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WILLIAM POCHIN, APPELLEE, V. FRANK N. CONLEY ET AL., APPELLEES, IMPLEADED WITH V. E. JAKWAY, APPELLANT.

FILED SEPTEMBER 20, 1905. No. 13,893.

1. **Mortgage: DEFICIENCY JUDGMENT: LIMITATION.** An application for a deficiency judgment should be made within the time that the statute would bar an action on the note secured by the mortgage on the foreclosure of which the deficiency arises, the statute commencing to run from confirmation of the foreclosure sale.

2. **Married Women: MORTGAGE.** A married woman is not bound by the covenants in a deed or mortgage, where she joins with her husband in making the same for the sole purpose of releasing her dower interest. Comp. St. 1903, ch. 73, sec. 48.

APPEAL from the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

R. A. Moore, for appellant.

C. L. Gutterson, Charles H. Holcomb and *Moore & Ledwich, contra.*

DUFFIE, C.

Nels Anderson, one of the defendants, purchased 160 acres of land in Custer county from one Mary G. Thornburg in June, 1892, for $1,600. At that time there was an $800 mortgage on the land in favor of the Globe Investment Company, which mortgage was deducted from the purchase price. Anderson paid Mrs. Thornburg $500 in cash and gave a second mortgage on the land for $300 to secure the balance of the purchase money. The $800 mortgage given to the Globe Investment Company was transferred to William Pochin, who commenced foreclosure proceedings thereon and obtained a decree on December 3, 1896. The $300 mortgage given to Mrs. Thornburg was by her transferred to the appellent, Mrs. Jakway, who was made a party defendant in the foreclosure action commenced by Pochin. The decree found

that there was due on the mortgage held by Pochin $946.66, and on the mortgage held by Mrs. Jakway, $391.50. An order of sale issued on this decree and the land was sold in June, 1898, and the premises bought in by William Pochin, plaintiff in the action, for $600. The proceeds of the sale being insufficient to satisfy the decree in favor of Pochin, of course there was nothing to apply on the second lien of Mrs. Jakway. This sale was confirmed by an order of the district court entered on June 21, 1898, and the sheriff ordered to make a deed to the plaintiff, Pochin. The sheriff's deed was made October 29, 1898. On July 24, 1903, Mrs. Jakway filed in the district court for Custer county what is termed an "application for judgment and supplemental answer"; this paper being entitled the same as the foreclosure proceedings commenced by Pochin. In this application and supplemental answer Mrs. Jakway alleges all of the matters above set out, and states further that, the Pochin mortgage having been deducted from the purchase price of the land at the time Nels Anderson bought from Mrs. Thornburg, he was in duty bound to pay the same; that he and his wife, Clara Anderson, for the purpose of defeating the mortgage held by Mrs. Jakway and depriving her of her security, permitted Pochin to foreclose his mortgage, and after the decree and sale, but before the making of the sheriff's deed, Mrs. Anderson took from him a quitclaim deed, which, it is alleged, amounts to nothing more than a redemption from the sale. The prayer is that personal judgment may be entered against both Nels and Clara Anderson for the amount found due her by the decree in the Pochin foreclosure, and that the judgment be made a special lien upon the mortgaged premises. Both Nels and Clara Anderson filed answers, and by a lengthy reply filed by Mrs. Jakway the facts are set out more in detail; the theory being that, Mrs. Anderson having joined with her husband in the mortgage given to Mrs. Thornburg, she is now estopped by the covenants therein from setting up title to the land as against that mortgage. It is fur-

ther claimed that the money paid Pochin for the quit-claim deed was principally furnished by Nels Anderson, and that he is the equitable owner of the land. A decree went in favor of the Andersons, and Mrs. Jakway has brought the case here by appeal.

Among other defenses interposed by the Andersons was the statute of limitations, but the decree entered does not show what view was taken by the district court of that defense. Whether Mrs. Jakway in her answer in the Pochin foreclosure action asked for a deficiency judgment against Nels Anderson, who alone signed the note secured by Mrs. Jakway's mortgage, does not appear, but the presumption is that no such relief was asked, the foreclosure decree not making any reference to such a claim made either by Pochin or by Mrs. Jakway. We have, then, this case: A decree of foreclosure entered in December, 1896; a sale under that decree which was confirmed in June, 1898; a deed from the purchaser to Mrs. Anderson after the confirmation, but before the execution of the sheriff's deed. The confirmation of the sale devested Nels Anderson of his title to the property, and, while the sheriff's deed was not executed until October, 1898, he still became the equitable owner of the land upon the confirmation of the sale. *Lamb v. Sherman,* 19 Neb. 681; *Yeazel v. White,* 40 Neb. 432. The sale and the confirmation satisfied the Pochin decree to the extent of $600, the amount bid upon the land, and we do not see how it can be claimed that redemption from the decree could thereafter be made. After the sale to Pochin was completed by confirmation, he could sell his interest in the land, and Mrs. Anderson had the same right as any other to make the purchase. If the money was furnished by her husband, that fact might be established in a proper action and the land subjected to the satisfaction of any judgment against him; but it does not appear that Mrs. Jakway is a judgment creditor. Upon confirmation of the sale she was entitled to a deficiency judgment against Nels Anderson, who alone signed the note secured by her

mortgage; but no judgment has yet been established against him for a deficiency, and, if we treat the pleading in this case as an application for such judgment, the defense of the statute of limitations was interposed and ought to be sustained.

In *Durkee v. Kochler,* 73 Neb. 833, it was held that an 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. More than five years from confirmation having elapsed before the filing of this supplemental answer, the right to a deficiency judgment is barred by the statute, and the court properly dismissed the application. Mrs. Anderson is not estopped by the covenants in the mortgage held by Mrs. Jakway. She did not hold title to the mortgaged premises at the time it was given, but joined with her husband only for the purpose of releasing her dower. By section 48, chapter 73, Compiled Statutes 1903 (Ann. St. 10251), it is provided that "a married woman shall not be bound by any covenant in a joint deed of herself and husband," and, while it has been held that this statute was abrogated by the married woman's act, so far as it attempted to release her from covenants made in a conveyance of property held in her own right and in which her husband joins, the statute is still effective to protect her her against covenants contained in a deed in which she joins with her husband in a conveyance of property owned by him for the sole purpose of releasing her dower interest.

The decree of the district court was correct, and we recommend its affirmance.

JACKSON, C., concurs. ALBERT, C., not sitting.

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

AFFIRMED.

LANCASTER COUNTY ET AL. V. MARY FITZGERALD ET AL.

FILED SEPTEMBER 20, 1905. No. 13,869.

1. **Bond:** PLEADING. It is essential to a recovery on a bond to plead a breach of the condition, and a petition which fails to allege such breach is fatally defective.
2. **Waste:** COUNTY MAY MAINTAIN. When taxes against real estate are past due and unpaid, the county by which the taxes were levied may maintain a suit to restrain waste, where the acts complained of would reduce the value of the property to an amount insufficient to pay the taxes.
3. ———: ———. In order to maintain such suit it is not necessary that the county should first become a purchaser of the property at tax sale.

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.

J. C. McNerney, R. D. Stearns and *Frank D. Eager, contra.*

ALBERT, C.

This suit was brought by Lancaster county in 1902 to restrain the defendants from removing a building from certain lots on which the county claimed a lien by virtue of taxes levied by said county under its general authority to levy and collect them. In its original petition the plaintiff alleged the levy of the taxes against the property for the years 1892 to 1901, inclusive; that said taxes were past due and unpaid; that the lots with the building thereon are of sufficient value to pay said taxes, but would be wholly insufficient therefor should said building be removed; that the defendant Eager was proceeding to raze said building, and to remove the same and the material of which it is constructed from said lots.

A temporary restraining order was allowed. Shortly afterwards the plaintiff and the defendant Eager entered into a written stipulation to the effect that the restraining order should be dissolved upon said defendants entering into a bond to the plaintiff, with sufficient sureties, conditioned "that in case the taxes, or any part thereof, set out in plaintiff's petition shall be finally decreed to be a lien upon the building and material taken therefrom by said defendant, as alleged in plaintiff's petition, said defendant shall pay the amount of said taxes to the plaintiff county, not exceeding the value of said building." In pursuance of this stipulation the defendant Eager, with the United States Fidelity & Guaranty Company, as surety, gave the bond, and thereupon the restraining order was dissolved. Thereafter, leave of court having first been obtained, the county treasurer filed a petition of intervention, and the plaintiff filed an amended and supplemental petition. The petition of intervention and the amended and supplemental petition are substantially the same. Both allege the due levy of taxes for 1892 to 1901, inclusive, upon said lots, and the nonpayment of such taxes; that the property had been duly offered for sale at tax sale, but had not been sold for want of bidders; that said taxes, including interest, penalities, etc., aggregate $600; that since the commencement of the action the defendant Eager had removed the building from said lots, and disposed of the material in such a way that it could no longer be identified; that by reason of the removal of said building the lots were not worth to exceed $50, whereas before said removal they were worth more than sufficient to satisfy the said taxes, interest, penalties, etc. Both pleadings also contain allegations showing the execution of the bond hereinbefore referred to, a copy of which is set out in said pleadings, the dissolution of the restraining order in pursuance of the stipulation, and the formal allegation that the plaintiff and intervener respectively have no adequate remedy at law. The surety on the bond was brought in as a party defendant, and both it and the de-

fendant Eager demurred to the amended and supplemental petition of the plaintiff, as well as to the petition of intervention. The several demurrers were sustained, and plaintiff's amended and supplemental petition, as well as the petition of intervention, dismissed. The case is here on error.

So far as the demurrers interposed by the Fidelity & Guaranty Company are concerned, we have no hesitation in saying that they were properly sustained. Its liability, if any, is on the bond. The condition of the bond is "that if it shall be finally decreed that said items of taxes, or any of them, are a lien on said property, including the building on said lots, and if, in that event, the said Frank D. Eager shall well and truly pay such taxes as decreed," etc. No breach of this condition is pleaded. On the contrary, the record shows affirmatively that the decree upon which the payment of the taxes by Eager is made contingent has never been entered. Until that decree is entered there can be no breach of the conditions, and until there is such breach there can be no recovery on the bond. This obstacle to a recovery is not overcome by the allegation that there is no adequate remedy at law. While that plight is often held sufficient to give a remedy, it is never held sufficient to create a right, nor to vary or modify the stipulated condition upon which the liability of a party to an obligation depends. What we have said with respect to the Fidelity & Guaranty Company applies to the defendant Eager, so far as the plaintiff and the intervener seek to recover on the bond, because his liability on the bond is to be tested by the same rules as that of his surety, so far as the sufficiency of the pleadings in question is concerned.

But where a pleading is assailed by a general demurrer, the question is whether it entitles him to any relief; and although, as we have seen, neither the plaintiff nor intervener can recover on the bond, it still remains to determine whether the facts pleaded by them entitle them to any form of relief. The theory of the plaintiff and the inter-

vener seems to be that this is an action in the nature of waste, and, while we agree in the view that both petitions are sufficient to charge the defendant with waste, we are met with the defendants' proposition that neither the plaintiff nor the intervener have sufficient title to maintain waste. We are not unacquainted with the technical rules which formerly prevailed with respect to the action of waste, and the action on the case in the nature of waste, but these rules have been greatly relaxed. An injunction restraining waste was granted at the suit of a judgment creditor, whose judgment was a lien on the premises, in *Vandemark v. Schoonmaker,* 9 Hun (N. Y.), 16, and *Witmer's Appeal,* 45 Pa. St. 455; at the suit of an attaching creditor in *Camp v. Bates,* 11 Conn. *51, 27 Am. Dec. 707. See also *Jones v. Britton,* 102 N. Car. 166; *Thompson v. Lynam,* 1 Del. Ch. 64; *Braswell v. Morehead,* 45 N. Car. 26.

By the provisions of the revenue law then in force the taxes were a lien on the real estate. Comp. St. 1901, ch. 77, art. I, sec. 138. The county treasurer was authorized to enforce the collection of the taxes by a sale. To that end he was the trustee of the state and the subdivisions thereof for whose benefit the taxes were levied. *Logan County v. Carnahan,* 66 Neb. 685. That being true, in view of the authorities cited, it is clear to us that the county treasurer, as such trustee, had a right to bring and maintain a suit of this character. But when the taxes are collected they pass to the county, which then becomes the trustee for their disbursement. *Logan County v. Carnahan, supra.* As between the treasurer and the county the latter is the party ultimately entitled to the taxes, or, in other words, the real party in interest, and, as such, is competent to bring and maintain this suit. It follows from what has been said that Eager's demurrers, not only to plaintiff's petition, but to the petition of intervention, should have been overruled, not on the ground that they state a cause of action on the bond, because they do not, but because they do state facts sufficient to constitute a

cause of action for waste. The defendant Fitzgerald appears to be only a nominal party, and for that reason this will be a sufficient reference to her.

It is therefore recommended that the decree of the district court be reversed and the cause remanded for further proceedings according 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.

MAX BEER, APPELLEE, v. JOHN E. WISNER ET AL., APPELLANTS.

FILED SEPTEMBER 20, 1905. No. 13,879.

Real Estate Contract: CONSTRUCTION. A party borrowed the amount necessary to pay the purchase price of certain real estate, for the purchase of which he had made an oral contract with the owner, giving his note therefor. To secure the payment of the note it was orally agreed among the vendor, the vendee and the payee of the note that upon payment of the note the title of the real estate should be conveyed to the vendee, but upon default in such payment it should be conveyed to the bank. Afterwards the vendee was adjudged a bankrupt and a trustee appointed for his estate. *Held:*

(1.) That so long as the vendee, or those claiming under him, base their claim upon the three-sided contract, they must accept it in its entirety, and will not be permitted to avail themselves of those terms which are favorable and reject those which are onerous.

(2.) That the vendee took merely the equitable title, subject to a lien in favor of the holder of the note for the amount due thereon, and that the trustee of his estate occupies no more advantageous position.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Becler & Muldoon, for appellants.

Wilcox & Halligan, contra.

ALBERT, C.

This is an appeal from a decree of foreclosure. It appears from the record that one Baskins was formerly the owner in fee of the real estate involved, and that he entered into an oral contract for the sale thereof to one Baker. To enable Baker to raise the money to pay the purchase price, it was orally agreed among Baskins, Baker and the First National Bank of North Platte that the bank should advance the money required, taking Baker's note therefor; that upon the payment of this note the fee title to the premises should pass to Baker, but upon default in the payment of the note the title should pass to the bank. In pursuance of this agreement the bank advanced the money, which was paid to Baskins; Baker executed his note therefor to the bank, and Baskins executed a deed to the real estate, leaving a blank space for the insertion of the grantee's name, and delivered it to the president of the bank, with the understanding on the part of all concerned that, upon payment of Baker's note to the bank, the president should insert Baker's name in the deed as grantee and deliver it to him, but that, upon default of such payment, the name of the bank should be inserted as grantee and the deed delivered to it. Under this arrangement Baker took possession of the premises. Afterwards Baker transferred his interest in the premises to one Hamilton, and, in pursuance of an oral arrangement among the parties concerned, Baker's note to the bank was canceled, and that of Hamilton taken instead, with the same understanding for the transfer of the title to the premises on payment of this note or in default of such payment as had previously existed, save that Hamilton stood in the place of Baker. Hamilton in turn transferred his interest in the premises to the defendant Wis-

ner, and thereupon his note to the bank was canceled, and that of Wisner taken instead for the balance due on the purchase price. The understanding for the transfer of the title to the premises was renewed with respect to Wisner, who took possession and continued in possession of the premises until March 14, 1903, when he was adjudged a bankrupt, and the defendant Roach was appointed trustee of his estate. The trustee thereupon leased the premises to the defendant F. E. Wisner. On the 17th day of March, 1903, the bank transferred Wisner's note, which had been given in lieu of Hamilton's and which was then past due, to the plaintiff, and thereupon the plaintiff's name was inserted as grantee in the deed and the deed delivered to him. Afterwards on the 17th day of February, 1904, without any further consideration, Baskins executed and delivered to the plaintiff a quitclaim deed for the premises. The trial court found that the plaintiff had a lien on the premises for the amount due on the note given by Wisner to the bank for the balance due on the purchase price, and entered a decree of foreclosure, from which the trustee of the bankrupt estate alone appeals.

The appellant contends that the bank had no lien on the premises, and consequently none passed to the plaintiff by the transfer to him of the note by the bank. The argument in support of this contention is based on two propositions which are thus stated in the brief: (1) "The deed was void for all purposes, being executed and delivered in blank, and therefore no rights could be based thereon." (2) "The delivery of the deed, even though a valid deed, would not create a lien or mortgage, because it was not accompanied with any writing signed by any of the parties sought to be charged, wherein it was agreed that the deed should operate as a mortgage on the premises to secure said note, and this was the condition of matters on the said 13th day of March, 1903, when the defendant Wisner was adjudged a bankrupt, and upon which day the rights and interests of the trustees became vested."

Both of these propositions might be conceded, and still the plaintiff's right to a lien on the premises would not be negatived. Whatever right the appellant, the trustee of the bankrupt's estate, has in the premises, must be based on the three-sided contract for the purchase of the premises, and so long as he claims under that contract, he must accept or reject it in its entirety; he will not be permitted to avail himself of those terms which are favorable to him and reject those which are onerous. By the terms of that contract the title in fee simple was to pass to the bankrupt upon the payment of his note to the bank, and in default of such payment the title was to pass to the bank. The bankrupt could never compel a conveyance of the title in fee to him until he had performed or offered to perform his part of the three-sided contract, namely, paid his note to the bank; and the trustee of the estate of the bankrupt obviously occupies no better position. The note has not been paid, and the decree of the district court, which is an ordinary decree of foreclosure of a mortgage lien, is as favorable to the trustee as he has a right to ask, and we recommend that it be affirmed.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

NATHANIEL BROWNFIELD V. UNION PACIFIC RAILROAD COMPANY.

FILED SEPTEMBER 20, 1905. No. 13,822.

Trial: INSTRUCTIONS. Where a party has produced proof tending to sustain his theory of the case, he is entitled to have such theory submitted to the jury by suitable instructions, without qualifying words calculated to mislead the jury into the belief that, although they may find the theory of such party to be true, they may return a verdict for the opposing party.

ERROR to the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

Warrington & Stewart, for plaintiff in error.

John N. Baldwin, Edson Rich, John A. Sheean and *E. A. Cook, contra.*

JACKSON, C.

This is a proceeding in error to reverse a judgment of the district court for Dawson county, Nebraska. The plaintiff in error sued the defendant in error in the court below to recover the value of certain cattle, which in his petition he claims were killed by having been run over by certain of defendant's engines at a place where by law the defendant was required to maintain a fence along each side of its right of way; it being alleged in the petition that the defendant negligently omitted to maintain a suitable and sufficient fence along the south side of its right of way, and that a large number of plaintiff's cattle strayed upon defendant's right of way and railroad track, without any neglect or fault on the part of the plaintiff, and while said cattle were so on the defendant's railroad track the defendant, by its servants and employees, carelessly and negligently and without due caution, propelled certain of its engines, with cars attached thereto, over and upon fifteen head of the plaintiff's cattle, killing eleven and injuring and crippling four. The defendant, by its answer, denied that it did not maintain a suitable fence along each side of its right of way, and alleged that it did maintain such fence and that the same was in good repair. It admitted that it was a corporation, and denied each and every other allegation in the petition. It further alleged that if any injury was caused to said stock it was due to the carelessness and negligence of the plaintiff, and not by the carelessness or negligence of the defendant or any of its servants. The reply was a denial of any care-

lessness or negligence on the part of the plaintiff. There was a trial to the court and a jury, resulting in a judgment and verdict for the defendant. The plaintiff prosecutes error.

The evidence discloses that in the night time on the 16th day of August, 1903, a large number of the plaintiff's cattle entered upon the right of way of the defendant, and that a passing train struck and killed eleven cattle and injured four others.

Many assignments of error are presented by the petition, including the giving of instructions numbered 7 and 9, given by the court on its own motion. Instruction numbered 7 reads as follows: "The court instructs the jury that by the law of this state the defendant was required to erect and maintain a fence suitable and amply sufficient to prevent cattle from getting onto the railroad track, at and along the right of way, where the cattle were killed and injured. If plaintiff satisfies you by a preponderance of the evidence that defendant failed to keep and maintain such a fence as herein described, and that the cattle were killed and injured because of such fact, then the defendant is liable, and your verdict will be for the plaintiff, unless you find for the defendant upon other instructions herein given." It is contended that this instruction is erroneous because of the words, "Unless you find for the defendant upon other instructions herein given." With this contention we agree. The plaintiff was entitled to an instruction advising the jury that, if they were satisfied by a preponderance of the evidence that the defendant failed to keep and maintain a fence suitable and amply sufficient to prevent the cattle from getting onto its railroad track, and that, if by reason of that fact, the plaintiff's cattle escaped upon the railroad track and were killed, the defendant was liable, and that their verdict should be for the plaintiff. He was entitled to that instruction without qualification. The qualifying words added can have but one meaning, and that is, that under a certain state of facts it was the duty of the jury

to find for the plaintiff, unless they should find for the defendant. There is some evidence in the record tending to show that the fence in question was not suitable for the purpose required by the statute, and the evidence is undisputed that on the morning after the cattle were killed some of the wires were down in at least two places, and for that reason the error in the instruction was prejudicial.

