omaha Nat. Bank v. Robinson* 351
10. An affidavit alleging a judgment, that it is unpaid and has become dormant, *held* sufficient to justify a conditional order of revivor. *Furer v. Holmes* 393
11. The five years' lapse of time from the rendition of a judgment to the time it becomes dormant only raises presumption of payment, and does not deprive the judgment of all vitality. *Furer v. Holmes* 393
12. That the transcript of a judgment in justice court was filed in the office of the clerk of the district court after the judgment had become dormant did not deprive the district court of jurisdiction to revive the judgment. *Furer v. Holmes* 393
    Bussing v. Taggert 787
13. A judgment is extinguished when paid by one primarily liable for its satisfaction, and it cannot be kept alive by assignment. *Ebel v. Stringer* 249
14. Evidence *held* incompetent to show assignment of a judgment. *Ebel v. Stringer* 249

Jurisdiction. See COURTS, 1, 2. JUDGMENT, 12. PLEADING, 10.

Jury.

1. If the *voir dire* examination of a juror does not show incompetency, a challenge upon that ground is properly overruled. *Keeler v. State* 441
2. An opinion based solely on rumor and newspaper reports will not disqualify a juror. *Barker v. State* 469
3. It is not ground for challenge that a juror is more than sixty years of age. *Keeler v. State* 441

Landlord and Tenant.

An agreement between a landlord and his tenant from year to year by which an existing lease is modified, without a surrender or an agreement to surrender, *held* not to create a new term. *McCaw v. Cox* 486

Larceny.

1. Evidence *held* sufficient to connect accused with the crime and to sustain a verdict of grand larceny. *Junod v. State* .. 208

Larceny—*Concluded.*

2. Wire used for fencing on the public domain is personal property, and one who takes it with larcenous intent is guilty of larceny. *Junod v. State*..... 208
3. Where one not the owner takes into his possession a calf as an estray, with the intent to convert it to his own use, it constitutes the crime of cattle stealing. *Crockford v. State*, 1
4. A sentence of five years for stealing property of the value of $40, *held* excessive. *Junod v. State*..... 208

Legislative Power.

The legislature cannot appropriate or pledge the public money for private purposes. *Oxnard Beet Sugar Co. v. State*..... 66

Libel and Slander.

1. A newspaper to be of general circulation under sec. 47 of the criminal code must circulate generally beyond the county where it is published. *Razee v. State*..... 732
2. In a prosecution for libel under sec. 47 of the criminal code, for publishing an alleged libelous article, the truth of the article is a perfect defense. *Razee v. State*..... 732

Liens. See HOMESTEAD.

Limitation of Actions. See CONTRACTS, 4. MECHANICS' LIENS, 3. NEW TRIAL, 4. 5.

The four years' limitation of actions to set aside fraudulent conveyances is not tolled by the death of the fraudulent grantor. *Lesieur v. Simon*..... 645

Lis Pendens. See MORTGAGES, 3.

Mandamus.

After a petition to foreclose tax liens under ch. 75, laws 1903, has been filed and notice published in a suitable newspaper, the treasurer will not be compelled by mandamus to republish the same on the sole ground that the newspaper was not designated for the publication by the proper official authority. *State v. Fink*..... 360

Master and Servant. See TRIAL, 4.

1. A railroad employee, by negligently exposing himself to known dangers, does not assume responsibility for others which are not known and by the exercise of ordinary prudence could not be discovered. *Holmes v. Chicago, R. I. & P. R. Co*..... 489
2. An obvious defect is one which is readily discernible. *New Omaha T.-H. E. L. Co. v. Rombold*..... 272
3. Whether due care required that an electric lineman see and avoid exposed wires *held* a question for the jury. *New Omaha T.-H. E. L. Co. v. Rombold*..... 272

Master and Servant—*Concluded.*

4. A lineman of an electric light company, while acting at fires under direction of the city authorities in pursuance of an ordinance, cannot render the company liable by his words or acts in the absence of special authority. *New Omaha T.-H. E. L. Co. v. Anderson* 84

Mechanics' Liens.