Instruction numbered 9 is as follows: "The court instructs the jury that, if you find from the evidence that the stock escaped upon the track of the defendant through a gate erected by the company for the accommodation of the plaintiff, and the plaintiff at the time had failed to lock and secure the gate, and by reason of such failure on his part the stock went through such gate and upon the track and were there killed, then the defendant is not liable to the plaintiff for such killing, unless you should further find that the killing or injury to such cattle was done through the negligence of the servants of defendant in operating their train." The particular portion of this instruction complained of is that part reading as follows: "And the plaintiff at the time had failed to lock and secure the gate, and by reason of such failure on his part the stock went through such gate and upon the track and were there killed, then the defendant is not liable." It is doubtless true that the only obligation resting upon the plaintiff with reference to the gate was to close and secure the same with the means provided for that purpose by the defendant. He was not required to lock the gate, which according to the ordinary meaning of the word lock would be to lock the gate with a key. No such obligation could be imposed upon the plaintiff, especially under the facts in this case, which disclose that such was not the means provided by the defendant for securing the gate. The giving of the latter instruction, however, might not be held to be prejudicial, because the undisputed evidence is that on the evening before the cattle were killed the gate was fastened in the manner provided by the company for that

purpose, and that the means so provided were amply sufficient for the purpose intended.

For the error in instruction numbered 7 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 further proceedings.

REVERSED.

NANNIE W. FISCUS ET AL. V. JOSEPH R. WILSON ET AL.

FILED SEPTEMBER 20, 1905. No. 13,875.

1. **Mortgage**: CONSTRUCTION. A receives from B the sum of $5,000, and executes and delivers to B a mortgage on real estate providing for the payment of $300 per annum during the lifetime of B. The mortgage contains the following provision: "It is understood and agreed that the intention of the parties hereto is to secure to said B the interest on said principal sum of $5,000 during the term or period of his natural life, and, in case the interest is paid according to the terms thereof, the principal sum of $5,000 is to remain to said A, her heirs, executors, administrators and assigns, and upon the death of said B and payments of interest as aforesaid this obligation is to become null and void." *Held* not to be an attempt at a testamentary disposition of B's property.
2. **Contract**: CONSTRUCTION. In the determination of the rights of parties to a contract, the contract should be construed in the light of surrounding circumstances and the condition of the parties at the time of making it.
3. ———: ———. Where the parties to a contract have, with a knowledge of its terms, given it a particular construction, such construction will generally be adopted by the courts in giving effect to its provisions.

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

Robert Ryan, for plaintiffs in error.

A. M. Harrah, Geo. E. Hibner, Hall & Marlay, Willard E. Stewart, Thomas C. Munger, Mockett & Polk, C. O. Whedon and *N. K. Griggs, contra.*

JACKSON, C.

This action involves the right of certain heirs of William W. Wilson, deceased, in a partition proceeding, to participate in the distribution of the partitioned estate in proportion to their respective shares, without diminution on account of the financial transactions of such heirs with the deceased in his lifetime. William W. Wilson died intestate in Lancaster county on the 20th day of March, 1901. His surviving heirs were Joseph R. Wilson, Carrie W. Covert, Roxana Wilson, Mary A. Wilson, Carrie C. Slater, Katharine Saum Howard, Jay Saum, Jennie L. Shuster, D. Banks Wilson, William W. Cook, Nannie W. Fiscus, Zachariah T. Wilson, Burt Wilson, Minnie Wilson Royer, Foss Wilson and Gladys Glenn. During the lifetime of the deceased he delivered to Nannie W. Fiscus the sum of $5,000, and she, joining with her husband, executed and delivered to him a certain mortgage bond in the sum of $10,000, conditioned "for the payment of three hundred dollars ($300) on the 24th day of May, 1894, and the like sum of three hundred dollars ($300) on the 24th day of May of each and every year thereafter following, during the term of said Wilson's natural life; the said annual sum of three hundred dollars ($300) each being legal interest at the rate of six per cent. on five thousand dollars ($5,000) this day advanced to Nannie W. Fiscus by said Wilson; and, in case of default of said first parties hereto in the payment of any one of the said instalments of interest for the period of thirty days after said instalments of interest become due, then in that event the whole amount of said principal sum of five thousand dollars ($5,000), together with the interest thereon, shall become due and pay-

able forthwith; and it is understood and agreed that the intention of the parties hereto is to secure to said W. W. Wilson the interest on said principal sum of five thousand dollars ($5,000) during the term or period of his natural life, and in case the interest is paid according to the terms thereof, the principal sum of five thousand dollars ($5,000) is to remain to the said Nannie W. Fiscus, her heirs, executors, administrators and assigns, and, upon the death of said W. W. Wilson and the payments of interest as aforesaid, this obligation is to become null and void, and of no effect." This bond also described certain real estate in Pennsylvania, which the makers pledged as security for the performance of the conditions of the bond; and later in the bond it was provided: "In case of default being made at any time in the payment of any one of the said instalments of interest, or any part thereof, for thirty days after the same falls due as aforesaid, the whole of said debt and interest shall, at the option of the said party of the second part, his executors, administrators or assigns, thereupon become due and payable." A further provision in the bond was: "That if the said Calvin S. Fiscus and Nannie W. Fiscus, their heirs, executors, administrators and assigns, do and shall well and truly pay, or cause to be paid, unto the said party of the second part, his heirs, executors, administrators or assigns, the interest as aforesaid on the days and times hereinbefore mentioned and appointed for the payment thereof, in like money in the way and manner hereinbefore specified, and all taxes that may be assessed on this mortgage, without any fraud or further delay, and without any reduction, defalcation or abatement to be made for or in respect of any taxes, charges or assessments whatever, then and from thenceforth as well this present indenture, and the estate hereby granted, as the said obligations above recited, shall cease, determine, and become absolutely null and void to all intent and purposes; anything hereinbefore contained to the contrary thereof in anywise notwithstanding."

They also at the same time delivered what might be

termed a contract, containing this provision: "The condition of this obligation is such that if the above bounden Calvin S. Fiscus and Nannie W. Fiscus, his wife, their heirs, executors and administrators, or any of them, shall and do well and truly pay or cause to be paid unto the above named W. W. Wilson the just and full sum of three hundred dollars ($300) on the 24th day of May, A. D. 1894, and a like sum of three hundred dollars ($300) on the 24th day of May of each and every year following thereafter during the term or period of said Wilson's natural life, the said annual sum of three hundred dollars ($300) each being legal interest at the rate of six per cent. on five thousand dollars ($5,000) this day advanced by said W. W. Wilson to said Nannie W. Fiscus, and in case of default of said first parties hereto in the payment of any of the said instalments of interest for the period of thirty days after said instalments of interest become due, then and in that event the whole amount of said principal sum of five thousand dollars ($5,000), together with interest thereon, shall become due and payable forthwith. And it is understood and agreed that the intention of the parties hereto is to secure the said W. W. Wilson the interest on said principal sum of five thousand dollars ($5,000) during the term or period of his natural life, and, in case the interest is paid according to the terms thereof, the principal sum of five thousand dollars ($5,000) is to remain to said Nannie W. Fiscus, her heirs, executors and administrators, and assigns, and upon the death of said W. W. Wilson and payment of interest as aforesaid this obligation to become null and void and of no effect."

The interest payments on this bond were made by Nannie W. Fiscus and her husband up to and including the payment due in May, 1899, and no payments were thereafter made by them. On the 24th day of July, 1894, the deceased executed a formal release of the mortgage bond given by Nannie W. Fiscus and her husand. This release he had in his possession until some time in 1898, when it was delivered to S. B. Donaldson, an attorney at law at

Wilkinsburg, Pennsylvania, who later gave to Wilson a written receipt as follows: "Pittsburg, Pa., Sept. 23, 1898. Received from W. W. Wilson a release of a mortgage given by Calvin S. Fiscus and Nannie W. Fiscus, his wife, to said Wilson. The said mortgage is for $5,000 and recorded in the recorder's office of Allegheny Co. state of Pennsylvania, in mortgage book vol. 663, page 487. The said release and satisfaction is to be held in escrow by me and is to be recorded in said recorder's office of Allegheny Co. upon the decease of said W. W. Wilson. S. B. Donaldson."

Concerning the custody of this release, Mr. Donaldson testified: "That he met the deceased at the home of Nannie W. Fiscus, and, after being introduced to Mr. Wilson, Wilson said: 'I want to consult you about a mortgage which I hold against Mrs. Nannie Fiscus, covering this property here.' He said to me that he understood that some question might be raised as to the satisfaction of the same, notwithstanding the terms of the mortgage providing that it should be canceled and satisfied at his death. He said he had given Mrs. Fiscus this money, and that he did not wish her to have any difficulty whatever with it when he was gone, and that the property was to be entirely clear of the mortgage at the time of his death; that he had a paper prepared which he thought would satisfy the record in such a way as to make her title clear and unincumbered so far as his mortgage was concerned. He then proposed to leave said paper with me. In case of his death, I should file it or have it filed in the recorder's office of Allegheny county. He told me to take the paper with me and examine it carefully, and, if I thought it would not make such a record as would fully discharge the mortgage, to prepare another paper that would give her a record clear of said mortgage and that would not likely be questioned. * * * He said: 'I have given her this money, I want the record of her mortgage to be clear when I am gone.' * * * Mr. Wilson said that he intended only to collect interest on the money so long as he

saw fit, and in no event was there any interest or any money whatever to be accounted for by Mrs. Fiscus or her husband at the time of or after his decease. I was to keep said release, which he delivered to me, until after his death, and then to be entered by me of record, and not to be recorded before that time unless he authorized me to do so." The release was filed and recorded on the 1st day of April, 1901.

On July 7, 1898, the deceased wrote a letter to Mrs. Fiscus from Lincoln, Nebraska, in which he said: "Has Mr. Donaldson given you his opinion of the matter and where? If so, tell me what he said, and if he wants me to execute some new papers. I am anxious to have it done right, as I want you to have no further trouble about it when I am gone the way of all flesh; so ask him to give you his opinion and not me. I will in all probability write Mr. Donaldson and try and fix things that will last." In a later letter he said: "Was glad to know that Mr. Donaldson thought the release I gave him to hold was sufficient; but if at any time he should alter his opinion, let me know it, and we will make new writings that will be good, as I am very anxious to make it beyond a doubt."

On the 28th day of April, 1894, Katharine Saum Howard, then Katharine Saum, received from the deceased the sum of $3,000, and at that time executed and delivered to the deceased a mortgage on certain real estate in Iowa. The conditions of the mortgage were as follows: "Provided, always, that these presents are upon the express condition that if the said Katharine Saum or her heirs, executors or administrators, shall pay or cause to be paid to the said W. W. Wilson, during the full term of his natural life, the sum of one hundred and eighty dollars ($180) annually—said payments shall commence the first day of May, 1895, and annually on the first day of May thereafter during his life; said sum being interest at the rate of six (6) per cent. per annum upon the aforesaid sum of three thousand dollars ($3,000)—and also pay six

(6) per cent. per annum on all annual payments that are not paid at maturity, then and in that event these presents shall be void and of no effect. And it is further agreed and understood that in case default be made at any time in the payment of any one of said instalments of interest, or any part thereof, or for taxes that may be assessed or levied on said premises for thirty days after the same become due and delinquent as aforesaid, then the whole of said debt and interest shall become due and payable at the option of said W. W. Wilson. And it is still further provided that if the said Katharine Saum, her heirs, administrators or executors, shall refuse or neglect at any time to pay the taxes when due as herein provided, then the said W. W. Wilson may pay the same, which sum so paid, with ten (10) per cent. interest per annum, shall be a lien upon said premises like the principal. The intention of this instrument is to secure to the said W. W. Wilson, during his natural lifetime, the interest upon three thousand dollars ($3,000) at the rate of six (6) per cent., payable annually, and in the event these conditions are strictly fulfilled, the said sum of three thousand dollars ($3,000) shall be vested in the said Katharine Saum, her heirs, administrators or executors, forever." The annual payments provided for by the mortgage had been fully paid at the time of Wilson's death, so that there was no default on the part of Katharine Saum Howard.

On July 10, 1900, the deceased wrote Mrs. Howard from Lincoln, addressing her as follows: "Dear Katharine: I wrote you yesterday and forgot to mention about that release I left with Mr. Harrah. You do not really need a note from Mr. H., but you had better preserve his letter to you acknowledging the note of the release left by me. That is all you need, but I took a receipt from him as it is necessary in case it should be put on record without my consent. I think you are perfectly safe, as you have his letter explaining you that he has it, and that is as good as a formal receipt, so don't worry any more over that. And if anything happens to me, you know where it is, and all

you have to do is to pay up the interest to the date of my death and get the release."

On the 1st day of June, 1894, Wilson executed a formal release of the Katharine Saum mortgage, and on June 27, 1900, delivered the release to A. M. Harrah, an attorney at law at Newton, Iowa, taking Mr. Harrah's receipt, as follows: "Newton, Iowa, June 27, 1900. Received of W. W. Wilson a release of mortgage securing a $3,000 mortgage signed by Katharine Saum, recorded in book 189, page 126, Jasper Co., Iowa. Release to be held in escrow until notice of death of Wilson, then to be placed on record on evidence being produced that interest is paid to date of said death. Then record to be delivered to said Katharine. A. M. Harrah." After Mr. Wilson's death this release was properly recorded. On the same date of the transaction with Katharine Saum, Jay Saum received from the deceased the sum of $3,000, and on the same date executed and delivered to the deceased a mortgage on real estate in Iowa, containing provisions substantially the same as those found in the mortgage given by Katharine Saum. The annual payments provided for in the Jay Saum mortgage were all made, the last payment having been made by a promissory note, and acknowledged by the deceased by a letter as follows: "Lincoln, Nebraska, May 22, 1900. Jay Saum, Esq., Dear Nephew: I found your letter of the 9th inst. awaiting me on my return from Kansas City and Wichita, enclosing your promissory note for $170, payable on one year from May 1, 1900, with 6 per cent. interest, for which I am very thankful, as it closes up the interest to May 1, 1900. I inclose you a note, which please carefully preserve, as it may be useful some day." The deceased also executed a formal release of the Jay Saum mortgage, and on June 27, 1900, delivered the same to Mr. Harrah, taking from him a receipt substantially like the one given for the Katharine Saum release. This release was also recorded after the death of Mr. Wilson. No notes were taken by the deceased from Katharine or Jay Saum in connection with his transactions with them.

After Wilson's death, George E. Hibner was appointed and qualified as administrator of the estate, and at the time of the commencement of this action the administration of the estate had proceeded beyond the time appointed for the filing of claims against the estate, and it was determined that the personal property was sufficient to pay all indebtedness and the cost of administration, and thereupon Katharine Saum Howard, Jay Saum, Roxana Wilson, Nannie W. Fiscus and William W. Cook commenced an action for the partition of the real estate involved in this controversy; the remaining heirs and the administrator were named as defendants. Thomas C. Munger was appointed guardian *ad litem* for the defendant Mary A. Wilson, a person of unsound mind, and answered in her behalf. R. S. Mockett was appointed guardian *ad litem* for the defendant Gladys Glenn, and answered in her behalf. Foss Wilson, Zachariah T. Wilson, Burt Wilson, Minnie Wilson Royer, Joseph R. Wilson and Jennie L. Shuster also answered. In each of the answers above referred to it was alleged that William W. Wilson in his lifetime loaned to Nannie W. Fiscus the sum of $5,000, to Katharine Saum Howard the sum of $3,000 and to Jay Saum the sum of $3,000. Copies of the mortgages given by them, together with a copy of the contract with Nannie W. Fiscus and her husband, were attached to and made a part of the answers, and it was alleged that no part of the principal or interest had been paid. They prayed for an accounting of the several sums due under the conditions of the mortgages, and that the amounts so found due be set off against the respective shares of Nannie W. Fiscus, Katharine Saum Howard and Jay Saum. Carrie W. Covert answered, but did not controvert the right of Nannie W. Fiscus, Katharine Saum Howard and Jay Saum to participate according to their shares. Nannie W. Fiscus, Katharine Saum Howard and Jay Saum replied, admitting the execution and delivery of the mortgages by each of them, and the contract by Nannie W. Fiscus; alleging that the sums received by them were

gifts on the part of Wilson during his lifetime; that they had fully complied with all of the conditions named in the mortgages, and alleged that the heirs of William W. Wilson had no right in this action to obtain a decree establishing claims for money against other heirs; that no one but the administrator of the estate of Wilson could sue for, collect or enforce payment of any claim, or maintain an action therefor. They also challenged the jurisdiction of the court to adjust money claims between heirs, or to assign to heirs the residue of estates of deceased, alleging that such jurisdiction belonged exclusively to county courts. Upon the issues thus presented there was a trial, and the court found, among other things: "That during the lifetime of William W. Wilson he loaned money to each of the hereinafter named heirs, and that on the 23d day of September, 1898 (?), he loaned to Nannie W. Fiscus the sum of $5,000, to Katharine Saum Howard the sum of $3,000 on the 28th day of April, 1894, and to Jay Saum the sum of $3,000 on the 28th day of April, 1894. That at the time of the loans so made to Nannie W. Fiscus, Katharine Saum Howard and Jay Saum, said persons above named executed and delivered to William W. Wilson bonds and mortgages to secure the payment of said sum of money so received by each of them, and the interest thereon. And the said mortgages or bonds so executed by the several parties to the said William W. Wilson, deceased, provided, among other things, that it was understood and agreed that the intention of the parties thereto was to secure to the said William W. Wilson the interest on said principal sums so advanced, during the term or period of the natural life of the said William W. Wilson, and that in case the interest was paid according to the terms thereof the principal sum was to remain to the said mortgagors, their heirs, executors, administrators and assigns, and that upon the death of the said William W. Wilson and the payment of interest as aforesaid the obligations or mortgages so executed by them to secure such money as herein described were to become null

and void and of no effect. That the said William W. Wilson, at or about the time of making such advancements as are herein described, executed releases of the said mortgages and satisfactions thereof, retaining the same in his possession or depositing the same in escrow to be delivered to the said parties to whom such advances had been made, conditioned upon the performance of the several conditions therein expressed; the more important of which was the payment of the interest by the several parties upon the amounts so advanced to them by the said Wilson at the time said interest became due up to the time of his death as aforesaid. And it was clearly the intention of the said William W. Wilson that the said advancements so made to the several parties herein, should be considered and was intended to constitute gifts to take effect upon his death, conditioned upon the payment of the interest as aforesaid. That said Jay Saum and Katharine Saum Howard had paid all interest due and owing upon their several obligations at the time the same became due, and at the time of the said William W. Wilson's death they were not in default of any of the conditions of their several obligations expressed. That the said Nannie W. Fiscus paid interest upon the amount so advanced to her by said William W. Wilson up to March 24, 1899, but had not paid or offered to pay any interest on said advancement subsequent to said date, and at the time of the death of the said William W. Wilson was in default of interest since the 24th day of March, 1899.

"Upon the foregoing facts the court finds the following conclusions of law: In the construction of the contracts between the several parties herein and now under consideration in this case, it is only necessary to consider, in determining the issues joined between the parties, the act to be performed and the manner of performing it. And such construction therefore must be adopted as will give effect to the provisions which carry out the intent of the contract made between the claimants herein and the deceased William W. Wilson. It does not seem to the court

necessary to pass upon the question, so far as the contract with Nannie W. Fiscus is concerned, as to whether that constituted a gift *'inter vivos'* or not. The payment of the advances were dependent upon the condition that interest should be paid on the sums so advanced until the death of the said Wilson. The said claimants having defaulted in the performance of this vital condition, it is clear to the court that, notwithstanding the findings heretofore made 'that it was the intention of the said Wilson that such advances should never be returned or repaid, provided the interest thereon should be paid until his death,' the said claimant, Nannie W. Fiscus, having failed to pay such interest, forfeited her rights under the contract. The court is therefore of the opinion that the said Nannie W. Fiscus should be charged with the sum so received. The only remaining question to be determined by the court in this case is the rights of Jay Saum and Katharine Saum Howard in the premises. They having complied with all of the conditions of said contract were entitled to the release of their several mortgages, and would be entitled to their share of said estate in addition to the advances so made to them. Therefore it is adjudged by the court that the defendant, Nannie W. Fiscus, be charged with the sum of $5,000 from her distributive share of the estate of William W. Wilson, deceased, and that the advances made by the said William W. Wilson during his lifetime to the other heirs of said estate, as above found, be, and the same hereby are, decreed to be canceled and paid in accordance with the contract as hereinbefore found."

In the final disposition of the case in the district court the court allowed to Mr. Munger and Mr. Mockett, as guardians *ad litem,* certain attorneys' fees, and directed that such fees should be charged to the entire estate. Nannie W. Fiscus brings the case to this court by petition in error because of the judgment of the lower court charging her with the sum of $5,000 received by her from the deceased in his lifetime, and directing that the same be

set off against her share of the estate. She also alleges error in the allowance of attorneys' fees to Messrs. Munger and Mockett and charging the same against the entire estate. Katharine Saum Howard and Jay Saum have filed cross-petitions in error, solely on the ground of the question of the attorneys' fees allowed to the guardians *ad litem*. Those of the defendants contesting the right of Katharine Saum Howard and Jay Saum to participate in the distribution without diminution filed cross-petitions in error because of the judgment allowing Katharine Saum Howard and Jay Saum to participate in the distribution without accounting for the controverted sums received by them from the deceased. They have, however, presented a motion to be permitted to dismiss their cross-petitions and to be allowed to proceed as by appeal. That motion is submitted with the merits of the controversy, and is allowed.

Omitting for the present the question of attorneys' fees, the contention of the parties in this court may be summarized as follows: The parties to the action who oppose the right of Nannie W. Fiscus, Katharine Saum Howard and Jay Saum to participate in the distribution without accounting for the sums received by them from the deceased now contend that the transaction of the deceased with reference to the sums received from him by those parties was an attempt on the part of the deceased to make a testamentary disposition of the sums so received. On the contrary, it is contended by the other side that the sums received by them should be treated as gifts *inter vivos*.

Taking up first the claim of an attempted testamentary disposition of the property of the deceased, we find ourselves unable to agree with that contention. A testamentary disposition of property involves the act or will of a single individual, a condition that does not here exist. The question involved is rather one arising out of contracts between parties in every respect possessing the capacity to contract. The rights of the parties must, therefore, depend upon their contract obligations, and in the

determination of those rights the contracts should be considered in the light of surrounding circumstances and the condition of the parties at the time of making them. Where the parties to a contract have, with a knowledge of its terms, given it a particular construction, such construction will generally be adopted by the courts in giving effect to its provisions. *Paxton v. Smith,* 41 Neb. 56; *Lawton v. Fonner,* 59 Neb. 214. Where both parties to a contract, regarding which there may be doubt or uncertainty as to the proper construction, by their acts under and with reference to it, and with knowledge of its terms, have given to such contract one and the same construction, it is generally a safe rule to adopt such construction. *State v. Board of County Commissioners,* 60 Neb. 566.

It becomes important, therefore, to consider the relations which these parties sustained toward the deceased, and the course which they pursued with reference to the contracts subsequent to the time of their execution. No one could read the record in this case without becoming convinced that Nannie W. Fiscus and Katharine Saum Howard were favorite nieces of the deceased, and that Jay Saum was a favorite nephew. He seems to have been a frequent visitor at their homes. His communications to them were of a kindly and endearing nature, and his every act in connection with the transactions involved showed a deep solicitude for their welfare and the ultimate benefits which they might enjoy from his bounty. There were frequent defaults in the payment of the instalments of interest, sometimes extending partially for a year or more after the time of payment, and no word of protest or act on the part of the deceased because of such default, and the fact that after such defaults had occurred he took the precaution to place the discharge of the mortgages, executed by these parties in his favor, in the hands of third persons, in connection with the statements made by him at the time they were so deposited, seems to show conclusively that it was never his intention to require a return of the principal sums given by him to these relatives. The intention of the

deceased is fully expressed in his letter of July 10, 1900, to his niece, Katharine Saum Howard, wherein he says, in reference to the release left with Mr. Harrah: "If anything happens to me, you know where it is, and all you have to do is to pay up the interest to the date of my death and get the release." This letter gives force to the testimony of the witness Donaldson concerning the conversation had by him with the deceased, at the time of the delivery to him of the Nannie W. Fiscus release, wherein he states that the deceased informed him that he had given Nannie W. Fiscus the $5,000; that his intention was to collect interest on it so long as he saw fit, but that he had given her the $5,000. Upon a consideration of the evidence in the case, we are impelled to construe the contract between the deceased and these parties so as to give effect to the evident intention of the parties, and to hold that in the distribution of the estate neither Katharine Saum Howard, Jay Saum nor Nannie W. Fiscus should be charged with the principal of the sums received by them. They should, doubtless, be charged with interest on such sums, not already paid, up to the date of the death of Mr. Wilson.

As to the matter of attorneys' fees, counsel who were appointed guardian *ad litem* for their respective wards were entitled to have their fees allowed by the court and taxed as a part of the costs of the case. The only question is whether it would be equitable in this suit to require that item of costs to be paid by all of the parties in proportion to their interest. The general rule is that in a partition proceeding, where such proceeding is adversary, counsel fees may not be taxed against the entire estate, and while in such cases, where infants are parties, considerable latitude has been given to the discretion of trial courts, yet where, as in this case, the appointment is not a mere formal one, but is for the purpose of conducting the litigation on behalf of the wards, and such wards choose to make the proceeding an adversary one, we think the more equitable rule is to require them to stand on the same footing with other parties to the litigation, and, under the cir-

cumstances as they are here presented, we think the trial court erred in requiring such fees to be borne by all the parties in proportion to their interest.

We recommend that the judgment of the district court as to Nannie W. Fiscus, and in so far as it taxes attorneys' fees to be borne by all the parties, be reversed, and that the cause be remanded to the district court, with instructions to enter a decree in conformity with this opinion.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court as to Nannie W. Fiscus, and in so far as it taxes attorneys' fees to be borne by all the parties, is reversed, and the cause is remanded to the district court, with instructions to enter a decree in conformity with this opinion.

JUDGMENT ACCORDINGLY.

FRANK SPENCER v. OLIVER WILSON.

FILED SEPTEMBER 20, 1903. No. 13,902.

1. Variance: REVIEW. Where a party relies upon a variance between the pleadings and the proof to defeat a recovery, that question should be raised at some time during the progress of the trial, and, unless it is so raised and suggested to the trial court, it will not be considered on error in this court.
2. Record examined, and found to contain evidence to sustain the judgment.

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

C. E. Spear, for plaintiff in error.

J. E. Wilson and *R. F. Williams, contra.*

JACKSON, C.

The defendant in error, herein styled the plaintiff, commenced an action in the district court for Boone county against the plaintiff in error, herein styled the defendant; his petition, omitting the caption, being as follows: "Plaintiff says that during the months of June, July, August and September, 1903, the defendant unlawfully and wrongfully, with force, broke and entered upon the wheat field of the plaintiff, situated on the west 30 acres of the southeast quarter of section 3, township 18, range 5 west, in Boone county, Nebraska, and then and there with his hogs trod down, ate up, and turned over shocks of wheat, causing the wheat to rot, and destroying the same to the amount of 125 bushels of wheat, of the value of 55 cents a bushel, amounting to $68.75 damages to the plaintiff, which defendant converted to his own use; that the said wheat while in the shock was on the above described land, and that the plaintiff had the possession and control of the said land and wheat, and was the owner of the wheat; that the defendant entered thereon without the consent of the plaintiff, and damaged and destroyed the said wheat, and that the damage was not of the fault or negligence of the plaintiff; that the plaintiff has demanded pay for the said damages from the defendant, which the defendant refuses to pay. That the plaintiff is damaged to the amount of $68.75 by the said defendant. Plaintiff asks judgment for $68.75 damages, and interest at 7 per cent. from July 1, 1903, and costs of suit." The answer was a general denial. The parties waived a jury, and the case was tried to the court, who found for the plaintiff and assessed his damages at $40, for which, with costs of suit, judgment was entered. The defendant prosecutes error to this court, and now urges that the damages are excessive, the judgment is contrary to law and is not sustained by sufficient evidence.

A considerable portion of the defendant's brief and argument is devoted to an attempt to demonstrate that there

is a variance between the pleadings and the proof; that the case stated in the petition is one in trespass, while the evidence tends only to support an action in trespass on the case. The record discloses that this question was at no time raised during the trial. The evidence of the plaintiff was offered and admitted without objection or exception. There was no attempt at the close of the plaintiff's case to nonsuit the plaintiff. The defendant proceeded with the introduction of evidence to controvert the case made by the plaintiff, and submitted his case upon the evidence so adduced. In *Knight v. Finney*, 59 Neb. 274, Mr. Justice HARRISON, who delivered the opinion of the court, in a discussion of the question of variance in that case, said:

"It is argued that there were fatal variances between the note in suit as pleaded and the one introduced in evidence. There were some differences, but none material to the issues, or the existence of which could in the least prejudice the rights of the complainant; moreover, the error, if any, in this regard, was in no manner the subject of notice, objection or exception in the trial court, and is not entitled to consideration here."

It is evident that in the trial court both parties placed a construction upon the pleadings different from the one now contended for by the defendant, and, that being true, where the case was fairly tried in the court below upon a theory adopted by both parties, they should not in a proceeding in error be permitted to adopt a different theory. If the defendant is correct in his construction of the petition, he should have raised that question in the court below, where the plaintiff would have been given an opportunity, upon proper terms, to remedy the defect in his pleading.

Concerning the question of the sufficiency of the evidence to support the judgment, there is evidence in the record sufficient to sustain the findings of the trial court. It may be true that the evidence would also have sustained a finding for the defendant, but in this court the case

stands as though it had been tried to a jury, and a verdict rendered and judgment entered upon conflicting evidence; and adhering to the long established rule of this court the judgment will not be disturbed.

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

DUFFIE, C., concurs. ALBERT, C., not sitting.

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

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL. V. JOHN H. HARLEY.

FILED SEPTEMBER 20, 1905. No. 13,909.

1. **Evidence** examined, and *held* to present a state of facts from which different minds might reasonably draw different inferences.
2. **Proximate Cause of Injury**: QUESTION FOR JURY. Where the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, it is a proper question for the consideration of a jury. *Lincoln Traction Co. v. Heller*, 72 Neb. 127.

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

J. W. Deweese and *Frank E. Bishop*, for plaintiffs in error.

A. W. Field, contra.

JACKSON, C.

This is a proceeding in error to reverse a judgment of the district court for Lancaster county. The defendant in error, hereafter styled the plaintiff, sued the plaintiffs in

error, hereafter styled the defendants, on account of a personal injury which he claims he sustained by reason of certain negligent acts of the defendants; the allegations of his petition material to the inquiry being: "On or about the 27th day of August, 1902, the said defendant railway company and the said defendant John Kreps, its foreman, negligently and carelessly placed the said handcar, with shovels and tools and the coats and dinner pails of the said workmen loaded thereon, in the said road near the track, and on the south side thereof, thereby negligently and wrongfully obstructing the road at said crossing, and so placing the same that it was impossible for any one desiring to use said crossing to pass over it. The workmen of the said defendant company, under the direction of the said Kreps, left said handcar so standing in the road and, at the time of the injuries herein complained of, had proceeded eastward along the railroad track about 300 feet, where they were at work. In the forenoon of said 27th day of August, 1902, the plaintiff John H. Harley, with one Frank Davey, was traveling along the public highway from Malcolm, and attempted to cross the railroad track at the crossing above described. The rails of said track at the point of said crossing were about five feet higher than the ground where said handcar had been left, and about five feet higher than the roadway along the north side of said track where the plaintiff and said Davey were driving. Upon reaching the right of way, at a point about 20 feet north of the defendant's track, said Davey, who was driving the horse, noticed an obstruction in the roadway on the south side of the track, and, placing the horse in charge of the plaintiff, left the vehicle and went forward to investigate. About this time the defendant Kreps, with the workmen, came to the crossing, and finding it impossible for the team to pass because of the obstruction by the handcar, on his volition and without request of the plaintiff or of said Davey, proceeded, with the assistance of said workmen, to remove said handcar from the roadway and place the same on the track. Plaintiff alleges that said

Kreps and said workmen moved the handcar along the roadway and upon said track in a careless, negligent and wrongful manner, so that the horse in charge of the plaintiff became frightened and unmanageable, because of the moving of said handcar along the roadway and upon the tracks, and ran eastward along the right of way of the defendant company, and at a point about 140 feet east of said crossing overturned the vehicle, throwing the plaintiff out, breaking his leg and rendering him unconscious. Plaintiff alleges that the horse in his charge at said time was of gentle disposition and safe for driving purposes, was accustomed to be driven near railroads, and was not frightened by the operation of cars along and upon railroad tracks; but that, because of the unusual sight of the handcar left standing in the road, and because of the negligent manner in which the same was moved along the road, and because of the unusual noise caused by said moving and the rattling of the tools, utensils and pails on said handcar, said horse became frightened and ran away." The defendants filed separate answers, in substance denying the allegations of the petition, and alleging that the injury received by the plaintiff was by reason of the running away of the horse, and that it was due to the carelessness and negligence of the plaintiff, and without fault or negligence on the part of the defendants. Plaintiff's reply was a general denial. There was a trial to the court and jury, resulting in a finding and judgment for the plaintiff. The defendants prosecute error to this court.

Many assignments of error are suggested in the petition, but, in the brief of the defendants and at the submission of the case in this court, counsel have suggested that they prefer to submit the case on the merits of the question of liability, rather than upon any technical error that would cause a reversal and a new trial, and that the facts upon which they rely for a disposition of the case, finally and without a new trial, are the facts that are admitted and sworn to by the plaintiff himself. We have examined the bill of exceptions and find competent evidence tending to

establish the following facts: The plaintiff is a resident of the city of Lincoln, where he is employed as secretary of a life insurance company. The company have agents at Malcolm, this state, and on the 27th day of August, 1902, the plaintiff was at that point for the purpose of assisting the company's agents in closing up some business they there had in view. One of the agents was a Mr. Davey, at whose home the plaintiff was a guest. Davey owned a farm about one mile distant from the town of Malcolm, of which a small tract was cut off from the balance of the farm by a creek, and the tract so cut off was accessible only by a private crossing over the right of way of the defendant company. The company's right of way was 50 feet wide on each side of the center of its track. At the point where the private crossing was located there was a fill of some four or five feet for the purpose of the company's roadbed, with borrow ditches on either side, and for the purpose of the crossing the company had built culverts over the borrow ditches, and Davey had built a grade from the culverts to the top of the fill. That portion of the driveway over the crossing that was used for travel was about ten feet wide, and on each side sunflowers had grown up as high or higher than a buggy top. The crossing opened into the public highway on one side and Davey's field on the other. The plaintiff was invited to accompany Davey's son to that portion of his farm reached by means of this private crossing, and hold the horse while he, Davey, procured some potatoes. The conveyance used on the occasion was a top buggy drawn by a single horse, known to be gentle and accustomed to be driven in that locality. He entered the buggy and accompanied Davey. They drove along the public highway, parallel with the defendant company's right of way, until the private crossing was reached. Here they started across, when, about half way between the railroad and the public highway, they discovered a handcar on the other side of the railroad track. Davey left the carriage in charge of the plaintiff and went across the track to see whether the handcar would interfere with

their crossing over the railroad. When Davey reached the car he informed the plaintiff that it would be necessary to remove the car from the crossing before they could pass over. The section foreman and crew of the defendant company in charge of the car were engaged in some repairs along the track at some distance away, and observing the presence of Davey and the plaintiff at the crossing, left their work and approached the crossing with the view of removing the car. On the handcar was clothing of the section crew, together with their dinner buckets. As the car was moved forward onto the track the dinner buckets rattled, and the horse, then being held by the plaintiff himself, who was alone in the carriage, being frightened, started to back up, the buggy was cramped, and the plaintiff, fearful of being overturned, undertook to control the horse and keep its head toward the car; but the horse became unmanageable and started to run down the defendant company's right of way. Plaintiff attempted to rein it back to the public highway. In doing so the buggy was overturned, the plaintiff was thrown to the ground and sustained a serious injury. The plaintiff had never before visited the place where the injury was received, and was therefore entirely unfamiliar with the crossing and surroundings. It was the custom of the section crew of the defendant company to leave the handcar where it was on this occasion, when at work in that vicinity. The car was on the wagon track and was so situated as to obstruct travel.

It is contended by the defendants that the leaving of the handcar at this crossing was not the proximate cause of the injury, and that, even though it may be held to have been an act of negligence on the part of the railroad company to have left its car on this crossing, still the plaintiff cannot recover, for the reason that the plaintiff himself was negligent in not permitting the horse to turn away from the object at which it was affrighted, and that the injury which he sustained was the direct result of his own negligent course in undertaking to keep the horse with its

face toward such object, and that he could readily have avoided the danger by turning the horse back toward the public highway. The question does not arise out of the ordinary use of a railroad track at a crossing, such as the operation of trains and handcars, or of the temporary obstruction to travel growing out of such use, but it involves the right of a railroad company, in the first instance, to remove a handcar from its track and place it upon a crossing in such a way as to obstruct travel, as well as the course subsequently pursued by the plaintiff when he found the highway so obstructed. There is no distinction in principle between a public and private crossing, in so far as the questions involved in this case are concerned; and, unless the plaintiff's own negligence was the proximate cause of his injury, then the case ought, to some extent, to be determined by the right of the railroad company to place its handcar upon the crossing as it did in this case.

In *Vars v. Grand Trunk R. Co.,* 23 U. C. C. P. 143, it appears that employees of the defendant removed a handcar from the track onto the public highway and went away and left it. "The plaintiff drove past in his carriage, and his horse, shying at the car, ran away, threw the plaintiff out and severely injured him. *Held,* that there was evidence of negligence to go to the jury, in thus placing the car on the highway, for which defendants were responsible; and a verdict for the plaintiff was upheld." In that case it was said by the court: "It was a matter entirely for the jury to say whether the vehicle in question was one calculated to cause the injury, and whether the place in which it was left was, or was not, a fit and proper place for it, so as to render the defendants guilty of negligence in so placing it."

In *Sherman S. & S. R. Co. v. Bridges,* 16 Tex. Civ. App. 64, 40 S. W. 536, the facts were as follows: Plaintiff's wife aproached defendant's railroad crossing, driving a horse which she had driven for several years and which had been found to be gentle. Defendant's employees had

left a handcar loaded with tools in such a position as to obstruct the highway, and the horse became frightened at the obstruction, and, after the employees had moved the handcar off the crossing, the woman urged the horse across the tracks, and it then ran away and she was killed. *Held,* that she was not guilty of contributory negligence, and that obstructing a highway, by allowing a handcar filled with tools and surrounded by employees dressed in white and blue garments to remain thereon, is such negligence as will render defendant liable for the death of one whose horse was frightened at the obstruction. In that case the crossing was a private crossing.

In *Atchison, T. & S. F. R. Co. v. Morrow,* 4 Kan. App. 199, 45 Pac. 956, it was said: "Where section-hands, in repairing a railroad track, place a handcar, with tools, buckets and coats thereon, by the side of the track, and within the margin of a highway, near the traveled road, in such a position as naturally or manifestly to be calculated from its appearance and situation to frighten horses of ordinary gentleness and broken to travel along the same, and a traveler on the highway, riding a horse of ordinary gentleness and broken to travel along the road, and exercising ordinary care and prudence, attempts to cross the railroad track, and in passing said handcar his horse is so frightened that he becomes unmanageable, and in his fright throws the rider to the ground and thereby injures him, it would be such negligence on the part of the employees of the railroad company as would render the company liable for damages sustained thereby."

And in *Ohio & M. R. Co. v. Trowbridge,* 126 Ind. 391, it is found: Where a woman was thrown and injured by her horse taking fright at a handcar, which two minutes before, and while she was approaching in full view of the section men, had been left by them standing ten feet from the center of the highway, the evidence of negligence proximately causing the injury is sufficient to sustain a verdict against the company.

In the light of these authorities, and taking into con-

sideration the ordinary and rightful use of crossings over railroads and the obligations of railroad companies with reference thereto, we conclude that the jury were justified in finding that the placing of the defendant company's car on the highway in such a manner as to obstruct travel was an act of negligence. It certainly was not such ordinary use of the crossing as was contemplated in the discussion of *Chicago, B. & Q. R. Co. v. Roberts,* 3 Neb. (Unof.) 425, cited by defendants.

The disposition of the case, then, must turn upon the question of whether or not the course pursued by the plaintiff was so negligent in character as to justify the court in determining from the evidence produced in his own behalf that he was not entitled to recover. Counsel for the defendants have presented a very able and exhaustive argument in support of the defendants' contention that it was. It is based, however, upon an assumption of fact with reference to which the jury evidently found against the defendant company. It is true that this assumption of fact is supported by the testimony of the defendants' witnesses, and is, in effect, that, when the plaintiff and Davey discovered the handcar on the crossing, they had just started to turn from the public highway onto the roadway leading over the crossing, and that, when the attempt was made to remove the handcar and the horse became frightened, the horse was so situated and might readily have been turned down the public highway and thus avoided all danger. With reference to the fact, however, about the location of the horse and conveyance at the time the horse was frightened, there is a sharp conflict in the evidence, both the plaintiff and Davey having testified that, before they discovered the car and stopped the horse, they had covered about half the distance between the public highway and the railroad track, and had proceeded to the culvert over the borrow ditch on that side of the railroad track from which they were approaching the car. It is evident, as we have already intimated, that the jury found the fact to be as testified to by the

plaintiff and the witness Davey. Furthermore, we are asked to determine this controversy upon the fact as admitted and testified to by the plaintiff. Here then is the situation. The plaintiff is alone in the buggy on the driveway, the open part of which is some ten feet in width. He is surrounded by sunflowers on either side as high or higher than the buggy top. The horse becomes frightened from the appearance of the handcar with clothing thereon, and the noise of the dinner buckets as the car is being pushed forward upon the railroad track some 25 feet away. The horse in its fright starts to back. The buggy was cramped and the plaintiff was fearful of being overturned. What should he have done under the circumstances? There is no time for mature deliberation. He attempted to control the horse and keep him with his face toward the object at which he was frightened. It is evident that different minds might draw different conclusions as to whether this act of the plaintiff was a negligent one, and the rule is well settled that, where the proximate cause of an injury depends upon a state of facts from which different minds might reasonably draw different inferences, the question is one for a jury, and the finding of a jury under such circumstances should not be disturbed.

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

DUFFIE, C., concurs. ALBERT, C., not sitting.

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

AFFIRMED.

WILLIAM T. TURLEY V. STATE OF NEBRASKA.

FILED OCTOBER 5, 1905. No. 13,663.

1. **Jury:** QUALIFICATIONS: WAIVER. The objection that a juror is disqualified because of having been convicted of a felony may be waived. A party who does not inquire in regard to the matter on *voir dire* examination of the juror, nor object to the juror on that ground until after the trial, will be held to have waived the objection.

2. **Homicide:** SELF-DEFENSE: EVIDENCE. Upon trial of an information for murder, and a plea of self-defense, it is competent to show that the deceased was at the time in the lawful and peaceful possession of the premises where the homicide occurred; and for that purpose it is not error to allow, under proper instructions from the court, the introduction of evidence of a written lease conveying to the deceased the right of possession.