1. Sec. 4 of the mechanics' lien law contemplates a judgment and a sale of the property. *Durkee v. Koehler* 833
2. The holder of a mechanics' lien is entitled to a deficiency judgment where the property does not satisfy his claim, if his petition or cross-bill asks such relief. *Durkee v. Koehler*, 833
3. Application for a deficiency judgment should be made within the time that the statute would bar an action on the account on which a mechanics' lien is based, counting from the date of confirmation of sale. *Durkee v. Koehler* 833
4. To enforce a mechanics' lien for material, the evidence must show a contract with the owner or his agent. *Snyder & Co. v. Sparks* 804

Mortgages. See APPEAL AND ERROR, 7-9. TRIAL, 5.

1. Where the relation of debtor and creditor ceased, a deed *held* not to be a mortgage. *Samuelson v. Mickey* 852
2. Where land is conveyed by a deed to satisfy liens thereon, a subsequent parol promise without consideration to reconvey will not sustain a suit to redeem. *Samuelson v. Mickey*, 856
3. One who obtains a mortgage on real estate while suits are pending, with knowledge thereof, takes subject to the decrees in such suits. *Parrotte v. Dryden* 291
4. Where title to mortgaged premises is in the husband, and his wife joins in a mortgage to secure his note, and time of payment is extended without her consent, and the wife claims ownership of the property, she must show notice of her claim at the time of the extension to entitle the property to stand in the position of a surety. *Creighton v. Crane*, 650
5. If in the rendition of a decree of foreclosure the court errs in determining the priorities of liens, the mortgagee has an adequate remedy by appeal or error, and equity will not interpose. *Nebraska L. & T. Co. v. Crook* 485
6. Irregularities in a notice of sale will not avoid the sale. *Farm Land Co. v. St. Rayner* 319
7. The law of 1897, repealing the statute which permitted deficiency judgments, has no application to mortgages executed before its passage. *Daniels v. Mutual Benefit Life Ins. Co* 257

Mortgages—*Concluded.*

8. Writ of assistance denied against one in possession, claiming ownership, who was not a party to the foreclosure. *Urlau v. Ruhe*..... 807

9. A appeal will lie from an order awarding a writ of assistance in foreclosure after sale confirmed, subject to the conditions of an appeal from an order confirming the sale. *Escritt v. Michaelson*..... 634

10. Evidence in suit to foreclose a mortgage *held* to sustain the decree. *Campbell v. Miller*..... 779

11. Evidence *held* sufficient to sustain finding that deed was intended as a mortgage. *Samuelson v. Mickey*..... 852

Municipal Corporations. See ELECTRICITY. EMINENT DOMAIN, 2. TAXATION, 9-13.

1. A city council cannot determine in advance, and without a hearing, that a part only of property in a district will be benefited, and create a sewer district embracing only such part, and assess the cost to the property therein. *Shannon v. City of Omaha*..... 514

2. A party complaining of an unlawful division of a sewer district, and seeking to enjoin special assessments, must show injury. *Shannon v. City of Omaha*..... 514

3. The power to make public improvements and to assess the cost on property benefited may be exercised whenever the public need demands. *Shannon v. City of Omaha*..... 507

4. Where a person files a protest against a special assessment with the board of equalization before the time fixed in the notice for the meeting of the board, he waives any defect in the notice. *Shannon v. City of Omaha*..... 507

5. A city may create a new sewer district within the limits of a larger district and assess the cost of a new sewer in said district on property benefited. *Shannon v. City of Omaha*.. 507

6. Where a city has carried out a sewerage system of a competent engineer, it is not chargeable with the cost of improvements made necessary by the growth of the city. *Shannon v. City of Omaha*..... 507

7. Assessing the cost of a sewer by front-feet *held* equitable. *Shannon v. City of Omaha*..... 507

8. In cities of the second class having less than 5,000 inhabitants, the offices of chief of police and overseer of streets are separate, although both may be held by one person at the same time. *Mead v. State*..... 754

9. Under the city charter of Omaha, *held* that at a special meeting the mayor and council were authorized to pass a

Municipal Corporations—*Concluded.*
city ordinance then pending. *National Life Ins. Co. v. City of Omaha* 41
10. There must be direct connection between the negligence of a city and the damage complained of to entitle a party to recover on account of such negligence. *Reeder v. City of Omaha* 845

Negligence. See ELECTRICITY. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 10. STREET RAILWAYS.