3. **Experts:** EVIDENCE: REVIEW. Matters of common observation and matters upon which jurymen are as capable of forming an opinion as are physicians and surgeons are not matters for expert medical testimony. But it is not necessarily reversible error to allow a witness to testify to a truism with which all intelligent men are presumed to be acquainted, nor is it in all cases reversible error to allow a witness, over objection, to testify to a proposition of law, or a fact of science or nature which is a matter of common knowledge.

4. **Instruction:** SELF-DEFENSE. It is not error to instruct the jury in a trial for murder that, "when competent evidence has been introduced tending to prove that the defendant acted in self-defense, it is incumbent upon the state to prove to you beyond a reasonable doubt that he did not so act."

5. ———: ———. One who is violently assaulted may use such means for self-protection from the assault as would appear to an ordinarily reasonable and prudent man similarly situated to be necessary under the circumstances. An instruction which tells the jury that, if under such circumstances he uses "sound reason" in determining what is necessary for self-protection, it is all that is required of him, is inaccurate, but is not erroneous, requiring a reversal of the judgment, if it is coupled with another instruction which tells the jury that there must be an acquittal if under such circumstances the defendant had reasonable ground to believe and did believe that there was a design to take his life or to do him great bodily harm.

6. ———: ———. In a trial for murder, with evidence of self-defense,

when it appears that the accused was a trespasser or was otherwise violating the law at the time of the homicide, and there is evidence tending to show that the killing was done in justifiable self-protection from a vicious and dangerous assault by the deceased, it is error to instruct the jury that, "when a man without fault, in the lawful pursuit of his duties, is attacked," he may defend himself against such attack. A trespasser may defend himself against an unlawful and dangerous assault. But the whole charge upon this subject must be construed together; and if in one instruction the jury without such qualifications are plainly told that "where, from the nature of the attack, there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the shooting of the assailant under such circumstances will be excusable or justifiable," it is not reversible error to tell the jury in another instruction that the defendant will under such circumstances also be justifiable if he is himself without fault and in the lawful pursuit of his duties.

7. ———: ———. Although it appears that the deceased was at the time of the homicide guilty of a technical assault upon the accused, it would not be lawful to use more force than necessary for self-protection from that assault; and, if the jury should find that the accused was a trespasser at the time, it would be his duty to retire from his assailant, if by so doing he could avoid all danger from the assault. To kill the assailant under such circumstances would not be justifiable. A request to instruct that "the law does not require the defendant to flee from his assailant" was properly refused as misleading.

8. New Trial: NEWLY DISCOVERED EVIDENCE. It is not error to refuse a new trial on the ground of newly discovered evidence, if the proposed evidence might with reasonable diligence have been produced upon the trial or is cumulative.

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

Hamer & Hamer, Harrison & Prince, and *J. F. Walker,* for plaintiff in error.

Norris Brown, Attorney General, William T. Thompson, R. R. Horth, W. H. Thompson and *C. G. Ryan, contra.*

SEDGWICK, J.

In March, 1903, one Norman T. Bliss was shot and killed by the defendant in Hall county, Nebraska. The defend-

ant, who is plaintiff in error here, was prosecuted in the district court upon an information which charged him with murder in the first degree. He admits that he shot the deceased twice with a shotgun, and that this caused the death of the deceased. He alleges that what he did was done in self-defense. Upon trial of this issue he was found guilty of murder in the second degree, and was sentenced to a term in the penitentiary for 17 years.

1. There appears to be some complaint made in the voluminous brief filed that the allegations of the information are not sufficient to support the conviction, and we find that this objection was made upon the trial, and that the point is preserved in the record. It is difficult to determine from the brief upon what ground this objection rests, and upon examination of the information it appears to be in the usual form and to contain allegations of all the facts necessary to constitute the crime of which the defendant was convicted.

2. There is also a contention in the brief that the evidence is not sufficient to support the verdict. The defendant had leased the farm adjoining the premises occupied by the deceased, and the day before the shooting occurred had brought his family to the farm, which he had leased. It appears that the deceased did not reside upon the premises occupied by him, but on the morning of the homicide he, with his young son, took some cattle and other property there, and soon after their arrival discovered that some trespassing pigs were destroying corn which was piled in an inclosure near the house upon the premises. They drove these animals away some considerable distance through the stubble fields and corn-stalks, and, while doing so, chased them with pitchforks and killed two small pigs of about 25 pounds each. There was evidence from which the jury were plainly justifiable in finding that these animals belonged to one Barnhart, from whom the defendant had leased the place that he occupied, and that the defendant had, by authority of the owner, assumed the care of the animals, and that the premises were so situated that

the defendant, from the house where he was at the time, could see the deceased and his son chase the animals and apparently using violence against them, and that the defendant thereupon took his shotgun, which was loaded with two shells, and, together with two boys, one being his son, who accompanied him, left his house and went in the general direction of the deceased and his son, who were chasing the animals. The two parties were so near to each other that an altercation or conversation ensued, and thereupon the shooting occurred which resulted in the death of the deceased.

On the one hand, it is contended by the state, and there is evidence tending to support the contention, that it was the chasing and killing of these animals by the deceased which caused the defendant to leave his house; that his purpose was either to prevent further injury to the animals or to punish the deceased; that from the time he left the house he walkedly rapidly toward the deceased, and that the deceased, seeking to avoid contact with him, started for the house upon the premises which he occupied, and that the defendant changed his course from time to time, so as to intercept the deceased, and that finally, when they came in contact, the defendant asked the deceased whose pigs he was chasing, and was answered that they were Mr. Barnhart's pigs; that he then asked the deceased how many of them he had killed, and was told not to ask too many questions; that, when this altercation began, the defendant was in the field upon the premises occupied by and in the possession of the deceased, and the deceased was in the public highway adjoining these premises; that thereupon the deceased passed through the wire fence into his field, and ordered the defendant to get off from his premises, and then started toward his home, walking in a general direction away from the defendant; that the defendant thereupon followed the deceased for a few steps, and then, being a short distance, perhaps two rods, from the deceased, the defendant discharged his gun toward the deceased, striking him in the arm and back, and wounding him; that there-

upon the deceased turned toward the defendant, shouting, "Don't shoot! Don't shoot!" and the defendant immediately shot the deceased in the breast, killing him instantly. On the other hand, it is contended by the defendant that he and the two boys who accompanied him left his house with the purpose of hunting; that they could not see the deceased and his son from the house where they started, and knew nothing of their whereabouts until they had hunted for some time in the open fields; that the meeting between the deceased and the defendant was not sought by the defendant, but was accidental; and that, when they met, the defendant inquired of the deceased whose pigs those were that he was driving, and was answered by the deceased that he did not know; that he then inquired how many he had killed, whereupon the deceased, being greatly enraged, passed through the wire fence, and with violent and abusive language and threats, rushed upon the defendant with a fork, which the deceased held in his hands; that the defendant said to the deceased, "Stop! or I will have to shoot," and, the deceased not stopping, but continuing his assault, the defendant first shot him in the arm, and afterwards through the body, which caused his death; and that this shooting was necessary on the part of the defendant to defend himself against the assault of the deceased. There was a large volume of evidence taken; many witnesses were examined; other facts more or less material were shown. The issue thus presented was peculiarly one for the jury to pass upon, and we are entirely satisfied that their verdict should not be disturbed for want of evidence to support it.

3. After the trial was completed, it was discovered that one of the jurors had formerly been convicted of felony in the district court for Hall county, and had served a term in the penitentiary, pursuant to a sentence imposed upon that conviction. The sentence was on the 3d day of March, 1886, and was for the term of one year. The convict was allowed two months for good behavior, pursuant to the statute, and was discharged on the 5th

day of January, 1887. The evidence shows that in a fire which occurred at the penitentiary the records of his discharge were destroyed. There is a transcript of the record kept in the office of the governor, from which it appears that he was allowed two months for good behavior, and it also appears that no copy of the order for his discharge was preserved in the records in the governor's office. It is shown that the custom was in such cases to insert in the order for his discharge a provision declaring the convict to be restored to all his civil rights in all respects the same as though a pardon had been granted. No reason or precedent is shown in the briefs for declaring this man now to be deprived of his civil rights, and, even if we were constrained to so hold, we do not think that the objection to this juror would require a reversal of the judgment. Great latitude is allowed the defendant upon the *voir dire* examination to enable him to ascertain whether there is any ground for objecting to the juror. He cannot waive an objection of this nature, and, after taking his chances of an acquittal before the jury selected, insist upon an objection which he should have raised upon the impaneling of the jury, and, if he makes no effort to ascertain whether a juror offered is qualified to sit, he must be held to have waived the objection. Any other rule would introduce uncertainty into a jury trial which would be intolerable.

4. The shooting occurred, as before stated, upon premises which were in the possession of the deceased. Objection was made to the introduction of a lease of these premises to the deceased. This lease was introduced only for the purpose of showing the deceased's right of possession, and the court in its instructions expressly so stated to the jury. It was of course competent to show that the deceased was in the peaceable possession of these premises, from which it was contended on the part of the state he had ordered the defendant at the time of the shooting. It may be that the introduction of this lease was unnecessary; that the other evidence sufficiently

showed the actual possession and control of the premises to be in the deceased. No apparent prejudice to the defendant resulted from its introduction; none is pointed out in the briefs, and we are not able to see that the defendant was prejudiced thereby.

5. It will be remembered that an important question that was disputed upon the trial was whether the deceased at the time of the shooting was making or threatening to make an assault upon the defendant, or was, on the other hand, seeking to avoid a conflict with him. It was shown by the position of the body that the deceased, when shot, did not fall toward the defendant, but in an opposite direction. Dr. George Roeder was called as a witness by the state, and qualified as an expert physician and surgeon. After testifying at large to an examination of the body and his qualifications as an expert, he was asked this question: "Doctor, assuming that a man received a charge of shot in the right chest, the charge you describe as entering the right chest of Mr. Bliss, when he was standing still, and being about twenty-five feet distant from the person who shot him, do you know in what direction he would fall?" and answered, "Yes, sir." He was then asked in what direction. Objection to this question was sustained, and it was not answered. The witness was then asked if he had had military service or special study as a military surgeon, and answered that he had, and then was asked this question: "Now, doctor, assuming that a man was charging forward at a rapid gait, and would receive a gunshot wound, like the one you have described as entering the right chest of Mr. Bliss, being some twenty-five feet distant from the person shooting him, do you know what direction he would fall?" and answered, "Yes, sir." He was then asked: "You may state in what direction he would fall." His answer was: "He would fall in the direction of the momentum of the body at the time of the shooting." A motion was made to strike out the answer, for the reason, among other things, that he bases his answer on common knowledge of facts

that are supposed to be understood by everybody, and not in the line of surgery. This motion was overruled and an exception taken. These rulings of the court are now assigned for error.

It seems clear that the objection to the question was well taken. Matters of common observation and matters upon which jurymen are as capable of forming opinions as medical men are not matters for expert testimony. 2 Elliott, Evidence, sec. 1,094. The answer which the witness made to this question shows that he did not regard it or answer it as a medical question, and it cannot be properly so regarded. The testimony therefore should have been excluded; but it is not pointed out in the brief in what manner the defendant could have been prejudiced by this answer. It had already been shown conclusively in the evidence, not only by this witness but by others, that from the nature of the wound the deceased would have no control whatever of his motions after receiving the wound. That being the case, we take it that the proposition that a human body, when suddenly deprived of all self-control, will fall in the direction of the momentum of the body is a truism with which all intelligent men must be presumed to be acquainted. This answer of the witness therefore could not be prejudicial to the defendant. When Dr. Smith was testifying, he was asked substantially the same question. It was objected, among other things, that "it is a matter to be determined by facts and physics, supposed to be familiar to everybody, and further that it would depend upon whether the force of the charge was sufficient to overcome the force presented by the body. * * * The body would keep on moving in the direction it was going by receiving a bullet or shot wound, for the momentum of the body is so much greater than the momentum of the shot, being 2,500 times heavier." The question was then modified as follows: "Then, you say the body would go on in the direction in which it was moving at the time the shot was received?" There was no objection to this question, and the witness answered:

"Yes, sir." Thus the defendant by his counsel stated as a matter of law the substance of the witness's answer. The witness was not allowed to state his belief as to whether the deceased was standing still or was advancing toward the defendant at the time of the shooting, but merely stated that which the defendant insisted was a matter within the common knowledge of all. The receiving of this evidence could not be prejudicial error, requiring a reversal of the judgment.

Some other objections were made to the ruling of the court in receiving and excluding evidence, but we do not find any errors in that regard. The witness Earl Bliss, a young son of the deceased, testified that at the time of the first shot the deceased was going away from the defendant, and it appeared that the second shot took effect directly in the breast of the deceased. This witness was asked: "Do you know of anything that made your father turn around toward Turley, so that he faced him?" And it is now urged that the court erred in refusing to allow this question to be answered. Also, the same witness was asked: "Now, then, if your father was only five feet west of Mr. Turley when he stood there in the road, and as he came through the fence, I want to know how he got to be two rods west of him?" The witness was not allowed to answer this question, and the ruling, it is contended, was erroneous. Both of these questions are in their nature argumentative, and, taken in connection with the questions that preceded them, were clearly so. Defendant's attorneys were allowed great latitude in the cross-examination of this witness, and the matters apparently aimed at in these questions were thoroughly investigated. It was clearly within the discretion of the trial court to exclude such questions. The other complaints upon the exclusion of evidence are of a similar nature and do not require further discussion.

6. It was claimed that the tracks made by the parties at the place of the shooting, as seen by witnesses immediately after the shooting, indicated that the deceased had

walked along the fence in the field for some distance, and had been followed by the defendant immediately before the shooting took place. It was sought to identify these tracks as those made by the deceased and by the defendant, respectively, and the witness, who had examined them soon after the shooting and had described the boots worn by the deceased at the time of the shooting, was asked this question: "You may state how they compare as to size, Mr. Booda, the tracks you saw along the fence and the boots you saw on the dead man's body," and answered: "I thought they compared all right, although I never measured them." In *Russell v. State*, 62 Neb. 512, and *Clough v. State*, 7 Neb. 320, it is said that to allow a witness to tell the jury his belief as to who made certain tracks was to invade the province of the jury, and it is insisted that the ruling complained of comes within the principle established in those cases. We do not so regard it. The witness was not asked whether the boots of the deceased made the tracks in question. He was asked to state how they compared, and that only as to size. The effect of this testimony was no different than if the witness had testified to the size of each, matters which were within his knowledge, and not mere matters of opinion. This objection we think was properly overruled.

7. Nearly all of the 31 instructions given by the court upon its own motion are complained of. As to the most of these instructions there seems to be no ground of complaint whatever. They are, so far as we can see, clear and satisfactory in their statement of the law to the jury. Some of the objections, however, will be noticed. The fourth and fifth instructions given by the court to the jury are as follows: Instruction numbered 4: "You are further instructed that a reasonable doubt is an actual, substantial doubt arising from the evidence or want of evidence in the case." Instruction numbered 5: "By the term reasonable doubt, as herein used, is not meant a mere caprice, conjecture or groundless possibility. It is an actual, substantial doubt, based on a reason arising either

from the evidence or want of evidence in the case, and sufficient to cause an ordinarily prudent man to hesitate and refuse to act in the most important affairs and concerns of life. The guilt of an accused person is proved beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say from the evidence they have an abiding conviction to a moral certainty of the truth of the charge." It is possible that we do not understand counsel in the discussion of these instructions. *Cowan v. State,* 22 Neb. 519, and *Carr v. State,* 23 Neb. 749, which are cited, are not in point, as the instructions held erroneous in these cases defined a reasonable doubt as one having a reason for its basis derived from the testimony, and for the having of which the jury can give a reason. It was held that to require the jury to give a reason for the doubt, or else disregard it, was erroneous, and it was also held that the basis of doubt might be derived from a want of evidence as well as from the testimony actually given; but the instruction in this case is not subject to criticism on either ground. It is said in the brief that "a reason for the doubt is never necessary," and it seems to be insisted that it was error to instruct the jury that a reasonable doubt must be based on a reason arising either from the evidence or want of evidence in the case. We do not think that this proposition calls for a discussion, even in so important a case as this. There is not much difference between the expression "reasonable" and the expression "based on reason." We do not discover any prejudicial error in these two instructions.

8. In the next instruction the jury were told that, "when competent evidence has been introduced tending to prove that he did so act (in self-defense), it is incumbent upon the state to prove to you beyond a reasonable doubt that he did not so act, and if, upon a consideration of all the evidence in this case, you entertain a reasonable doubt as to whether the defendant acted in self-defense, it is your

duty to give the defendant the benefit of the doubt and acquit him." It is objected that this instruction requires the defendant to furnish some proof that he acted in self-defense. There are two sufficient answers to this objection. In the first place, the instruction does not require any proof from the defendant, but informs the jury that when competent evidence has been introduced upon that point, that is, when there is any competent evidence in the case tending to show that the defendant acted in self-defense, whether introduced by the defendant or by the state, the burden of proof is then upon the state. The second reason is that the defendant requested the court to give an instruction in the identical language now complained of.

9. The nineteenth instruction given by the court is as follows: "You are instructed that if you believe, from the evidence as explained in these instructions, that at the time the said defendant is alleged to have shot the said Norman T. Bliss the circumstances surrounding the defendant were such as in sound reason would justify or induce in his mind an honest belief that he was in danger of receiving from the said Norman T. Bliss great bodily harm, and that defendant did so believe, and that the defendant in doing what he then did was acting from the instinct of self-preservation, then he is not guilty, although there may in fact have been no real or actual danger." It is doubtful whether one who is the subject of a vicious assault is required in all cases to use sound reason in determining what he should do. If he acts as an ordinarily reasonable and prudent man would act under such circumstances, it is, perhaps, all that would be required of him. The language in this instruction, then, is not to be commended. This instruction follows one in which it is stated that "where, from the nature of the attack, there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the shooting of the assailant under such circumstances will be excusable or jus-

tifiable." We cannot believe that the jury were misled upon consideration of these two instructions together. A number of instructions were requested by the defendant upon this point, but no request was made for an explanation as to what was meant by sound reason.

10. The objection made to instruction numbered 18, given by the court upon its own motion, is of a more serious character. That instruction is as follows: "You are instructed that in this case the defendant, William T. Turley, sets up the plea of necessary self-defense. The rule of law on this subject of self-defense is, where a man without fault, in the lawful pursuit of his duties, is attacked, and where, from the nature of the attack, there is reasonable ground to believe that there is a design to take his life or to do him great bodily harm, and the party attacked does so believe, then the shooting of the assailant under such circumstances will be excusable or justifiable, although it should afterwards appear that no injury was intended and no real danger existed." In this case the jury may well have found from the evidence that the defendant was not without fault. According to his own evidence he was engaged in hunting on the Sabbath day, and he was a trespasser upon the land occupied by the deceased. It was admitted by all parties that he was not "in the lawful pursuit of his duties." In *Hans v. State,* 72 Neb. 288, an instruction similar to this, but omitting the words "without fault," was held to be prejudicially erroneous. In that case there was evidence tending to show that the defendant was a trespasser at the time of the homicide, and was therefore acting unlawfully. The instruction there complained of was followed with a more particular instruction as to the right of self-defense, but this made that right depend upon the existence of a non-essential fact which was in dispute. In the case at bar circumstances in evidence were of such a character as to make the fault of this instruction still more apparent. The conclusion is unavoidable that the instruction was not applicable to the facts in the case. We think, however, that this error is not of

such a character as to require a reversal of the judgment. In the next instruction, which is copied in another paragraph of this opinion, the court states the law of self-defense and applies it to the facts in this case, and tells the jury plainly that, if certain facts exist, the defendant is not guilty. The propositions that the defendant was without fault, and was in the lawful pursuit of his duties at the time of the killing, are not included as necessary in order to require his acquittal on the ground of self-defense. This is a positive statement that they must acquit the defendant if the necessary elements exist which are recited in the instruction, although it should not appear that he was without fault or was in the lawful pursuit of his duties. The statement in the instruction complained of that the shooting of his assailant would be excusable if these unnecessary elements existed in connection with others which were necessary do not contradict the positive statements of the nineteenth instruction, and could not have misled the jury. It appears to us that these two instructions, taken together, although each of them contains language that is not to be commended, do, if properly construed, and as they must have been construed by the jury, contain a correct statement of the law as applied to this case. Instructions that were explicit, and more fully explained the law in view of the peculiar facts of this case, would have been proper, and no doubt would have been given, if requested.

11. The defendant requested the court to instruct the jury as follows: "You are instructed that if you find from the evidence that the deceased Norman T. Bliss assaulted defendant, Turley, with a pitchfork, then the law does not require that defendant Turley flee from his assailant, but he might stand his ground and meet force with force." If the abstract proposition of law embraced in this instruction is correct, still we do not think that the refusal to so instruct the jury in this case is reversible error. The jury might have thought from the evidence that the deceased was entirely justifiable in ordering the defendant from his premises, but that the conduct of the deceased in insisting

upon the defendant's leaving his premises was such as would amount to a technical assault, and yet this instruction would induce them to suppose that under such circumstances defendant was justifiable in killing the deceased, although he had no reasonable ground to believe that he was in danger of serious injury, and notwithstanding that the use he made of the deadly weapon in his hands was entirely unnecessary to save himself from injury. The instructon as it was offered was not applicable to the facts in the case as contended for by either party, and might have been very misleading to the jury.

12. Exception is taken to some of the language used by counsel for the state in the closing argument to the jury. Some of these expressions are copied in the record and are discussed at large in the briefs. The main objection taken seems to be not so much to any particular statement or form of expression used as to the general character of the argument. We cannot, of course, present the argument complained of here. It is sufficient to say that we do not find therein any serious violation of the rights of the defendant.

Another point urged in the brief and discussed quite at large is that the court erred in not granting a new trial on the ground of newly discovered evidence. There was a large mass of evidence produced upon this point on the hearing of the motion, and we do not feel justified in taking the time and space necessary for a statement and discussion of the question. The evidence supposed to be newly discovered was cumulative in its character and of doubtful importance.

Other questions suggested in the brief have been considered, but are not of such importance as to require further discussion.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. BANKERS UNION OF THE WORLD, V. E. M. SEARLE, JR., AUDITOR.

FILED OCTOBER 5, 1905. No. 14,268.

1. **Insurance: LICENSE: DISCRETION OF AUDITOR.** The auditor is clothed with a broad discretion in determining whether a fraternal beneficial society has complied with the law and is entitled to a license to do business. It is a legal and not an arbitrary discretion.

2. ———: **FUNDS.** The mortuary fund of a fraternal beneficial society should be "kept separate and apart from the other funds of such society." The auditor may require this to be done before granting license to continue business.

3. ———: **LICENSE: DUTY OF AUDITOR.** Under the facts in this case, as disclosed by the petition demurred to, it is held that the auditor should have called the attention of the society to the irregularities practiced in regard to the preservation of the mortuary fund, so as to allow the society to comply with the requirements of the auditor in that regard, and, upon such compliance, should not have refused a license because of such former irregularities.

ORIGINAL application for a writ of mandamus to compel respondent to issue a license authorizing relator to transact business. *Writ denied.*

Weaver & Giller and *Field, Ricketts & Ricketts*, for relator.

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

SEDGWICK, J.

This was an original application in this court for a writ of mandamus. The object of the proceeding was to compel the auditor to issue a license to the relator, authorizing it to transact business for the year commencing March 1, 1905. The relator is a fraternal beneficiary association, and made its annual report pursuant to the provisions of section 100, chapter 43, Compiled Statutes, 1903 (Ann. St.

6492), and, upon the auditor's refusing to issue a license, made a subsequent report. These two reports were set out in the petition and in the alternative writ, and in behalf of the auditor a general demurrer was filed to the petition. The demurrer having been overruled, the petition was amended by striking out the words "capriciously, wantonly and wilfully," and inserting the words "wrongfully and unlawfully," so that the allegation of the petition in that regard now is that the auditor wrongfully and unlawfully refused the license. After making this change in the petition, the demurrer was refiled, and the cause is now submitted upon the demurrer.

1. The first question presented upon the argument was whether the auditor has an absolute discretion in the matter of granting or refusing this license, or whether it is a legal discretion and must be based upon some reason derived from the statute. Authorities have been cited supporting the proposition that the discretion of the auditor is an arbitrary one. It seems that this is the law in some of the states, and in others a contrary rule obtains. We think that the question must be determined from a consideration of our statute. The language of section 100 is: "If, upon examination, the auditor is satisfied that such society is transacting its business according to law and in no sense fraudulently, he shall issue his certificate authorizing it to transact business for the following year." If this were the only provision of statute throwing any light upon the question, it might be difficult of solution, but section 98 provides: "All such societies organized under the laws of this or any other state, territory or province, and now doing business in this state, may continue such business provided they hereafter comply with the provisions of this act," and section 106 provides that "the auditor of public accounts must, within sixty days after the failure to make such report, or in case any such society shall exceed its powers, or shall conduct its business fraudulently, or shall fail to comply with any of the provisions of this act, give notice in writing to the attorney general, who shall im-

mediately commence an action against such society to enjoin the same from carrying on any business," so that the auditor is expressly prohibited from annulling a license when he has issued it, which would appear to be inconsistent with that large absolute and personal power over these corporations which is involved in the idea that he may refuse a license without having just cause so to do. We conclude, unhesitatingly, that it is not the policy of our statute to clothe the auditor with such unlimited powers.

2. The question next arising is whether under the circumstances of this case it was the duty of the auditor to issue the license to this relator. This question is to be resolved from the petition itself. Attached to the petition and made a part thereof is the first report of the relator to the auditor, above referred to, also the correspondence of the auditor in which he refused to grant the license, and a copy of a statement of the relator furnishing additional information requested by the auditor, and also a copy of a second corrected report. Was it the duty of the auditor, if not satisfied that the relator was entitled to the license, to inform the relator of the ground of his objection, and give the relator an opportunity to comply with the law and obtain the license? As we have seen, the statute provided that, if companies organized and doing business at the time of the enactment of the statute should thereafter comply with the law, they should be allowed to continue in business. It is insisted, and to our minds with apparent reason, that a proper understanding of the various provisions of the statute would lead to the conclusion that it was the intention of the legislature that companies of this class, that had been licensed and were allowed to do business for a term of years, should be permitted to continue their business under the same restrictions imposed upon companies that had been organized before this provision of the statute was enacted. It may be that a corporation of this nature might be guilty of such gross misconduct and fraud, and the fact of its guilt be so palpable and indefensible, as to justify the auditor in peremptorily

refusing to issue a license to such company upon any conditions whatever. This question we do not find it necessary now to determine or discuss. We prefer rather to consider the particular violations of law which it is insisted are disclosed by this petition.

3. The first reason assigned for the refusal of the license is that "nearly $2,000 of these trust funds had disappeared in a single year, and no account made of any return." In answer to this charge it is pointed out by the relator that the first report shows two items of $1,250 and $750, repectively, owing by the relator to a certain company, and also shows two notes of the same company held by the relator, amounting to $2,000, and the amended report shows $2,000 of the assets of the company "charged off" because the mutual claims of these two parties had in the meantime been adjusted, and canceled each other.

4. The first report was filed with the auditor February 28, 1905, and the second report on the 15th day of April, the same year. In the meantime the company had been required to deposit the sum of $304.92 as additional security upon a supersedeas bond. A change in the report in that amount was apparently intended to explain this transaction, but it is urged against the relator as an arbitrary attempt to account for a discrepancy in its accounts.

5. It is suggested in the brief that the first report gives the losses adjusted during the year at $5,960, and the second report at $8,716.76, an increase of $2,756.76. The explanation made is that in the statement of losses adjusted in the first report the amounts were given as adjusted and allowed by the officers of the company, and that, subsequently, settlements of these claims were made upon compromise or judgment, and larger amounts were allowed. Without going into the details of this item, it is sufficient to say that there is nothing in the report, as made, from which it could be found that the officers of the company had intended to deceive the authorities of the state upon this point or that their action in connection with it was fraudulent.

6. In like manner it is suggested that the first report gives the losses not adjusted at $5,536.23, the second report at $6,113.90, an increase of $577.67. Of course, a statement of losses not adjusted would not be expected to show with exactness in all cases the amount that might afterwards be required to adjust the loss, and it is urged in explanation of this point that some of the claims listed in the first report as not adjusted were in fact afterwards adjusted at a larger amount, and in making the second report, which was supposed to show correctly the amount of the claims that were in process of adjustment on the 31st day of December, 1904, these claims were stated at the amount that was finally found to be the company's liability thereon. Whether the second report should have stated the amount which the company's liability on these claims was supposed on the 31st day of December to be, or should have stated the amount which it was afterwards discovered the company was actually liable thereon, it does not appear from the petition that it was attempted by the relator to deceive the authorities or to practice any fraud in this regard.

7. There are several other supposed discrepancies pointed out in the two reports of a similar nature to those above mentioned, and, without taking time to go into details in regard to these items, it is sufficient to say that the explanations offered, arising from the facts disclosed in the reports themselves, sufficiently answer the suggestion that these discrepancies show a violation of law, or an intention to deceive the authorities, or to conduct the business of the company fraudulently.

8. The reports contain statements of "claims upon which proofs had not been received December 31, 1904," and it is objected that the amount of these claims is not included in the statement of the liabilities of the relator. It may be that we do not correctly apprehend the position of the respondent upon this point, but as the claims appear, as far as we have discovered, to be described in the reports, if a better method of tabulating them, or if they should

have been included in general statements of the liabilities of the company, it would seem that attention should have been called to such defects, as they could have been easily corrected.

9. There is one matter to which attention is called in this connection that appears to be of a more serious nature. Section 111 provides: "The moneys collected by any such society from its members, according to the plan or method provided in its constitution and by-laws for the payment of death or disability claims arising under the terms of its beneficiary certificates shall be kept separate and apart from the other funds of such society, and shall be used only in payment of such claims, and no part thereof shall be used by such society in payment of expenses of any kind or character." It was pointed out upon the argument that these reports show a deficiency in the mortuary fund of the society amounting to between $4,000 and $5,000. It is attempted to explain this deficiency by the suggestion that moneys belonging to this fund have been by the company advanced to its agents in the nature of loans, upon the understanding and agreement that the amount shall be deducted from moneys that may afterwards become due to the agents from the company, and the reports appear to show that money has been loaned during the year to agents and others more than sufficient to account for this deficiency in the mortuary fund. It is suggested also that "loans of relator's funds have been made during each year of its business existence in exactly the same way and for similar purposes as was done by the board of directors of said relator in 1904. Such loans have always been regarded as good ones by the insurance department and allowed as a proper asset, and relator's renewal of license has always been issued it from year to year without questioning the character of said loans, always including them in relator's assets." The brief then gives a detailed statement of these loans for each year during the existence of this company. These matters do not appear in the petition demurred to, and, if they did, it would not follow that

the auditor should continue to approve a practice which in his judgment was improper. It seems to us that the statute above quoted, as well as the general policy of the law as disclosed in the entire act, amply justifies the auditor in concluding to disapprove of such practice. It would seem that the mortuary fund should be "kept separate and apart from the other funds of such society," and if notes, bonds or securities were taken or held by the society for the mortuary funds loaned, the papers themselves should be deposited with or exhibited to the auditor, which would enable him to ascertain whether such loans were made upon sufficient securities. If the practice described in the brief has been indulged in by this society ever since it was organized, and such practice has been from year to year approved by the auditor, the most that can be urged from this would be that the auditor should have called the attention of the society's officers to his determination to change this practice, and give the society an opportunity to make such change, before refusing to issue the license to continue in business. The question as presented by this demurrer is not free from difficulties, but we have concluded that the matters shown in the petition demurred to are sufficient to entitle the relator to an opportunity to change its practice in this regard. It follows that the auditor, before refusing the license, should have pointed out this objection to the relator, and, upon satisfactory showing that the mortuary fund would be properly protected and preserved, should not have refused a license upon this ground.

The prayer of the petition is: "Wherefore, by reason of the premises, relator moves the court for a writ of mandamus directing defendant to issue to relator his certificate authorizing relator to transact its business in the state of Nebraska for the year 1905," and the command of the alternative writ is in substance the same. With the view that we take of the practice of this company in regard to the mortuary fund, we think that the discretion with which the law has clothed the auditor in that regard ought not to be ignored, and that the relator is not entitled to the re-

lief as prayed for in this application. It does not appear that the auditor has wilfully disregarded his duty toward this relator, and it will not be presumed that a peremptory writ will be necessary. The denial of the writ will, of course, be without prejudice to a new action when conditions are changed. The writ will be denied, without costs.

WRIT DENIED.

WILLIAM HASE V. STATE OF NEBRASKA.

FILED OCTOBER 5, 1905. No. 14,105.

1. A criminal information must charge explicitly all that is essential to constitute the offense sought to be described. Nothing can be interpolated therein, and its averments will not be aided by intendments.
2. Information. It is not necessary to charge the offense in the exact language of the statute, provided the words employed are equivalent in meaning to those contained therein.
3. Surplusage. Where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments therein, they may be treated as surplusage, and be entirely rejected.
4. Information: HOMICIDE. By the application of the foregoing principles the information herein is found to be sufficient to charge the crime of assault with intent to commit a murder.

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

F. B. Righter and *L. C. Burr,* for plaintiff in error.

Norris Brown, Attorney General, W. T. Thompson, J. L. Caldwell, F. M. Tyrrell and *C. E. Matson, contra.*

BARNES, J.

The plaintiff in error, William Hase, was convicted in the district court for Lancaster county of the crime of

assault with intent to commit murder. He was sentenced to the penitentiary for the term of three years, and now prosecutes error.

The only question presented for our consideration is whether the information on which he was tried was sufficient to charge the crime of which he was convicted. The charging part of the information reads as follows: "That William Hase, late of the county aforesaid, on the 2d day of October, A. D. 1904, in the county of Lancaster and state of Nebraska, aforesaid, then and there being, did unlawfully and feloniously in and upon one Frank Williams then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice an assault with a dangerous and deadly weapon, to wit, a knife, held in the hand of him the said William Hase, then and there, with the intent of him the said William Hase, then and there and thereby, the said Frank Williams unlawfully, feloniously, purposely and maliciously to kill and murder." It is contended that there is no averment contained in the information describing the offense; that just after the word "malice" and before the words "an assault" the charging verb "make," or "did make," is omitted, and it is insisted that this renders the information defective in substance and insufficient to charge any offense whatever. To support this contention, counsel cite *Smith v. State*, 21 Neb. 552; and *Schaffer v. State*, 22 Neb. 557, together with a number of authorities from other states. It is claimed that *Smith v. State* and *Schaffer v. State* cover the exact question involved in this inquiry, and support the contention of the accused. From an examination of those cases it appears that the question here under consideration did not arise in either of them. *Smith v. State* holds that an information must charge explicitly all that is essential to constitute the offense; that it cannot be aided by intendments, but must positively and explicitly state what the prisoner is called upon to answer; while in *Schaffer v. State* it was held that, where the purpose to kill is not averred by way of description of the

offense, the omission cannot be aided by intendment. That these propositions are sound there can be no doubt, but they fail to decide the point in controversy here. Counsel has also directed our attention to *State v. Halder,* 2 McCord (S. Car.), *377, 13 Am. Dec. 738. In that case the word "did" was not contained in the indictment at all, and it was held that such omission rendered it fatally defective. By referring to the charging part of the information in this case, which is quoted above, we find that the word "did" appears in its proper place, as follows: "Then and there being, *did* unlawfully, feloniously in and upon one Frank Williams, then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice an assault with a dangerous and deadly weapon, to wit." This charge, stripped of its qualifying words and reduced to its simplest form, is that William Hase did assault Frank Williams. It has been repeatedly held by this court that it is not necessary to use the exact language of the statute in describing an offense, but it is sufficient to use words of the same import and meaning; that in charging the commission of an offense in an indictment it is not necessary that the exact words of the statute be used, provided the words employed are equivalent in meaning to those contained in the statute. *Whitman v. State,* 17 Neb. 224; *Hodgkins v. State,* 36 Neb. 160. It seems clear that the words "did an assault" are equivalent to the expression that the accused made an assault, and that the information, without the addition or elimination of any words thereto or therefrom, is technically sufficient to charge the crime of which the accused was convicted and sentenced.

Again, if we treat the word "did," not as an independent verb but as an auxiliary to the verb "assault," then the information is sufficient. By treating the word "an," immediately preceding the word "assault," as surplusage, the information would then read: "That William Hase, late of the county aforesaid, on the 2d day of October, A. D. 1904, in the county of Lancaster and state of Nebraska,

aforesaid, then and there being, did unlawfully and feloniously in and upon one Frank Williams then and there unlawfully, feloniously, purposely and of deliberate and premeditated malice assault with a dangerous and deadly weapon," etc. Section 412 of the criminal code, among other things, provides: "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected * * * for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged." In *State v. Kendall,* 38 Neb. 817, construing the above provision, we said:

"Where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments, the state should, upon motion, be permitted to strike out such words."

In *Hall v. State,* 40 Neb. 320, it was said:

"Allegations in an information which are immaterial and unnecessary may be treated as surplusage and be entirely rejected."

It was further said in *Hurlburt v. State,* 52 Neb. 428:

"Averments in an information of matters which are immaterial, and not necessary ingredients of the offense charged, may be rejected as surplusage."

Again, by inserting the word "make" after the word "malice" and before the words "an assault," we would eliminate the question involved in this controversy. The rule, however, is well settled that nothing can be inserted in an information, but it is equally well settled that any matter which may be treated as surplusage can be stricken therefrom. So, striking out the word "an," there remains sufficient to clearly charge the crime of assault with intent to commit murder. While the information is carelessly and inartistically drawn, and we do not feel inclined to commend such criminal pleading, yet we hardly feel justified in holding that it is insufficient in form and substance to charge the accused with the offense of which he was convicted.

We have examined the cases cited by counsel for the accused, and find that they do not tend to shake either of the foregoing propositions, and we are therefore of opinion that the information is sufficient to sustain the conviction and sentence herein, and the judgment of the district court is therefore

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. HENRY FICKENSCHER.*

FILED OCTOBER 5, 1905. No. 12,297.

1. **A verdict** will not be set aside on the ground of want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong. *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb. 529.

2. **Evidence** examined, and *held* to support the verdict.

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

John N. Baldwin and *Edson Rich*, for plaintiff in error.

Warrington & Stewart, H. M. Sinclair and *Roscoe Pound, contra.*

LETTON, C.

This action was brought by Henry Fickenscher against the Union Pacific Railroad Company to recover damages sustained by him in a prairie fire which he alleges was set out through the negligence of the defendant. Upon the trial a judgment was rendered for the plaintiff, from which the defendant prosecutes error.

A detailed statement of the facts with reference to the fire, together with a map of the locality, is to be found in

* Rehearing allowed. See opinion, p. 507, *post.*

Union P. R. Co. v. Fickenscher, 72 Neb. 187. The plaintiff in this case is the brother of John Fickenscher, and, with his father, Ulrich Fickenscher, was in company with John at the time they were all three burned in the prairie fire. In the petition in error the defendant assigns 55 different grounds, but upon the argument and in the brief a comparatively small number of errors were considered. The assignment of error upon which the most stress has been laid is that the evidence does not support the verdict, and it is urged that the evidence in this case does not differ materially from that in the case of John Fickenscher against the railroad company for injuries resulting from the same fire, and that, since that case was reversed upon the ground that the verdict was not supported by sufficient evidence, this case, likewise, should be reversed for the same reason. If no additional evidence has been produced by the plaintiff in this case to sustain his contention that the fire which burned him was the fire which started from the defendant's right of way, then, under the rule in the former case, he cannot recover. The point upon which the testimony in the case of John Fickenscher seemed to this court to be insufficient was as to the identity of the fire which burned him with that which started at the railroad.

The theory of the plaintiff is that, when the railroad fire struck the sand hills, it spread off over them and drifted northwest before the wind; that one branch of the fire went a little west of north and kept to the east of the road running between Fosburg's and Ditto's, and that another branch of the fire crept to the westward, south of Ditto's, and ran several miles north before the change of wind occurred, when it was blown back across the unburned grass between the two fires to the place where the injury occurred.

The defendant's theory is that the fire never got any farther west than the point where the plaintiff and his neighbors were fighting it on the line east of Ditto's, and that the fire which burned the plaintiff was an entirely

different one, which had been burning for some time many miles northwest of the place where the plaintiff was injured, and which was blown down from the northwest with great rapidity when the wind changed early on Monday morning.

The surface of the country lying to the north and northwest from where the fire started is made up of sand hills from 10 to 100 feet in height. These sand hills were at this time sparsely covered with dry grass, in the depressions between the hills the growth being heavier. From the physical configuration of the country it was difficult to see where any fire was exactly situated, except when it burned upon the hills or when the observer stood upon one of the numerous knolls or sand hills. South of these hills lies the Platte valley, which consists of level bottom lands, where there is nothing to obstruct the sight and over which it was possible for observers south of the sand hills at some distance to see the relative location of the fire east or west of a given line. In the other case the plaintiff relied upon the testimony of witnesses residing south of Brady Island, who say they saw the fire gradually spread west until late in the evening, when it appeared to be north of George's pasture, which adjoins Brady Island on the east.

At the trial it was admitted, by agreement of the parties, that that portion of the fire which came up from west of Vroman and extended north from Ditto's house to the house of Fosburg, east of the road as shown upon the map, was out by 11 o'clock of Sunday evening, April 16, 1899, and the plaintiff makes no claim by reason of that portion of the branch of the fire just described east of the road running from Ditto's to Fosburg's. This disposes of one line of fire as far south as Ditto's house, the fire that the plaintiff and his associates had been fighting, and leaves the fire that burned him to be accounted for either as being the fire that had been burning on Sunday afternoon far to the northwest, or as a branch of the railroad fire which had crept to the westward, south of Ditto's,

thence run northward at least 4 or 5 miles, and was driven back when the wind changed.