New Trial. See JUDGMENT, 1, 2.
1. When a proceeding is begun in the county court, and appealed to the district court and there tried, an application for a new trial can be made only in the district court. *Williams v. Miles* 193
2. Secs. 602 *et seq.* of the code are inapplicable to obtain a new trial in the trial court on the ground that by unavoidable casualty complainant has been deprived of his right of review. *Ritchey v. Seeley* 164
3. To obtain a new trial it is not requisite to show conclusively that complainant has a sufficient cause of action or defense. *Ritchey v. Seeley* 164
4. The time within which such an action may be brought is prescribed by sec. 16 of the code. *Ritchey v. Seeley* 164
5. In an action tried in the district court upon appeal from the county court, the time in which an application for a new trial may be filed runs from the date of the judgment of the district court. *Williams v. Miles* 193
6. To obtain a new trial for newly discovered evidence, the party applying must use due diligence. *Williams v. Miles* .. 193
7. In an application for a new trial for newly discovered evidence, it must appear that the new evidence will probably change the result. *Williams v. Miles* 193
8. There is no provision for filing a motion for a new trial in a *habeas corpus* proceeding in county court. *State v. Shrader* 618
9. In an action in equity to vacate a judgment at law, the district court may grant a new trial as in other equity cases. *Williams v. Miles* 193

Nuisance.
1. A private citizen cannot enjoin a public nuisance from which he suffers no special injury. *George v. Peckham* 794
2. To confer jurisdiction in equity to abate a nuisance plaintiff must have suffered damages special to himself which cannot be measured. *George v. Peckham* 794

Nuisance—*Concluded.*

3. Damages to an individual caused by a public nuisance are not special because they exceed those inflicted on the general public in degree, but to have that character they must differ in kind. *George v. Peckham*..... 794

Officers.

Persons contracting with public officials are charged with knowledge of the extent of their authority, and contracts in the supposed exercise of public powers will not impose upon the officials executing them any personal liability. *Henry v. Henry*..... 746

Parent and Child. See HABEAS CORPUS, 1, 2.

Parties.

1. Where two or more parties claim the ownership of a fund in the hands of a third, suit may be maintained to recover the fund and to litigate the ownership; and all persons claiming the fund are necessary parties. *Conservative S. & L. Ass'n v. City of Omaha*..... 720
2. A minor recovered a judgment against a city, which was assigned by her guardian to plaintiff. The guardian was removed. Plaintiff sued the city, the first guardian and his surety, and the new guardian, to quiet title to the judgment in it. Demurrers were filed. *Held*, that the new guardian and the city are the only necessary parties. *Conservative S. & L. Ass'n v. City of Omaha*..... 720
3. Persons severally liable upon a note may all or any of them be included in the same action under sec. 44 of the code. *Palmer v. McFarlane*..... 178

Partnership. See PLEADING, 5.

Party Walls.

1. Registration of a party wall agreement is constructive notice thereof. *Loyal Mystic Legion v. Jones*..... 342
2. Party wall agreement construed, and *held* that the privileges.... and liabilities given and imposed by the contract pass to all persons obtaining title to either of the lots upon which the wall stood, and that the agreement itself operates as an assignment thereof. *Loyal Mystic Legion v. Jones*..... 342

Petition. See PLEADING.

Pleading. See ELECTIONS, 3. EXECUTORS AND ADMINISTRATORS, 3. JUDGMENT, 1, 2. PARTIES. SPECIFIC PERFORMANCE, 2.

1. Where a petition is for money had and received, the answer pleads payment, and the reply negatives the payment, the reply is not inconsistent with the petition, and it is error to strike out its allegations. But where proof is admitted

Pleading—*Concluded.*

of the allegations stricken, the error is without prejudice. *Patterson v. First Nat. Bank* 384

2. Where a petition alleges the rendition of a judgment, which is not denied, no proof is necessary to establish the fact. *Henry v. Henry* 752

3. An amendment is permissible which does not change the cause of action. *Raley v. Raymond Bros. Clarke Co* 496

4. On an appeal an amended petition may be filed to conform to the facts proved. *Raley v. Raymond Bros. Clarke Co* 496

5. Petition for the dissolution of a partnership and for an accounting *held* to state a cause of action. *Carroll v. Cunningham* 295

6. Conclusions of law are disregarded when the sufficiency of a plea is questioned, but not conclusions of fact. *Western Travelers' Accident Ass'n v. Munson* 858

7. A pleading is good against demurrer if ultimate facts are alleged; if indefinite, the remedy is by motion. *Western Travelers' Accident Ass'n v. Munson* 858

8. Petition in an action on a note *held* to state a cause of action. *Palmer v. McFarlane* 178

9. Petition *held* sufficient to allege purchase of note for value, before maturity. *Haslach v. Wolf* 658

10. A demurrable petition may confer jurisdiction, and a decree, valid unless appealed from, may be rendered upon it. *Selby v. Pueppka* 179

11. New matter pleaded in a reply is constructively denied by the statute, and leave to amend an answer to put such matter in issue is error without prejudice. *Lininger & Metcalf Co. v. Clark* 799

12. The plea *nil debet* under our system puts in issue no fact. *Bankers Union of the World v. Favalora* 427

13. Where in the county court the defense was an account stated, and on appeal to the district court the defense of accord and satisfaction was added, *held* the latter plea was new ground of defense. *Bankers Union of the World v. Favalora* 427

14. An answer which pleads only a conclusion states no defense. *State v. Tanner* 104

15. A pleader is not required to anticipate matter in avoidance. *Lutz v. Pender Nat. Bank* 314

Pledges.

In an action to foreclose the lien of a pledge, the court may render a deficiency judgment. *Commercial Nat. Bank of Omaha v. Grant* 435

Principal and Agent. See REAL ESTATE AGENTS.

Principal and Surety.

1. The failure of the clerk, in recording a judgment, to certify certain defendants as sureties is reversible error, though not presented to the trial court. *Escritt v. Michaelson*..... 634
2. Where an assignment of all the property of a debtor was made to the president of a bank to pay debts to himself and the bank, *held* his liability to the bank was not that of surety, but was primary. *Gund v. Ballard*..... 547

Public Lands.

1. The grant of indemnity school lands under 27 U. S. Statutes at Large, ch. 200, p. 555, became absolute upon the state's acceptance of the terms of the grant and its selection of lands granted. *State v. Tanner*..... 104
2. One settling upon such land is a trespasser, and can acquire no preference right as against the state's right. *State v. Tanner* 104
3. The act of congress, 23 U. S. Statutes at Large, ch. 214, p. 103, recognized only the right of an individual settler who was in actual occupation of a portion of a military reservation prior to the location of the reservation or prior to January 1, 1884. *State v. Tanner*..... 104
4. The rights thus acquired are the "lawful rights" which it is declared shall not be prejudiced in the act of March 3, 1893, granting lands to the state as indemnity school lands. *State v. Tanner*..... 104
5. The act of congress, 28 U. S. Statutes at Large, ch. 314, p. 491, giving the preference right of entry to a *bona fide* settler on lands within an abandoned military reservation, in no way impairs the right of the state to select indemnity school lands. *State v. Tanner*..... 104
6. The constitutional provisions relating to educational lands and funds are only applicable to the management thereof after the title has become vested in the state. *State v. Tanner* 104
7. The state may by its legislature accept the terms of an act of congress granting to it lands as indemnity school lands, and authorize the commissioner of public lands and buildings to select the lands. *State v. Tanner*..... 104
8. Under the act of congress of March 3, 1893, the state became vested with a perfect and absolute title to such lands. *State v. Tanner*..... 104
9. The legislature cannot provide for the disposition of school lands except as authorized by the constitution. *State v. Tanner* 104

Quieting Title.