There were over 60 witnesses examined in the case, who had observed these fires from nearly every point of the compass. Part of the strongest evidence in behalf of the plaintiff came from the mouths of defendant's witnesses, the plaintiff having made the effort to introduce this testimony taken by the defendant at the opening of his case, but, upon the objection of the defendant that he expected to produce it, the defendant's objection was sustained, and it only came into the case by being offered by the defendant. One McIntyre, a witness for the defendant, testified that from about 12 o'clock until 2 o'clock on Sunday night he was fighting a fire near the west line of section 8 about one-half mile west of Ditto's house; that this was a side fire, and that the head fire had run 6 or 8 miles to the north, as well as he could judge. It was agreed, however, by the parties that if he were present upon the stand he would testify that, when he spoke of the head fire having gone on, he meant the fire that had gone east of Fosburg's. On cross-examination he testified that at 2 o'clock on Monday morning, when he left this place, a fire was burning to the northwest, which he supposed was the head fire of that which he was fighting. McIntyre is an employee of the defendant, who lives at Brady Island. Unless he was mistaken as to the locality, his evidence shows that a fire was burning about one-half mile south and west of Ditto's at that time, and one was burning 6 or 8 miles northwest, after the line of fire the plaintiff had been fighting was extinguished as far south as Ditto's. Two witnesses, Larson and Jacobson, testify that on Sunday afternoon and evening they had been fighting fire to the south and east of where McIntyre was; that the fire which they were fighting had burned along on the north side of sections 16 and 17, which would be in the direction of the point where McIntyre says he was, and that about 12 or 1 o'clock at night they saw a big fire up near them, apparently north and west of near

Ditto's. Jacobson further testifies that, when they were back-firing on Larson's pasture, they followed the south line of the fire to the west edge of the pasture, which would be about south of Ditto's house, according to the map, and the head fire had gone northwest when they got to the west line of the pasture. The testimony of one Scott, a witness for the defendant, who lives south of the Platte river, is to the effect that about 9 or 10 o'clock on Sunday night he saw a fire to the north of him; it seemed to be just above Mr. Beatty's place, which was just north of where Scott lived and a mile and a half west of Ditto's. This testimony is corroborated by the testimony of Pearl Scott, his daughter, who testified that she could see the flames of this fire and that it seemed to be north and west of Beatty's. John Elander, who lives a mile east of the place of injury, testified that at half past 2 o'clock on Monday morning he could see a fire—"a little flame or red"—3 or 4 miles northwest of his house. One Peterson, who lives northwest of Ditto's, says that he saw a fire by Ditto's house on Sunday afternoon, but did not see it after it got dark, although he looked for it; that at 10 o'clock at night he could not see any fire down there, that "it was west"; and testifies, further, in substance, that at that time he could see fire about 4 or 5 miles northwest. It blazed so high he could see the fire. He saw a fire much farther off to the northwest, but very faint, and the nearer fire that he saw in the northwest burned him out. That he watched it from that time until it came over his place about 4 or 5 in the morning. That at 8 o'clock on Sunday night he saw the "railroad fire" about 2 miles east of his place, but saw no fire toward Brady Island. He also saw a fire a little bit west, but mostly north. That the distant fire was away about 10 or 12 miles, he thought, and that, if he looked on a line north from his house, this fire that he saw at a great distance would be 6 miles west of that line, he thought. Mrs. Peterson also testified that on Sunday night about 9 or 10 or 11 o'clock she saw two fires in the northwest, one not as close as the other, and

did not see any fire southeast at that time; that she could see the flames of the northwest fire then, and that it was about 6 or 7 miles away. Mr. Pettit, who lives south of Peterson's and 2 miles northwest of Ditto's, says that between 12 and 1 o'clock on Sunday night the fire east of Ditto's had apparently gone out; that he did not see any smoke between his place and Brady Island, and that the fire which was in the northwest was apparently 25 or 30 miles away. Mrs. Anderson, who lived at his house, had been to Brady Island on Sunday night, and drove from there to Pettit's about 8 o'clock. There was no fire between Pettit's and Brady Island at that time. About 12 or 1 o'clock at night she saw a fire to the southeast or south.

A number of defendant's witnesses live 10 or 12 miles north and west of Brady Island, several living north of the station of Maxwell. Some of these men testify they saw a fire on Sunday evening toward Maxwell, close to Maxwell, while others saw no fire that afternoon. One Talbot, who lives on section 13, township 15, range 29, said on Sunday evening he saw a fire right east of him, which was going north; that the end toward the south seemed to be out, and the north end toward Cox's settlement seemed to be burning, and that the Cox settlement was 12 miles north and east, pretty nearly east. Another of defendant's witnesses, named Herring, who lives 14 miles northwest of Brady Island, saw a fire southeast of him on Sunday evening. That he and his son sat up and watched this fire until after midnight on Sunday night. W. T. De Witt, who lives about 7 or 8 miles north of Brady Island, saw a fire a little southeast of him, a very little southeast, on Sunday night, and, the last time he saw it, it seemed to be moving northwest. Mrs. Mott, who lives 5 miles north of Brady Island, testifies she first saw the southeast fire about 3 o'clock on Sunday; that she last saw it about 12 o'clock that night, and it appeared to be going northeast at that time; that she did not notice any fire to the northwest at that time, but that early in the morning she saw a fire to

the northwest, some distance away, and that it came to their place in about 2 hours from the time she first saw it. Theodore Anderson, a boy, who lived 2½ miles northeast of Brady Island, says that at midnight that night he was on the southeast corner of their place, and that he could see a fire south of the place when he was there; that the fire appeared to be between a mile and a quarter and a mile and a half away.

In addition to this testimony a number of witnesses for the plaintiff, who live in the Platte valley, some of whom did not testify in the former case, testified to the location of the fire during Sunday evening and night among the sand hills on the north side of the railroad. These witnesses place the location of the fire to the west of the line of fire extending from Fosburg's east to Ditto's and thus corroborate the testimony of McIntyre, Larson, Jacobson and other witnesses, who described a line of fire as being west of Ditto's. So far, then, as the existence of a line of fire to the westward of the line contended for by the defendant as the west line of the railroad fire, we are of the opinion that there was sufficient testimony to submit to the jury, if sufficiently connected with the fire at the place of injury to make it probable that this fire was the proximate cause of the injury.

We must next consider whether there is any evidence to connect these fires. The Fickenschers, with Fosburg and others, in the party who were fighting the fire to the east of Ditto's, were at Ditto's on their way home at about 1 o'clock in the morning. Mr. Ulrich Fickenscher, the father, with his sons, John and Henry, left Fosburg's while it was still dark, and apparently reached the place of injury about half past 4. This fire reached Ditto's before daylight, for he testifies that his wife was wakened and she woke him up sometime before daylight. A number of defendant's witnesses, who lived far to the north and northwest of the place of injury, testified that the fire which came from the northwest reached them by daylight. The fire reached Peterson's, 2 miles west and 1½ miles south of

the place of injury, about 5 o'clock on Monday morning. Mr. Pettit, who lived south of Peterson, testified that the fire struck him between 5 and 6 o'clock on Monday morning. Mr. Guyer, who lives 10 miles north and 10 miles west of the place of injury, says that the northwest fire came down on him on Monday morning at daylight. Edward Johnson, who lives about 5 miles north and 1 mile west from the place of injury, testifies the fire reached him from the northwest just a little before daylight. One Wilson, who lives north and west of Maxwell, far to the northwest of Brady Island, testifies that the fire from the northwest came to his place just before daylight. One Herring, who lives 14 miles northwest of Brady Island, says the fire from the northwest reached his place about 4 o'clock on Monday morning. Mr. De Witt, who lived still north of Herring, testifies that he had been up watching both fires; that the south fire was running northwest, as nearly as he could make out; that he was awakened in the morning by a rush of wind that struck the north window; that it was about 4 o'clock; that he went in and lay down again, when his wife told him to look out for the fire; that it was about 4 o'clock, just getting daylight at that time. Mrs. Mott says that she first saw the northwest fire toward morning, somewhere near the break of day, and that it took about 2 hours to come to their place; that she first saw it in the northwest, and that it was just daylight when it passed their place, which is north of Brady Island, and about 6 miles northwest of the place of injury. Elander says that, when he came back from fighting the southeast fire about half past two in the morning, he could see a little bit of flame about 3 or 4 miles to the northwest and a little north, but mostly west.

It is said in the opinion by Mr. Commissioner DAY in *Union P. R. Co. v. Fickenscher, supra:* "It seems a striking fact that none of the neighbors living in the vicinity of where the fire is supposed to have burned saw it or even the reflection of it." But in this case we have the testimony of George and Pearl Scott, of Lynch and of Guyer,

and of other witnesses, which was not taken in the former case, and have additional facts from the same witnesses, such as the burning of the grass under the fresh-turned sod, and the finding of burned-over ground in the line over which the Fosburg-Fickenscher party was back-firing.

In this examination of the testimony we have selected only that part of the same which tends to support the plaintiff's contention. If the evidence upon the part of the plaintiff, standing alone, is sufficient to convince any ordinary and reasonable mind that the fire which burned the plaintiff found its origin in a fire which started by defendant's negligence upon its right of way, then there is sufficient testimony to support the verdict. A verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong. *McCune v. Thomas*, 6 Neb. 488; *Sycamore Marsh Harvester Co. v. Grundrad*, 16 Neb. 529; *Young v. Roberts*, 17 Neb. 426; *Spurck v. Dean*, 49 Neb. 66.

We think there was sufficient circumstantial evidence that a branch of the railroad fire was burning west and northwest of Ditto's after 11 o'clock on Sunday night, that it had run to the north and west, just west of Ditto's, and that the change of wind on Sunday morning blew it to the southeastward, and to the point where the plaintiff was injured before the fire which had been burning far to the northwest came down, to warrant the court in submitting the whole question to the jury. The stories told by the witnesses upon both sides are in many instances contradictory and inconsistent with that of other witnesses upon the same side of the case. The writer's experience of over 35 years in this state has taught him that the smoke arising from, and the reflection in the sky of, a prairie fire are often very poor guides to its actual situation, and the testimony in this case has only served to confirm this experience. We do not believe that the witnesses wilfully misrepresented the facts, but some of them must have been mistaken as to the fire. The jury were men who lived in the

sand-hill country, who knew the conditions surrounding them, and whose experience in their daily walk of life was a valuable factor in weighing the testimony and in arriving at a proper verdict. From the circumstances, direct evidence of the identity of this fire with the railroad fire was unattainable, and the plaintiff was obliged to rely upon circumstantial evidence. While not entirely satisfied, we do not feel justified in displacing the tribunal provided by the law to determine questions of fact, and believe that the verdict is not contrary to, but is sustained by, the evidence.

Error is assigned in permitting cross-examination of the witness Kreitsenstein as to facts occurring after the time to which his examination in chief was directed. We are unable to see wherein the defendant was prejudiced by this cross-examination.

It is urged that the court erred in sustaining an objection to a question asked the engineer of the train that set out the fire. The question was answered before the objection was made. The answer was not stricken out, so the defendant suffered no injury by the ruling. Besides, the engineer afterwards testified, without objection, substantially to the same effect.

The objections urged to the giving and refusal of instructions we think are not well taken, and the case appears to have been fairly submitted to the jury.

Error is assigned by the defendant with reference to an admonition given to the jury by the court, after it had been out about 24 hours, as to the importance of their agreeing upon a verdict. We fail to discern in what manner the defendant was prejudiced by this remark. It appears that jury did not agree upon a verdict for 3½ hours after this advice was given by the court, which shows that, if the admonition had any effect, it took a long time to operate, and that the jury took full time for deliberation thereafter.

We do not believe that the other matters complained of, which were presented to the trial court at the time the

motion for a new trial was heard, are of sufficient gravity to warrant this court in reversing the judgment of the trial court in refusing to grant a new trial.

Upon the whole, the case seems to have been carefully and impartially tried and submitted to the jury, and we recommend that the judgment of the district court be affirmed.

OLDHAM, C., concurs. AMES, C., not sitting.

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 December 7, 1906. *Reversed:*

1. **Verdict:** EVIDENCE: REVIEW. This court will not set aside the verdict of a jury for want of evidence to support it, if there is sufficient evidence in the record, taken by itself, to have supported a judgment by default, unless the preponderance of the evidence against the verdict is so strong as to indicate that the verdict must have been predicated upon something other than the evidence.

2. **Railroads:** ACTION FOR DAMAGES: EVIDENCE. In an action for damages by fire originating in the carelessness of the defendant, the plaintiff to establish his cause of action must trace the fire from the place of its origin, and identify the fire which caused the damage with the fire which was originated by the defendant. If the evidence shows several prairie fires of different origin, each of them originating several miles from the place of damage, it is not sufficient to show that it is more probable that the fire started by the defendant was the one that caused the damage. A verdict cannot be supported by probabilities and conjecture.

SEDGWICK, C. J.

This is an action for damage by fire which it was alleged was caused by the negligence of the defendant. A map showing the location, and in part also the course of the fire, may be found in connection with the opinion of

this court in the case of *Union P. R. Co. v. Fickenscher*, 72 Neb. 187. Ulrich Fickenscher and his two sons, John and Henry, were together when they were injured by fire on the night in question, and each of them brought an action against this defendant to recover damages. The case just referred to was the action of John Fickenscher, and in that case it was held that the evidence was not sufficient to support the verdict against the defendant. In the case of Henry Fickenscher it was held that there was sufficient evidence to require the matter to be submitted to a jury, and that a judgment for the plaintiff based upon a favorable verdict of a jury should be affirmed. *Union P. R. Co. v. Fickenscher, ante,* p. 497. It was thought that further evidence had been given in the latter case sufficient to require a different conclusion from that reached in the former. A motion for rehearing was filed in the case of Henry Fickenscher, and, as the action of Ulrich Fickenscher and two actions against the same defendant begun by John Westlund and John Fosberg, respectively, were all actions for damages alleged to have been occasioned by the same fire, all of the plaintiffs being represented by the same counsel, arguments were heard in all the cases together. It was substantially conceded upon the argument by counsel for the claimants that this court was in error in supposing that there was other and different substantial evidence in the Henry Fickenscher case, distinguishing it from the John Fickenscher case before determined by this court. It was insisted that the decision of this court in the first case was not now binding upon the court in the other cases. It was urged that that judgment could not be considered as *res adjudicata* in the other cases, because the parties were not the same, and, also, because all of the cases depended upon questions of fact, and upon the issue in each case the trial was had and witnesses examined independently of the trial of the issues in the case first decided. It was also conceded that the evidence upon the principal issue in the remaining cases was substantially the same as the evidence

in the Henry Fickenscher case. It was urged that the court re-examine the whole question upon the record in the Henry Fickenscher case, and upon that theory the argument upon the last hearing was presented. Believing that counsel are correct upon these preliminary questions, we have re-examined the question presented in the light of the additional briefs filed and the subsequent arguments.

From the foregoing observations it will be seen that it is now unnecessary to restate the general outlines of the evidence as contained in the record. Such statement will be found in the two opinions above referred to, and reference is made to those opinions and to the map accompanying the first. It will be remembered that the plaintiff, Henry Fickenscher, with his brother John and his father and Mr. Fosberg were fighting the main branch of the "Vroman fire" (the fire which originated upon or near the right of way of defendant) near Mr. Fosberg's place, with a number of other people, until that fire was extinguished, and the plaintiff, with his brother and father and Mr. Fosberg, went down to Mr. Ditto's place to fight the fire which was burning just south of this place. They reached Mr. Ditto's place at about 1 o'clock, and continued in that vicinity until about 3 o'clock in the morning, when they started to return to Mr. Fosberg's place. The distance was three or more miles. These four men seem to be intelligent men and fair witnesses. They were in a wagon drawn by Mr. Fosberg's team. The plaintiff himself was a lad of about 18 years. He was exhausted with his labor and was sleeping in the wagon. Mr. Fosberg was driving the team. He testifies that the wind began to come from the northwest at about the time they started to go home, that it grew stronger as they went on, and that before they reached his place it was blowing in a gale. He drove his horses as fast as he could make them go; they were running. He was asked if he noticed fire in the north and northwest before he got home, and answered: "I noticed in the sky there must be some fire, but I couldn't see any on the ground." When they came to within about 40 rods of Fos-

berg's house, where the Fickenschers had left their wagon, the Fickenschers took their team (which they had been leading behind the Fosberg wagon) and wagon and started for their home about three miles directly north. They had gone about 80 or 100 rods when the fire from the northwest was upon them and the plaintiff suffered the injury sued for.

In the briefs and in the oral arguments some attention was given to the evidence tending to show that the fire, which was of unknown origin and which came down from the northwest, was the cause of the damage complained of. The defendant insisted that this was the fire that damaged the plaintiff. Of course, if that contention could be established, it would relieve the defendant of liability. If, however, the defendant failed to establish that contention, the burden would still rest upon the plaintiff to show that the fire which originated by the defendant's negligence was the cause of the damage. To prove that the defendant originated a fire, and that the plaintiff was damaged by fire, and that the fire originated by the defendant could have caused the damage, would not be sufficient to make the plaintiff's case. This, as was shown in the first opinion, would be basing a verdict upon possibilities and conjecture. In order to make the defendant responsible for the damages caused by the fire, the plaintiff must prove that the fire originated by the defendant was the fire that caused the damage. The course of the fire must be traced by the evidence so as to connect the fire that caused the damage with the fire for which the defendant is responsible. If the plaintiff has failed to do this, then the evidence in regard to the fire called the "northwest fire" cannot establish a cause of action in this case. It is not a question of probabilities as to which fire caused the damage. The jury were not at liberty to take a general view of the whole evidence and see which was more probable, and base their verdict upon the weakness of the evidence tending to show that the northwest fire caused the damage. It is not clearly shown by the evidence how far

the northwest fire (the fire of unknown origin) was distant from the scene of damage at the time that the wind changed from a southerly direction to a northwesterly direction. After the change the wind came down from the northwest in a vigorous gale. Some witnesses estimated it as high as 50 miles an hour, and if we suppose that the rate of the wind was 40 miles an hour, and that the fire traveled at one-half that rate after the wind from the northwest had reached it, and if the fire was then 20 miles distant from the scene of damage, the gale would reach that place in 30 minutes, while it would require an hour for the fire to travel over the same distance; so that the fire would not reach the place where the damage occurred until some 30 minutes after the gale reached it. The evidence shows that the fire traveled very rapidly. Some of the witnesses testified that its rate was faster than a horse could run, but the evidence is not harmonious and certain on any of these points, and there was some latitude left for the finding of a jury. The gale may have reached the place of damage an hour in advance of the fire or, possibly, even more, and we do not think that the evidence is so conclusive upon this point that the verdict of the jury, which essentially finds that this fire from the northwest did not cause the damage, is unsupported by sufficient evidence upon that point. The evidence in regard to this fire, then, is not conclusive on the question under investigation. We are not at liberty to say what our conclusion would be upon the evidence as to whether this northwest fire caused the damage. It is sufficient to say that the evidence taken together upon that point is all of so conflicting a nature that the question must necessarily have been left to the determination of a jury.

The remaining question, then, and the question upon which the determination of these cases depends, which has already been referred to, is whether there is sufficient evidence in this record to support a finding that the fire, originated by the carelessness of the defendant, caused the damage. This itself is peculiarly a question for the jury.

If there is substantial and credible evidence tracing the fire from its origin near the defendant's right of way and connecting it with the fire that caused the damage, this court will not interfere with the finding of the jury, even though it seems clear that the preponderance of the evidence is the other way. In other words, the court will in no case set aside the verdict of the jury upon questions of fact, if there is sufficient evidence in the record, taken by itself, to have supported a judgment by default, unless the preponderance of the evidence against the verdict is so overwhelming as to indicate that the verdict must have been predicated upon something other than the evidence. It has been said that, as a chain is no stronger than its weakest link, so if the chain of evidence entirely fails at some vital point, there is a failure of proof; and if the testimony of the witnesses, taken together, does not show that this fire for which the defendant is responsible extended to the place where the damage occurred, and there are no circumstances proved from which such conclusion is a reasonable inference, the plaintiff's case must fail. The fire caused by the defendant originated a little over 7 miles south, and a short distance east, of the place where the damage sued for occurred. The course of this fire, as shown upon the map referred to, was for about one-half of its distance a little west of north, and then nearly directly north until it had reached a place about 80 or 100 rods southeast from the place of damage, and then in an irregular course to the north and east, where it was extinguished. The map is substantially, although not entirely, accurate in showing the course of the fire as disclosed by the evidence. It is sufficiently accurate for the purposes of this discussion. The witnesses agree, and it is conceded by the parties, that this fire, which is called the "head fire," was extinguished before the injury complained of occurred.

The contention is that a branch from this fire ran to the west, and then north, until it was caught by the gale from the northwest and brought down to the place of damage,

Upon this contention the plaintiff rests his case. There is evidence showing that a side fire left this fire at a point about 4½ miles south of the place where the accident occurred and burned toward the west. This was south of and not far from, the line between sections 9 and 16; and the plaintiff insists that there is evidence sufficient to warrant a finding that this fire ran to a point nearly north from Brady Island, and thence in a northerly direction until it encountered the gale from the northwest and was carried to the southeast to the place of the accident. In opening the discussion upon this point the plaintiff's brief says: "Of the testimony to sustain the verdict, the witnesses may be properly divided into four groups: (1) Those who actually saw the fire go west and northwest of the Fosberg-Ditto road. (2) Those who lived on the Platte valley and could see the fire north of them, and did observe its location east or west of a given line. (3) Those who saw fire in the locality west of where the boy was burned, shortly before the wind changed. (4) Those who testify concerning the time when the northwest fire came down." The witnesses Charles Jacobson, Anna Johnson, Thomas Lynch, J. R. Elliott and William McIntyre are named by the plaintiff as the ones who actually saw the fire go west. The brief says that McIntyre's testimony is very important. It is natural therefore first to look at his evidence. This witness resided in Brady Island, four miles west and half a mile north of the place where this side fire is alleged to have left the main line of the fire. He testified that he went out where the fire was burning, and arrived there at about 12 o'clock Sunday night. He remained there about one hour and a half or two hours, and was plowing and fighting fire. He says that two men were with him. He does not know who they were. The first one was a "bum," and the other he thinks was Robert Craig, but he is not sure. He says that the fire that he was fighting was "south of west about half a mile" from G. L. Ditto's place. The witness did not go to Ditto's place, and he does not disclose any means of

knowing in what direction he was from Ditto's place, except that he knew the general location of Ditto's place and estimated about how far he had gone from Brady Island, so that his evidence in regard to the exact location is somewhat indefinite. If his evidence is believed, it would not tend to prove that the fire had progressed more than one mile to the west from the main fire. He says that the fire was traveling a very little west of north, and, when asked at what rate it was traveling, he said that he did not know, "but it was a fire that was kind of backing, there was very little wind at that time." He was then asked the leading question: "The direction in which the fire was traveling under the prevailing wind would have driven this fire past James Romine, who lived on northeast quarter of 16-12-26, and past Pettit, who lived on southeast quarter 32-13-26, would it not?" His answer was: "Why, if you gave it time, I suppose it would have backed in." This it will be remembered was the last that this witness knew of the fire. He left it at about 2 o'clock in the morning. He plowed a furrow from one-half to three-quarters of a mile long while he was there. This furrow was very nearly east of the west line of section 8. The purpose would seem to have been to stop the westward progress of the fire beyond that point. He says that the wind changed direction about 3 o'clock, which would be an hour later. He says that he saw a fire to the northwest, and that this was "the head fire" of this same fire that he was fighting; but, as he himself was west of the main fire, he must have intended to have said northeast. The most that can be said of the evidence of this witness as supporting the plaintiff's theory is that the side fire, called in the record the "McIntyre fire," which was 4½ miles south of the place of the accident, had extended a mile toward the west, possibly a mile and a half from the main fire, about an hour before the gale from the northwest reached Brady Island.