One seeking relief from a cloud on title to land created by a void mortgage must do equity as a condition precedent to relief. *Henry v. Henry* 752

Quo Warranto.

When a county judge dies pending a proceeding in *quo warranto*, his successor cannot be substituted as respondent while the cause is pending on petition in error. *State v. Gower* 304

Railroads.

1. The use for agricultural purposes of the right of way of a railroad company is not adverse to the enjoyment of the easement. *Roberts v. Sioux City & P. R. Co* 8
2. Occupancy of parts of the right of way will not be treated as adverse, without notice to the company. *Roberts v. Sioux City & P. R. Co* 8
3. In the absence of notice, the erection of elevators on the right of way without express agreement therefor will be regarded as permissive. *Roberts v. Sioux City & P. R. Co* .. 8

Real Estate Agents.

Letter to agent *held* sufficient to authorize sale of land according to the terms therein stated. *Weaver v. Snively* 35

Receivers.

1. A receiver will not be appointed in a stockholder's suit for mismanagement of corporate affairs, where neither the corporation nor the corporate officers are insolvent and the corporation is a going concern. *Miller v. Kitchen* 711
2. Where equity may grant sufficient relief to a complaining minority stockholder, who alleges mismanagement by corporate officers, a receiver will not be appointed. *Miller v. Kitchen* 711

Replevin.

It is a complete defense to sureties sued on a replevin bond that the court was without jurisdiction to render the judgment in replevin. *McBrayer v. Jordan* 483

Revivor. See JUDGMENT, 10-12.

Sales. See CONTRACTS, 1.

It is a general rule that a delivery to a common carrier is a delivery to a vendee or consignee. *Butts v. Hensey* 421

School Lands. See PUBLIC LANDS.

Specific Performance.

1. A party to a contract of sale of real estate for cash upon delivery of deed is excused from performance if the other

Specific Performance—*Concluded.*

party refuses to pay when deed is ready for delivery. *Mason v. Strickland* 783

2. An answer and cross-petition praying specific performance of a contract for the sale of land and in which no claim is made for damages does not state facts sufficient to entitle defendant to relief. *Weaver v. Snively* 35

States.

A moral obligation can never be deemed to rest on the state to discharge a contract made by the legislature in violation of the constitution. *Oxnard Beet Sugar Co. v. State* .. 57

Statutes.

1. A law cannot be established by certificates of the officers of the senate and house of representatives, made after adjournment of the legislature for the purpose of authenticating a purported act as having been passed. *State v. Mickey* 281
2. Ch. 157, laws 1903, not being authenticated as required by sec. 11, art. III of the constitution, *held* not to have become a law. *State v. Mickey* 281

Street Railways. See CARRIERS, 1-5.

Whether the driver of a vehicle in attempting to cross a street railway track was guilty of negligence, *held* a question for the jury. *Omaha Street R. Co. v. Mathiesen* 820

Subrogation.

One loaning money to an administrator upon a void mortgage to pay a previously executed void mortgage is not entitled to subrogation to a lien discharged with the proceeds of the latter. *Henry v. Henry* 746

Taxation. See MANDAMUS. MUNICIPAL CORPORATIONS, 1-7.

1. The word "franchise" in sec. 78, art. I, ch. 77, Comp. St. 1903, includes all rights and privileges granted to or exercised by a person or corporation engaged in the express, telegraph or telephone business. *Western Union Telegraph Co. v. City of Omaha* 527
2. The act of congress, 14 St. at Large, p. 221, ch. 230, known as the "Post Roads Act," does not exempt telegraph companies from taxation. *Western Union Telegraph Co. v. City of Omaha* 527
3. Taxation of franchises in this state must be by valuation and in proportion to value. *Western Union Telegraph Co. v. City of Omaha* 527
4. Under sec. 1, art. IX of the constitution, the legislature has no power to establish an arbitrary rule or standard of

Taxation—*Continued.*

fixing values for taxation, which has no relation to the ascertainment of value. *Western Union Telegraph Co. v. City of Omaha* 527

5. The legislature cannot prescribe rules that prevent the assessment of the property and franchise of a corporation on an equality with property in general. *Western Union Telegraph Co. v. City of Omaha* 527

6. The provision of sec. 78, art. I, ch. 77, Comp. St. 1903, which fixes gross receipts as the value of a franchise, fixes an arbitrary rule, and violates the constitutional requirement that franchises shall be taxed by valuation. *Western Union Telegraph Co. v. City of Omaha* 527

7. "Gross receipts" may be considered in estimating the value of a franchise, but are not a proper measure of such franchise value. *Western Union Telegraph Co. v. City of Omaha,* 527

8. The legislature has power to tax the gross receipts of corporations under sec. 1, art. IX of the constitution, but such taxation is not by valuation but is a tax upon the business of corporations. *Western Union Telegraph Co. v. City of Omaha* 527

9. Under sec. 161, ch. 12*a*, Comp. St. 1901, a board of equalization properly in session acts judicially, and its action is not open to collateral attack except for fraud, gross injustice or mistake. *Wead v. City of Omaha* 321

10. The provisions of sec. 164, ch. 12*a*, Comp. St. 1901, do not apply to cases of fraud, gross injustice or mistake. *Wead v. City of Omaha* 321

11. "Gross injustice" within the meaning of sec. 164, ch. 12*a*, Comp. St. 1901, must be so excessive as to be confiscatory. *Wead v. City of Omaha* 321

12. Where proceedings by a board of equalization are regular, and in its determination it errs as to a particular piece of property, such error will not defeat the whole tax in equity. *Wead v. City of Omaha* 321

13. Where the excess of a tax cannot be determined, the court should determine the amount of tax justly due as nearly as practicable and require the payment of the same as a condition of relief against the excess. *Wead v. City of Omaha,* 321

14. The word credits as used in sec. 28, art. I, ch. 77, Comp. St. 1903, means net credits, therefore the indebtedness of the taxpeyer may be deducted from gross credits to find the true value for assessment. *Lancaster County v. McDonald* 453

15. The statute distinguishes between items of property to be

Taxation—*Concluded.*

scheduled for taxation, hence, notes and mortgages are not subject to deduction of debts. *Lancaster County v. McDonald,* 453

16. Where the owner of live stock pays taxes thereon in a county in which it was assessed improperly, *held* he must pay the tax properly assessed in another county. *Jandt v. Sioux County* 381

17. That a petition for foreclosure of a tax lien discloses that no preliminary sale for taxes was had will not of itself render the foreclosure proceedings void. *Selby v. Pueppka,* 179

18. Sec. 3, art. IX of the state constitution, providing for two years' time within which to redeem from tax sales, applies to judicial as well as to administrative sales. *Selby v. Pueppka* 179

Telegraphs and Telephones. See TAXATION, 1-8.

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 8. INSURANCE, 4. MASTER AND SERVANT, 3. STREET RAILWAYS.

1. It is not error to deny a motion for a continuance because of the absence of an attorney, if the party is represented by other competent counsel. *First Nat. Bank v. Dye* 300

2. Contributory negligence *held* to be a question for the jury. *Holmes v. Chicago, R. I. & P. R. Co* 489

3. In an action for personal injuries against a city, *held* the question of plaintiff's contributory negligence was for the jury. *City of Lexington v. Kreitz* 770

4. Whether it was the duty of an electric light company to insulate its wires, or the duty of an employee to make inspection and discover defects therein, *held* to be questions for the jury. *New Omaha T.-H. E. L. Co. v. Rombold* 272

5. On a motion for a deficiency judgment in the foreclosure of a mortgage executed prior to the law of 1897, the mortgagors are not entitled to a trial by jury. *Daniels v. Mutual Benefit Life Ins. Co* 257

6. Allowance of reading the petition to jury in opening statement by counsel, unless prejudice is shown, rests in the discretion of the trial court. *City of Lexington v. Kreitz* .. 770