The witness Jacobson lived about a mile south and nearly the same distance west from the point where the

side fire in question diverged from the main fire. He says that he saw the main fire, and that it moved nearly north, a little west, and that, at about 10 o'clock or after, the fire went up into section 16. The course of the main fire seems to have been across the corner of section 16 and his evidence would indicate that this was what he had in mind. About 10 o'clock this witness went over to the scene of the fire. He was asked to point out on the map about where he found the fire. He seems to have hesitated and was asked if he could see, and said that he could not see very well. He seems to have pointed out a place on the map where he understood the fire was at about 10 o'clock, but the record does not show where he so located it, but he says he fought a back fire on the east line of his fence, which will be shown by a glance at the map could not have been this side fire in question. He says that the fire that he was fighting ran "northeast across the north end of the pasture." The pasture included nearly all of section 16, and the main fire, as before stated, ran across a corner of this section, so that it is not clear whether the witness referred to the main fire or to the side fire referred to by the witness McIntyre. He said that he saw a fire go off to the northeast, and was asked the question: "Tell the jury about how far that fire went off; in other words, did it go in south of Ditto's"? He answered: "Yes, come that way, I can't tell exactly how far it went." He says that he found a sod that was turned over in his pasture and was burned on the other side, showing that the ground was burned before the sod was turned over; but he fails to state where this was, or when or by whom the sod was turned over. The pasture included about three sections of land.

The witness Elliott saw the fire only from the hotel in Brady Island. His evidence shows that he saw the reflection of the principal fire up to about 10 o'clock at night, when he retired for the night. Afterwards he again arose and saw the reflection of a fire somewhere northeast of Brady Island. He does not know anything about what

time it was when he saw it, nor where the fire was located. This evidence is of no assistance in the case.

The witness Anna Johnson testified that she lived several miles south of Brady Island. She went to Brady Island to church between 6 and 7 o'clock. She then saw a fire down around George's pasture. This is the same pasture that is marked "Beatty's pasture" on the map. It lies directly east from Brady Island. She undoubtedly saw the reflection of the main fire, which all the witnesses agree was east from Brady Island at that time, and her mistake, if any, was in estimating the distance that the fire was from her. She left the church about half past 8 in the evening, and she says that the fire "looked like it was north of Brady, northwest." That the McIntyre fire should be northwest of Brady Island at that time is not possible under the evidence of all the witnesses. If she saw a fire to the northwest of Brady Island then, it must have been a third fire, which is indicated by the witness Peterson. She seems to have reached home at about half past 2 in the morning. She says she saw the fire then, "which was still moving on," and, when asked where she would say the fire then was from Brady Island, answered: "I could not say, I am not acquainted there. Q. Did it look like at was farther away and farther west? A. Yes, sir."

The witness Thomas Lynch was in Brady Island on the evening of the fire. He was there from 3 or 4 o'clock in the afternoon until the next morning. He noticed the fire as he went to Brady Island in the afternoon. He was asked: "Did you notice a fire north and east of the town of Brady Island that night?" and answered, "Yes, sir." This was between 10 and 11 o'clock. He was asked this question: "Q. And, when you say north of Brady, you don't mean on a straight line north, but you mean the fire was over here east of Brady and north of a line that would run through Brady east and west? A. Yes, sir."

Mr. Lawrence Larson, who was the owner of the so-called Larson pasture in which Mr. Jacobson lived, was

with Mr. Jacobson during the evening fighting the fire, which was on the east side of his pasture, to prevent its spreading over the pasture. He testifies that the fire also burned across the north side of his pasture, which was about the center of section 16, and not on the north side of that section, as shown in the map. He found in the morning that the posts of his fence along that line had been burned, but he did not trace this fire any farther to the west than other witnesses have done, that is, possibly, to section 17, but, at all events, not far into that section. His testimony, which is cited by the plaintiff as tending to show that the McIntyre fire escaped to the northwest in the early part of the evening, was in answer to this question: "Q. Now, I wish you would indicate on the map about where you left the east line of section 21 at 3 o'clock in the morning?" His answer was: "Why, I left it at the southeast corner." * * * "Q. What would you say, Mr. Larson, as to it being west of Ditto's at that time? A. I wouldn't say how far west, because I wasn't west myself only over to Jacobson's; but I should judge the fire was right in there around him, north and east and west and all over." The main fire, being that part of the Vroman fire which was afterwards extinguished, burned to the north, not more than a quarter of a mile west of a line due north from the Ditto farm. This testimony of Mr. Larson in regard to the fire north of him was given with reference to the time he left Mr. Jacobson's house, about 12 o'clock at night. A straight line drawn directly from Mr. Jacobson's house across Mr. Ditto's place would strike the line of the Vroman fire, which was afterwards extinguished. The McIntyre fire, if it ran into section 17, would be directly south of Mr. Ditto's farm; so that Mr. Larson's testimony proved that at that time he saw either the main branch of the Vroman fire or the McIntyre fire, or, perhaps, the reflection of both, and he may well have supposed that the fire was right around Mr. Ditto's farm. This evidence does not tend to prove that the McIntyre fire went father to the northwest than into section 17.

Mr. George Scott lived about five miles south and two miles west from the point where the McIntyre fire is supposed to have left the main course of the Vroman fire. If the McIntyre fire extended a mile and a half west into section 17, it would be nearly due north, perhaps half a mile east of Mr. Scott's place. He says that between 9 and 10 o'clock he saw a fire "most due north" from his place, "and that would bring it up about Mr. Beatty's place." Mr. Beatty's place extends into section 17, so that this evidence does not tend to show that the fire was farther west than it was shown to be by the witnesses who were present at the McIntyre fire.

The evidence of the five witnesses relied on by plaintiff attempts to trace the side fire, which is called the McIntyre fire, and which left the main line of the Vroman fire, as above stated, and tends to prove that it extended west in the vicinity of the north line of the Larson pasture for a distance of about a mile. It does not tend to prove that it extended farther than a mile and a half. There is no evidence of any other witnesses who saw this fire advance, or afterwards traced its course farther to the west or north. There is testimony that several "sods" were observed that had been turned over by the plow, and were so burned on the under side as to indicate that the plowing was done after the fire had passed over. The evidence shows that some of the plowing, at least, was recklessly done (as by the witness Lynch and those with him), and those accompanying the men doing the plowing were continually "backfiring," so that evidence that a few isolated burned sods were turned by the plow is of no consequence.

What is the evidence to trace this "McIntyre fire" from the place where it is left by these witnesses to the place where the damage occurred? It will be remembered that the McIntyre fire is supposed to have left the main course of the Vroman fire at a point something over four miles directly south of the place where the damage occurred. The fire did not pass between section 32, where Mr. Pettit resided, and Brady Island. This is clearly shown by the

evidence, and is conceded by plaintiff, and will be again referred to. To have escaped, then, to the northwest, as contended, this McIntyre fire must have passed between Mr. Pettit's place and the main line of the Vroman fire, which is a little over a mile, possibly a mile and a half, distant. The plowing done by Fosberg and Fickenschers from soon after 12 o'clock until about 3 when they returned to Fosberg's place, is shown upon the map along the line of road from Fosberg's to Ditto's farm. The McIntyre fire, upon plaintiff's theory, must have passed several miles along substantially the same general direction of this plowing, and not long before the plowing began. It seems incredible that these men could have spent several hours in plowing along the vicinity where the fire had so recently passed; and, when it is remembered that there is no direct evidence that the fire had passed through there at that time, then, it must be said that there is an entire failure of evidence at that point, unless it is shown that there actually was fire to the north and west of the Pettit farm between 12 o'clock and the time of the commencement of the northwest gale, and this be regarded as evidence that the McIntyre fire must have gone through the route indicated.

In the plaintiff's brief the evidence that a fire passed toward the north on the east side of the Pettit farm is discussed in two branches, the evidence of those witnesses who resided on the Platte valley to the south of Brady Island, and the evidence of those witnesses who resided in the vicinity of the Pettit place. The witnesses who resided on the Platte valley were not situated so as to give satisfactory evidence in regard to the location of a fire that must have been seven or more miles distant, and it is not necessary to enter into analysis of their testimony. Mr. Peter Peterson and his wife, who also lived on section 32, both testified that at 10 o'clock in the evening they saw a fire three or four miles northwest of their place, and that it was a big fire. If this evidence is true, it establishes the existence of a third fire. It could not have been the fire

that came down from the northwest, because that fire clearly had not reached within three or four miles of the Peterson place at that hour of the night. It could not have been the so-called Vroman fire, because the course of the main branch or "head fire" is traced by the evidence, and it is conceded that that branch of the fire was extinguished before the damage occurred. It could not be that the so-called McIntyre fire, that is, the branch of the Vroman fire which extended to the west, and in regard to which so much evidence was received and so much discussion was had on the part of both parties, extended to the west and north between Mr. Pettit's place and Brady Island. Indeed, in the last brief filed in behalf of the plaintiff, it is said: "No one ever claimed that the McIntyre line of fire went between Pettit's place and Brady Island, or south or southwest of him, but that it did go east of him." Mr. Pettit's place joins the Peterson place on the south, and Mr. Anderson's place is in section 20, a mile directly north from Peterson's place. Mr. Anderson testifies that the fire burning north from Vroman's did not at any time burn south of Pettit's house. This evidence is so far corroborated and is so far reliable that it is quoted as reliable in plaintiff's brief. We have seen that there is an entire failure of proof that the so-called McIntyre fire passed over the territory between Pettit's place and the place of the accident, and then off to the west, so as to be northwest from Peterson's place at 10 o'clock in the evening. It follows that, if the evidence of the Petersons is regarded as credible, it goes far toward proving that a third fire had been started in the northwest before the so-called northwest fire came down with the gale. The evidence shows, and it is also a matter of common knowledge, that backfiring, as it is called, is a usual method of protecting one's property from approaching fire. When the wind had changed to the northwest, and had reached the fire that is called the northwest fire, and had increased the volume and power of that fire so as to make it visible to those in the course that that fire must take, the people threatened

would be justified in putting out new fires for their protection. Did the fire which is testified to by the Petersons have such an origin? These plaintiffs, in order to recover from the defendant, must so trace the fire originated by the defendant as to show that that fire, and no other, was the cause of their damage. Their evidence wholly fails to do this. They have been greatly injured without any fault of their own, and the party who caused their injury ought to make good their loss. Their misfortune is in not being able to produce evidence to prove who caused their damage.

The judgment heretofore entered is vacated, and the judgment of the district court reversed and the cause remanded.

REVERSED.

LETTON, J., concurring.

I have carefully reexamined the entire record in this case in the light of the aid afforded by the briefs and argument of counsel upon rehearing. As indicated in my former opinion, the question is a very close one. I think, however, that there is ample evidence to sustain the plaintiff's contention that a portion of the Vroman fire extended westward from the Ditto-Fosberg line, and that this branch fire, extending across the north line of the Larson pasture and northward into section 8, is the identical fire which is testified to by the defendant's witness, McIntyre. At 2 o'clock in the morning McIntyre ceased fighting the side line of a fire, the head of which had passed northward in the direction the wind was blowing. John Elander, whose place was a mile east of the place of injury, testifies that at half past 2 o'clock in the morning he stood on a hill and could see a little bit of flame or red about three or four miles away. It was "a little north, but mostly straight west of me." This would place the fire about two or three miles west and north of the place of injury, and about four miles north and a little west of where McIntyre was, and in the direction in which he said the fire had gone. No wit-

nesses testified, however, to seeing this fire between these two points. Several witnesses at a distance, who saw reflections in the sky, gave their opinions as to where the fire was, but could not definitely settle its locality. My associates are of the opinion that for the lack of direct evidence upon this point a case has not been made for submission to the jury. I think the testimony justifies the conclusion that the McIntyre fire extended northward; but the doubt is whether there is sufficient evidence that it went as far north as the point where Elander saw the flame, to justify the submission of the question to the jury. As to this point there is grave doubt. Much of the testimony in the case has but little relevancy to the inquiry as to whether the fire passed northward between Pettit's and Ditto's, and on a new trial further facts may be developed upon this question. As is pointed out by the chief justice, the parties seem to have spent much more energy in asserting and denying that the northwest fire caused the injury than upon the principal inquiry whether the Vroman fire ever reached the point where the plaintiff was injured.

I do not concur in several of the deductions drawn in the opinion, but, under all the circumstances, concur in the conclusion reached.

FRANK X. RIIFF V. PETER C. GARVEY.

FILED OCTOBER 5, 1905. No. 13,788.

Party Walls: ACTION FOR DAMAGES: EVIDENCE. One who consents to the uncovering of a portion of the roof upon a building belonging to him, to allow one of its walls which is a party wall to be built higher, cannot recover from his co-owner for damages from leakage, unless he proves that the injury resulted from the negligence of the defendant.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. C. Robinson, for plaintiff in error.

Millard & Snider, contra.

LETTON, C.

This suit was brought for ejectment and to recover damages for injury to certain property in Hartington, Nebraska. The plaintiff was the owner of a two-story brick building in Hartington, and also a lot of land 25 feet by 50 feet adjoining this building upon the east. He sold this adjoining tract to the defendant, Peter C. Garvey, and also sold and conveyed to him the right to use the east wall of the brick building as a party wall. Garvey proceeded to erect a two story brick building upon the land thus purchased, using the party wall as the west wall of the same. The roof of the plaintiff's building was constructed with a ridge in the center, and the water on the east side of the roof ran off into a gutter or eaves trough that projected over the land Garvey bought, and upon which his building was constructed. In the erection of Garvey's building it was necessary to remove the eaves trough, to roll back the tin roof which covered the top of the party wall for about two feet and to build the wall several feet higher. The plaintiff's first cause of action sets up that the defendant made an unlawful entry upon the east wall, and that he tore up and destroyed the eaves, spouts and gutters, and the roof of the building, thereby causing the rain to come in and destroy the plaintiff's plastering and causing the plaintiff to change the pitch of his roof and the gutters for the flow of water from the roof. The second cause of action alleges that, in consideration of allowing Garvey to close the window in the east wall in the second story of plaintiff's building, Garvey agreed to furnish sufficient light by constructing a skylight in the plaintiff's building; and the third cause of action is in ejectment to oust Garvey from that portion of the party wall which was extended by him higher than it was when the conveyance was

made. By agreement of the parties the third cause of action was withdrawn from the consideration of the jury after they had been instructed by the court. There is no competent evidence in the record to support a verdict for the plaintiff as to the second cause of action, and the verdict of the jury was clearly right upon this issue.

As to the first cause of action, there is evidence to show that the plastering in the plaintiff's building had been injured by water coming through the roof from melting snow at the time that the tin had been rolled back, but the weight of the evidence shows that the removal of the gutters and the rolling back of the tin was done with the knowledge and approval of the plaintiff. Before the Garvey building was begun, other parties had erected a building directly adjoining the plaintiff's upon the south, and he had engaged a man to change the slope of his roof and the direction of the escape of water therefrom so that it would not flow through the gutters on the east side of the building and be discharged at the southeast corner as before. The testimony is conflicting, but we think the greater weight is with the defendant, and the jury so found by their verdict. It appears that the opening was suffered to remain uncovered except by boards for more than a week, and that during this time some leakage occurred, but it is not shown that the defendant was to blame for this condition of affairs. Whatever damage the plaintiff suffered seems to have come from his own carelessness, or from the failure of the man he had previously employed to rebuild that portion of the roof, and not from any wrong upon the part of the defendant.

As to the instructions complained of, three of them bear upon the question of ejectment, which was afterwards withdrawn from the jury by agreement of the parties. We see no error in instruction numbered 12, which tells the jury that the owner of a building has no right to collect or discharge the rainwater which falls upon his roof upon his neighbor's premises. Instruction numbered 13, which tells the jury that a party wall is in law a solid wall with-

out openings, was apparently intended to apply to the issue as to light. The plaintiff was not prejudiced by the giving of this instruction, since in no event could he recover upon this issue under the evidence. We see no valid objections to instruction numbered 14. As to instruction numbered 15, the language is somewhat involved and obscure, but the idea which is conveyed by this instruction, in connection with the others, is that, if the injury to the plastering was caused by a defective and leaky condition of the plaintiff's roof, not created by the defendant's employees loosening the same, the defendant will not be liable. This is a correct statement of the law.

Upon the whole record we find no error prejudicial to the plaintiff. In fact, as the evidence stood at the close of the plaintiff's case, the motion of the defendant to direct a verdict might have been sustained by the trial court without error, since the only positive testimony that the condition of the plastering was caused by the opening of the roof came from one of defendant's witnesses. The question as to the legal right of one of the owners of a party wall built upon land belonging to the other owner to extend the same to a greater height, without the consent of the other proprietor, is not in the case and is not decided.

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.

GEORGE J. WOODS ET AL. V. LINCOLN GAS & ELECTRIC LIGHT COMPANY.

FILED OCTOBER 5, 1905. NO. 13,905.

1. **Taxation: VALUATION BY ASSESSOR: PRESUMPTION.** The valuation of property made by the proper assessing officer is presumed to be correct, and the burden is upon those attacking the same before the board of equalization to show that it should be assessed at a higher rate.

2. **The findings of a board of equalization must be so manifestly wrong that reasonable minds could not differ thereon before this court will disturb them.** *Field v. Lincoln Traction Co., ante,* p. 418.

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

Allen W. Field and *A. S. Tibbets,* for plaintiffs in error.

H. F. Rose and *E. C. Strode, contra.*

LETTON, C.

This is a proceeding in error to review the judgment of the district court for Lancaster county in affirming the action of the city council of the city of Lincoln, sitting as a board of equalization, in assessing the value of the personal property of the Lincoln Gas & Electric Light Company for the year 1902. The manager of the company made a return to the assessor that the value of its personal property was $175,000. This was increased by the tax commissioner of the city to $300,000. Objections were filed to this assessment with the board of equalization and a hearing had thereon. The board of equalization found that the value as fixed by the tax commissioner was correct, and the district court found no error in the proceedings.

At the outset of the discussion we deem it advisable to say that this court will not usurp the functions of the

tribunals created by law for ascertaining the fair cash value of property for taxation, and will not constitute itself a taxing board or board of equalization. It will examine the errors assigned in the proceedings of the district court in the same manner and to the same extent as in other error proceedings, and the same presumptions will be applied as in other cases. If the evidence is sufficient to support the judgment of the inferior tribunal it will not be disturbed, even though our view of its effect should differ from that of the board of equalization.

A number of errors were made in the admission of evidence before the board of equalization, but in the view we take of this case it is needless to discuss them. The main question in the case is whether or not sufficient evidence was introduced before the board of equalization to warrant that body in changing or modifying the assessed valuation returned by the tax commissioner. We have said that a verdict will not be set aside on the ground of want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong (*Sycamore-Marsh Harvester Co. v. Grundrad,* 16 Neb. 529); and so with the findings of the board of equalization, these must be so manifestly wrong that reasonable minds could not differ thereon before this court will disturb them. *Field v. Lincoln Traction Co., ante,* p. 418. The valuation made and returned by the tax commissioner is presumed to be correct, and the burden was upon the complainants before the board of equalization to show that the property of the corporation should have been assessed at a higher rate.

The evidence which was relied upon by the complainants consisted mainly of certain facts with reference to bond issues made by the company. It seems that the present corporation was formed as the result of a reorganization of the persons interested in a former corporation named the Lincoln Gas & Electric Company; that an issue of bonds and capital stock of this company

was surrendered at a discount to a reorganization committee, who issued bonds and stock of the present corporation in lieu thereof. There are now outstanding bonds of this company to the par value of $1,052,000. The testimony upon this branch of the case offers no definite basis upon which to estimate the actual value of the personal property of the corporation. The defendant introduced testimony with reference to the value of certain stocks of merchandise in the city of Lincoln for the purpose of comparison, and also testimony as to the amount it would cost to replace the entire property of the corporation within the city. But, taking the whole evidence together, there is not sufficient data furnished by either party upon which to base a reasonable estimate of the value of this property. This being the case, the determination made by the tax commissioner and the board of equalization must stand.

It may be said that the principal officers of this corporation are nonresidents of the state; that the books and papers from which accurate knowledge might be obtained of the cost or value of the plant were not within the jurisdiction of the board of equalization, and that the resident officers betrayed a remarkable degree of ignorance with reference to the corporate affairs. The errors committed in the admission of evidence were not prejudicial to the complainants, since, taking all the evidence that was furnished in the case, there is not sufficient to justify this court in reversing the judgment of the district court.

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.