7. Instruction as to burden of proof *held* faulty. *Chicago, B. & Q. R. Co. v. White* 870

8. An instruction is erroneous which withdraws from the issues a material matter in dispute. *Tibbets v. Sweet* 161

9. Where, in an action for personal injuries, counsel for plaintiff invites the jury to return a verdict for defendant, if they find that plaintiff is only entitled to nominal damages, and such verdict is returned, plaintiff cannot complain. *Langdon v. Clarke* 516

Trial—*Concluded.*

10. Where contradictory verdicts are returned it is the duty of the court to ascertain whether either can be upheld, and if either of them is such, to render judgment of affirmance thereon, disposing of the other as the law and the relations of the parties may require. *Chicago, St. P., M. & O. R. Co. v. McManigal* 580

11. Where, in a joint action against a principal and his agent for damages for negligence of the agent in performance of his duty, there is a verdict in favor of the latter supported by evidence, there should be a judgment for the principal also, although there may be a verdict against him. *Chicago, St. P., M. & O. R. Co. v. McManigal* 580

Trover. See EVIDENCE, 15.

1. Trover will lie for the wrongful conversion of shares of stock in a corporation. *Herrick v. Humphrey Hardware Co.*, 809

2. Any wrongful act of dominion over another's property in denial of his rights is a conversion. *Herrick v. Humphrey Hardware Co* 809

3. Where the transfer of stock of a corporation must be made on its books, and it wrongfully refuses to make the transfer, it is a conversion of the stock. *Herrick v. Humphrey Hardware Co* 809

Trusts.

1. Where a testator bequeaths property, the legatee promising to hold it for the benefit of another, he will be held as trustee. *Smullin v. Wharton* 667

2. In such case, the will effects an absolute legacy, but equity, to defeat fraud, raises a trust in favor of the beneficiaries. *Smullin v. Wharton* 667

3. A testamentary trust must be reasonably certain as to the property embraced in the trust, the beneficiaries, the estate, and the manner in which the trust is to be executed. *Smullin v. Wharton* 667

4. Where the objects of an alleged trust are indefinite, the property not certain, a discretion to act is given, and the prior dispositions of the property import absolute ownership, words of recommendation or request will not create a trust. *Smullin v. Wharton* 667

5. Whether a trust is express or constructive, the same certainty as to the property is necessary. *Smullin v. Wharton*, 667

6. Where the owner of an undivided one-half of a tract of land conveys it by quitclaim deed to his co-owner, without consideration, equity will convert him into a trustee of the legal title. *Koefoed v. Thompson* 128

Trusts—*Concluded.*

7. On the refusal of the grantee to reconvey, equity will restore the grantor to his rights in the property. *Koefoed v. Thompson* 128
8. If the grantee makes no claim for an accounting the court is not required to state one before rendering the decree. *Koefoed v. Thompson* 128

Usury.

1. The president of a bank cannot contract with the bank to pay a usurious rate of interest and thereby escape all interest under the statute denouncing usurious contracts. *Gund v. Ballard* 547
2. In such case, equity will not enforce the usurious contract, but will require the debtor to do equity by paying the legal rate of interest. *Gund v. Ballard* 547

Vendor and Purchaser. See SPECIFIC PERFORMANCE, 1.

1. In an action for damages for breach of a contract to convey land, the measure of damages is the difference between the price agreed to be paid and the value of the land when the breach occurred, with interest. *Nolde v. Gray* 373
2. To recover for breach of contract to convey land, the vendee must either be evicted or rescind his contract because of the failure of the vendor to perform. *Nolde v. Gray* 373
3. A vendee of real estate in possession and claiming ownership under a contract of purchase cannot maintain an action to recover the purchase price for a breach of the contract to convey, together with damages for the breach. He must first rescind and surrender possession. *Nolde v. Gray* 378
4. A vendor may rescind a contract of sale when the vendee fails to perform, and a demand for the return of a deed, with notice that the "deal is off," is a rescission of the contract. *Mason v. Strickland* 783

Venue. See CRIMINAL LAW, 2.

Verdict. See APPEAL AND ERROR, 38-43. CRIMINAL LAW, 18, 19. TRIAL, 9-11.

Waiver. See APPEAL AND ERROR, 44. HIGHWAYS, 1. WITNESSES, 3-5.

Waters.

1. After an appropriation of water the appropriator had the right under sec. 5, ch. 93*a*, Comp. St. 1903, to extend a ditch beyond where the first use was made. *Farmers & Merchants I. Co. v. Gothenburg W. P. & I. Co* 223
2. Under the general irrigation law of 1895, persons applying

Waters—*Concluded.*

to extend a ditch must specify the lands which the new use of the water is designed to irrigate. *Farmers & Merchants I. Co. v. Gothenburg W. P. & I. Co* 223

Wills. See JUDGMENT, 8. TRUSTS, 1-5.

1. An undue prejudice based on some reason is not an insane delusion. *In re Clapham's Estate* 492
2. Will and testamentary trust construed. *Smullin v. Wharton,* 705
3. A formal request of testator to witnesses to bear witness that the words spoken are his will is essential to the validity of a nuncupative will. *Godfrey v. Smith* 756
4. Nuncupative wills must be proved in strict conformity with the statute. *Godfrey v. Smith* 756
5. A nuncupative will cannot be established by witnesses who are the only legatees. *Godfrey v. Smith* 756
6. A verbal will made by one sick unto expected death, *held* made in the last sickness of the testator, although sufficient time may have intervened between making the oral will and death to have permitted the making of a written will. *Godfrey v. Smith* 756
7. Evidence *held* to sustain verdict finding testator mentally capable of making a will. *In re Estate of Owen* 840
8. Where the verdict is the only one which could be sustained under the evidence, rulings on evidence will not be considered. *In re Estate of Owen* 840
9. When a subsequent will is lost or cannot be produced, it is competent to prove by parol that it contained a clause revoking a former will. *Williams v. Miles* 193
10. If a prior will is proposed for probate by a beneficiary, it will not be presumed that the testator destroyed a later will, with intent to revive the former one. *Williams v. Miles* 193
11. Evidence of a conversation with deceased as to a former will *held* properly excluded. *In re Clapham's Estate* 492
12. Under a will and the evidence, *held* that the wife's interest in certain property was limited to the amount necessary to maintain her, and to give not to exceed $10,000 to charity, the equitable title to and interest in the remainder passing to the collateral heirs, to be distributed according to the terms of the will, the parol requests and directions of the testator. *Smullin v. Wharton* 690
13. Under a will and the evidence, *held* that a constructive trust arose in favor of collateral heirs, and that the wife should be charged as a trustee *ex maleficio. Smullin v. Wharton* 690

Wills—*Concluded.*

14. Under a will and the evidence, *held* that property to which a constructive trust attached was sufficiently definite to render the trust capable of enforcement. *Smullin v. Wharton* 690
15. In a will contest, *held* inequitable to tax the fees of a guardian *ad litem* against the contestant. *In re Clapham's Estate* 492

Witnesses.

1. A husband and wife are competent witnesses concerning the value of their household furniture. *Lincoln Supply Co. v. Graves* 214
2. An insufficient objection to the competency of a witness cannot be availed of as an objection to the competency of his testimony. *Lincoln Supply Co. v. Graves* 214
3. Under sec. 333 of the code confidential disclosures to a physician are for the benefit of the patient, who under sec. 334 may waive them. *Western Travelers' Accident Ass'n v. Munson* 858
4. Such waiver may be part of the contract sought to be enforced in the action in which such testimony is offered. *Western Travelers' Accident Ass'n v. Munson* 858
5. A stipulation in a contract of life insurance that proofs of death shall consist in part of the affidavit of the attending physician constitutes a waiver under sec. 334 of the code, and renders the physician a competent witness as to confidential disclosures concerning last sickness of insured. *Western Travelers' Accident Ass'n v. Munson* 858
6. Where an accused person testifies he may be cross-examined as to matters brought out on his direct examination, but not as to matters not brought out which are incompetent and immaterial, and tend to disgrace him. *Razee v. State* .. 732