W. Y. TEETZEL v. DAVIDSON BROTHERS MARBLE COMPANY.

FILED OCTOBER 5, 1905. No. 13,921.

Sales: ACTION. Certain goods shipped by the plaintiff to a bankrupt were stopped in transit. An order upon the carrier was then given by the plaintiff's agent to the defendant, whereby defendant obtained the goods and used them in his business. *Held*, that under the circumstances there was an implied contract upon his part to pay the plaintiff the fair market value of the goods, which could be enforced by an action on the contract.

ERROR to the district court for Douglas county: IRVING F. BAXTER, JUDGE. *Affirmed.*

B. F. Thomas and *E. R. Duffie,* for plaintiff in error.

Richard S. Horton, contra.

LETTON, C.

This is an action for goods sold and delivered. The plaintiff is a corporation doing business in Chicago as a wholesale marble dealer, and the defendant is in the marble business in Council Bluffs. In September, 1900, the plaintiff shipped to one W. E. Lewis, who was then in the marble business in Council Bluffs, the goods the price of which it is sought to recover. Before the goods reached Council Bluffs, Lewis failed and went into bankruptcy. The goods were stopped in transit by the plaintiff, acting through one Benjamin, an attorney of Council Bluffs. While they were lying in the hands of the railroad company at Council Bluffs, together with two other shipments made to Lewis at an earlier date, Benjamin testifies Teetzel was at his office, and that he gave Teetzel copies of certain bills of goods he was notified were at the depot; that Teetzel agreed to take the goods and pay for them, but the price was not definitely agreed upon, and that he gave Teetzel an order on the railroad company for the marble shipped by plaintiff to Lewis. Lewis testifies that Teetzel

paid the freight on all the marble shipped him, took it from the railroad station and used it in his business, and that he was with Teetzel and his employees when this was done. Teetzel denies that he bought this shipment of marble. He testifies that he did buy from Benjamin two other bills that had been shipped to Lewis, and paid for those. He further testifies that this lot of marble, or a part of it, was taken to his place by his drayman Bridenberg; that his men did some work on it under the direction of his foreman, but that this was done for Lewis; that the goods were taken from the railroad company by Lewis, and shipped out by him, and the work upon the marble paid for by Lewis. Upon this conflicting evidence the jury found for the plaintiff, and there is sufficient evidence to support the verdict.

Error is assigned as to the exclusion of certain exhibits. These exhibits all refer to the other two bills of goods shipped to Lewis and taken and paid for by Teetzel. Teetzel testified that he bought and paid for these goods, and that they did not include those the price of which is sued for in this action, which is not disputed by the plaintiff. While the admission of these papers might have been proper, yet the defendant could not be prejudiced by their exclusion, since there was no dispute over the matter they evidenced.

The instructions are complained of as being based upon the theory that there was a contract of sale between the parties, while no such contract was proved. The order upon the railroad company given to Teetzel by Benjamin was to deliver to him "the marble which was shipped by Davidson Bros. Marble Company to W. E. Lewis." It is admitted in defendant's brief that if Teetzel used this order to obtain the goods the price of which is sued for, even if they were not included in the contract of sale, he would be liable for their value, but it is said, "not on a contract, but in tort for a conversion." The plaintiff, however, might waive the tort and sue upon the implied contract of sale, which is what it has done in this case. When the defendant obtained possession of the goods by virtue of the

order, there was an implied agreement upon his part to pay the plaintiff the reasonable and fair market value of the same. This value was proved at the trial, and upon this implied contract the instructions were based. We find nothing prejudicial to the defendant in the record, and 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.

TOOTLE-WEAKLEY MILLINERY COMPANY, APPELLANT, V. L. W. BILLINGSLEY, TRUSTEE, APPELLEE.

FILED OCTOBER 5, 1905. No. 13,928.

1. Judgment: EQUITY: NEGLIGENCE. A court of equity will not relieve against a judgment obtained against a party by reason of the negligence of his attorney.
2. Absence of Reporter: REVIEW. If a party desires to complain of the absence of the official reporter, he should call the attention of the trial court thereto, obtain a ruling, and if forced to trial without the reporter preserve his exceptions.
3. Appearance. If a party who contends that a court has no jurisdiction over his person files a motion for a new trial, he thereby concedes that the court has power to act, and will not be afterwards heard to assert the contrary.
4. Bankruptcy: SET-OFF. A party against whom a judgment has been rendered in favor of the trustee of a bankrupt may, by proper proceedings in equity, be allowed to offset against the same a claim allowed in its favor against the bankrupt in the bankruptcy proceedings.

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

Wilson & Brown, for appellant.

Joseph E. Philpott, contra.

LETTON, C.

This is an appeal from an equitable action instituted by the appellant in the district court for Lancaster county to obtain a new trial in a certain cause pending in that court, and in which judgment was entered on the 2d day of April, 1903, against the appellant and in favor of L. W. Billingsley, trustee. In January, 1900, the appellant filed in the district court for Lancaster county his petition against the Globe Savings Bank, and certain sureties upon a bond given to the state of Nebraska to pay the debts of said savings bank, and against Sadie E. Puckett. The petition alleged, in substance, that Sadie E. Puckett had deposited certain money in said savings bank; that she had assigned her passbook and account to the Tootle-Weakley Millinery Company; that the bank was insolvent, and that the sureties were liable for the amount of the deposit. After this petition was filed, Sadie E. Puckett was adjudged a bankrupt, and L. W. Billingsley was appointed as trustee of her estate. On May 8, 1902, the trustee obtained leave to file an answer and cross-petition to the petition of the Tootle-Weakley Millinery Company, within ten days. On February 3, 1903, without further leave of court, Billingsley, trustee, filed an answer and cross-petition. The cross-petition alleged that the passbook was the property of Sadie E. Puckett; that it came into the possession of the Tootle-Weakley Millinery Company without her knowledge or consent; alleged a demand for its return, and refusal; that it was of the value of $500; and prayed judgment for its value. No notice of the filing of this cross-petition was served upon the appellant, but on March 10 the plaintiff was given five days to plead to the same. On the 19th of March the default of

the plaintiff to the cross-petition was entered; and the record recites that on the 2d day of April, 1903, the parties appeared by their attorneys, a trial had to the court without the intervention of a jury, the same being waived by agreement in open court; and a finding in favor of Billingsley, trustee, upon the cause of action set forth in the cross-petition was made, and a judgment for $532.64 was rendered against the plaintiff. The next day, during the same term of court, a motion for a new trial was filed by W. T. Stevens, acting as attorney for the plaintiff, alleging, as grounds therefor, that the court was without jurisdiction over the plaintiff; that no service of process was had upon the cross-petition; that the judgment was rendered without notice and after the jury was discharged; alleging the usual grounds that the judgment was contrary to law, and to the evidence, etc.; and, further, that the defendant was guilty of fraud and deception in her testimony. This motion for a new trial was overruled, and the court adjourned April 6, 1903. The plaintiff was given 40 days to prepare a bill of exceptions. An application was made to the court to prepare a bill of exceptions within this time, but it appears that no notes of the evidence were taken at the trial and the plaintiff was unable to procure such bill.

The appellant contends that the default judgment was rendered without jurisdiction. The record shows an appearance by its attorneys at the time of the trial, and active participation therein by the agreement to waive a jury. It is alleged, however, that these allegations are untrue. Even if so, the duly authorized attorney for the appellant appeared in court the next day and filed a motion for a new trial, which motion was acted upon by the court, and exception taken. Having invoked the powers of the court to set aside the default judgment, the appellant thereby admitted its jurisdiction. It cannot consistently say that the court had no jurisdiction in the proceedings, and at the same time pray for the exercise of its powers for its own benefit. The appearance made by the

attorney at this time gave jurisdiction as to the entire proceedings. *Fisk v. Thorp,* 60 Neb. 713.

Appellant's second contention is that there was no evidence to support the judgment. This point could properly have been raised upon error proceedings from the original judgment, and offers no reason for granting a new trial by a court of equity.

Appellant's third contention is that the plaintiff had an absolute right to depend upon the official reporter to take the evidence, and, when called upon, to prepare a bill of exceptions. The evidence shows that W. T. Stevens, the attorney for the plaintiff, knew of the order made by the court giving the plaintiff leave to answer the cross-petition. The record shows that he was present at the time of the trial. It is true the petition alleges that this entry is incorrect and that no attorney was present, but we are compelled to accept the record as true in this proceeding. If any mistake was made by the clerk, the plaintiff should have applied to the court under the provisions of sections 602 *et seq.* of the code to have the same corrected so as to show the facts. It would establish an evil precedent if we should permit the records of the district court to be corrected by proceedings in equity to obtain a new trial. If the record could be contradicted in a proceeding of this nature, no faith could be placed in the verity and finality of judicial proceedings, until the time fixed by the statute of limitations to bring such actions had expired. The remedy provided by the statute for such corrections is ample and there is no reason why it should not be followed. If the plaintiff was present at the trial, the absence of the official reporter should have been called to the attention of the court, and, if an order for his attendance was refused, that fact should have been preserved in the record. We have held that a party is justified in relying upon the court reporter for a transcript of the oral proceedings at the trial, and that if, without fault on his part, such transcript cannot be furnished nor a bill of exceptions prepared, a court of

equity will, in a proper case, grant a new trial. In this case Mr. Stevens testifies that the judge spoke to him about this cross-petition in the court house, and that he told him it was doubtful whether he would make any further appearance. He thinks this was just before judgment was entered, and the testimony of Judge Frost and of Mr. Philpott shows that Mr. Stevens was aware that an effort would be made to obtain a judgment against his clients upon the cross-petition during that term of the court, which was just about to expire. It is a settled principle of law that a court of equity will not relieve against a judgment obtained against a party by reason of the negligence of his attorney. *Funk v. Kansas Mfg. Co.*, 53 Neb. 450; *Scott v. Wright*, 50 Neb. 849; *Losey v. Neidig*, 52 Neb. 167. If the appellant's attorney was present at the trial and did not object to the absence of the official reporter, he cannot now seek a new trial upon that ground. It was his duty to call the attention of the trial court thereto, to obtain a ruling, and, if adverse, to preserve his exceptions. As the record now stands, it appears that the attorney failed to do this, and hence is in no position to urge it to a court of equity as ground for a new trial. The fact may be that he was not present, but as to this we are concluded by the record as it now stands.

The appellant prays for alternative relief, and asks, if it is held that it is not entitled to a new trial and the judgment is not set aside, that it may be allowed to set off against the judgment a balance remaining unpaid upon its allowed claim against the estate of Sadie E. Puckett. It argues that this claim was allowed in the bankruptcy proceedings; that this allowance is of the nature of a judgment, and that it is peculiarly within the province of a court of equity to set off one judgment against another. It appears that the appellant filed its claim in the bankruptcy proceedings for the sum of $2,293.60, which claim was allowed. This debt was secured by a mortgage upon certain real estate. Foreclosure proceedings were afterwards had, which resulted in a sale of the land and the

payment of $2,000 upon the debt. There is still unpaid on the allowed claim an amount which, together with interest, exceeds the amount of the judgment.

It has been urged that this is not the forum in which the appellant can have relief, but that it should be referred to the bankruptcy court, which alone has jurisdiction. At the time of the hearing upon the allowance of the appellant's claim in the bankruptcy court, the claim made by Mrs. Puckett against the appellant for the conversion of her passbook and money was not urged by her or her trustee as a ground of set-off against the appellant's claim. That court therefore could not act upon it, even if it had possessed jurisdiction to pass upon the validity of an unliquidated claim for damages. Nor can appellant at this time be given any relief in the bankruptcy court, since its claim stands in the same condition as that of other creditors. It is adjudicated, and nothing remains to be done with it except to apportion to it its *pro rata* share of the assets of the bankrupt estate. With the judgment the case is different; unless the set-off is allowed, the appellant will be compelled to pay the whole amount of the judgment, and to receive in return upon its allowed claim only a small percentage of what is due to it from the bankrupt. The allowance of the appellant's claim against the bankrupt's estate has all of the finality of a judgment. We have, then, two adjudicated demands, one in favor of the bankrupt's estate and one against it. We have held that the appellant is not entitled to a new trial, and the case, as it now stands, is a suit in equity to set off one judgment against another. This is the usual and ordinary manner of obtaining relief of this nature. It is not in every case that a court of equity will set off mutual demands which are distinct and independent of each other, but the insolvency of one party is a circumstance which strongly appeals to a court of conscience to apply the rule. If the result of the refusal would deprive one party of his property for the benefit of others to whom he is under no obligation, this will justify the granting of

the relief prayed. *Boyer v. Clark,* 3 Neb. 161; *Wilbur v. Jeep,* 37 Neb. 604; *Richardson v. Doty,* 44 Neb. 73. The instant case is a strong one for the application of the rule. Considering the nature of the claim for which the judgment was rendered, the facts as to the manner of its rendition, and the entire situation of the parties, it seems clear to us that equity demands that the appellant should be permitted to set off the balance due it upon its allowed claim against the judgment.

As to the contention that the matter should be determined by the bankruptcy court, and not by this court, the rule is that the party desiring the set-off must move in the court where the judgment against him was recovered, because that is the court that controls the judgment. Black, Judgments, sec. 1,002. It is also true that suits to set off a judgment of one court against the judgment of another are equitable in their nature, and usually must be brought in a court of chancery. *Thrall v. Omaha Hotel Co.,* 5 Neb. 295; *Stenberg v. State,* 48 Neb. 299. It is another elementary rule that, where a court of chancery has obtained jurisdiction of a controversy for certain purposes, it will retain the same until full justice and equity have been done between the parties. Why should the appellant be compelled to have recourse to another court to obtain relief which the present forum has full power to grant? No good reason has been assigned, and we think none can be given.

We recommend that the judgment of the district court be affirmed so far as the refusal to grant a new trial is concerned, but that the cause be remanded, with directions to the district court to ascertain the amount due the appellant upon its allowed claim and to set off the same against the judgment.

AMES and OLDHAM, CC., concur.

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

far as the refusal to grant a new trial is concerned, and the cause is remanded, with directions to the district court to ascertain the amount due the appellant upon its allowed claim and to set off the same against the judgment.

JUDGMENT ACCORDINGLY.

F. W. FITCH V. EUCLID MARTIN, AMINISTRATOR.

FILED OCTOBER 5, 1905. No. 13,937.

1. **Contract:** CONTINUANCE OF SERVICES. If a contract of employment by the year has been entered into for a definite period, continued service of the same nature rendered from year to year after this period has expired, without any other contract being shown, will be presumed to have been performed under the original contract.
2. **Evidence:** COPY OF ACCOUNT. An admission by a deceased person that an account kept in a certain book is correct is not sufficient to warrant the admission in evidence of a copy of this account in another book.
3. **Verdict:** EVIDENCE. A verdict will not be set aside on the ground of want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong.
4. **Witness:** COMPETENCY. A person who has filed a claim against the estate of a deceased person for legal services performed under a yearly contract is not incompetent to testify as to certain independent acts which he performed when the deceased had no personal connection with the act, and as to which the deceased did not participate.

ERROR to the district court for Douglas county: EDMUND M. BARTLETT, JUDGE. *Reversed.*

A. S. Churchill, for plaintiff in error.

F. H. Gaines and *E. R. Duffie, contra.*

LETTON, C.

In September, 1902, Robert Major, who was a resident of Douglas county, Nebraska, died testate in South Carolina.

Euclid Martin was appointed administrator of his estate. A claim was filed by F. W. Fitch in the county court for Douglas county, alleging that the deceased was indebted to him on account of professional services rendered by him as an attorney at law, under a parol contract entered into in October, 1893, for the employment of Fitch at the yearly salary of $500, and alleging that on or about the 1st day of January, 1895, it was agreed between them that the compensation should be $400 a year instead of $500. The claimant further alleges that services were performed under said contract during each year down to the death of Major on September 13, 1902; the payment of a part of the amount claimed in the lifetime of Major, and that the sum of $3,450 is owing on said contract from the estate of the deceased to the plaintiff. The administrator answered, denying every allegation in the plaintiff's petition, alleging a settlement during Major's lifetime, pleading that all claims for services rendered more than four years before the claim was filed are barred by the statute of limitations, and specifically denying that any services were rendered after October, 1898. The reply denies the settlement, and denies payment, except so far as stated in the petition. Upon the trial, after the evidence of both parties had been produced, the district court instructed the jury to return a verdict for the defendant, which was done, and judgment was rendered dismissing plaintiff's cause of action. A number of errors are assigned, but it will only be necessary to consider a few.

The first error assigned is that the court erred in sustaining objections made to a question asked the witness Karbach. Karbach had testified that in October, 1893, he heard a conversation between Major and Fitch concerning the making of a contract for the employment of Fitch. He was then asked what that conversation was; to which objection was made as immaterial and irrelevant, and for the further reason that any contract made at that time would be barred by the statute of limitations. The objection was sustained, and exception taken. Plaintiff,

however, did not make any offer to prove the facts which were sought to be elicited by the question, hence is in no position to complain of this ruling. *Alter v. Covey,* 45 Neb. 508. We may say, however, that we think the evidence sought was proper, since, even if a contract had been entered into for employment by the year at a time beyond the period limited by the statute in which recovery for services might be had, evidence of continued service of this same nature from year to year, without any other contract being shown, will be presumed to be under the original contract, and it is proper to receive such evidence to furnish the foundation of the plaintiff's claim. *Kellogg v. Citizens Ins. Co.,* 94 Wis. 554, 69 N. W. 362; *Tatterson v. Suffolk Mfg. Co.,* 106 Mass. 56; *Tallon v. Grand Portage Copper Mining Co.,* 55 Mich. 147; *Sines v. Superintendents of the Poor for Wayne County,* 58 Mich. 503, 25 N. W. 485; *Dickinson v. Norwegian Plow Co.,* 101 Wis. 157, 76 N. W. 1108.

It is next urged that the court erred in sustaining the objection to exhibit numbered 2. Exhibit numbered 2 is a book which contains a number of pages of charges against Major made by Fitch from November, 1892, to June, 1902; the first entries being charges for specific services rendered, and the remaining pages apparently being memoranda of professional services performed each year, with a charge of $400 for each year up to the time of Major's death. Mrs. Dunham, who was Fitch's stenographer, testifies that Fitch kept this book for Major; that she remembers the first time that Major went over the account he said to Fitch he would like to have him make a copy of it, so that he could have it to take with him whenever he wanted it; that Fitch gave the book to Major, and that Major took it away, and then afterwards brought it back; that he had it once or twice; that when Fitch did not have the book Major had it. It is not contended that Major ever made an admission of the correctness of the entries in this book, but it is urged that it is a copy of another record which was introduced in evidence; that Major agreed to the correctness of the entries in this other account book, and that consequently

this was an admission of the account in this book, and made it competent evidence as an admission. These facts, if true, would entitle the other account to be admitted in evidence, which was done, but furnish no ground for the admission of a copy of that account. The fact that the witness does not testify that any objection or complaint was ever made by Major in her hearing to the entries in this book does not amount to the dignity of an admission by Major that the charges therein made against him were correct, and we think that the ruling of the court was proper when it excluded this evidence.

The principal error complained of is that the trial court erred in directing the jury to return a verdict for the defendant. To determine this point requires an examination of the evidence. It appears from the evidence that Major and Fitch, prior to the time that they lived in Omaha, had both lived in Atlantic, Iowa; that Major, while living in Atlantic, was a man of family, engaged in the lumber and building material business; that he was worth at that time from $50,000 to $70,000; that afterwards his wife died, and he moved to Omaha, where he lived alone. Fitch testifies that Major was worth about $50,000 when he came to Omaha. Major obtained employment in the postoffice, and was apparently classed as a janitor, though the work he did was more in the nature of being custodian of certain post office supplies. Charles Karbach testifies that he first knew Major in October, 1893; that Fitch's office at that time was on the fourth floor of the Karbach Block, of which the witness had charge; that Major used to go frequently to Fitch's office, averaging two or three calls a week for ten years; that in 1894 he heard a conversation between Major and Fitch with reference to Fitch's employment as attorney; that in that conversation Fitch wanted to charge Major $500 a year for services, but Major objected, and that they finally agreed that it should be $500 up to the next year and $400 a year from then on. He says that after that he was frequently in Fitch's office when Major was talking with Fitch about lands or the

examination of title; that at one time Major went away and was gone for some time, and that after he came back he would be up there two, three or four times a week. He says that in 1896 he saw a note given by one Page turned over to Fitch by Major, and that Major told Fitch to collect the note and take his fees out of it. John A. Meyer, who was the janitor in the Karbach Block, says that he was working on the elevator in 1898; that Major came to see Fitch sometimes every day, sometimes twice a day and sometimes he would not see him oftener than twice a week. Mrs. Dunham testifies that she began to work for Fitch as his stenographer in 1898, and worked for him in 1901; that she first saw Major at Fitch's office in November, 1898, and at that time Fitch was looking up taxes and abstracts and deeds to real estate for Major; that one day she heard a conversation between a man named Siltz and Major with reference to some property; that Siltz made a remark which she did not hear, but she heard Major say in reply: "No, I am paying Fitch $400 a year for my work, and it is right that he should do this." She further testifies that she has seen Major and Fitch go over their book account in the book marked exhibit numbered 1 on pages 77 and 78; that after they had been looking over the account together in December, 1898, Fitch collected some money for Major; that Major paid Fitch $50 of it, and told him to give him credit for that on his account. She further testifies that she heard a conversation in which Major gave Fitch the Page note, but that Fitch did not get the money on this note, and he gave it back to Major, and Major told him to charge it up to his account; that he expected some money pretty soon from his brother's estate, and he would settle up with Fitch; that Major went south about the first of July, 1899, was gone until November, 1900, and that Major wrote Fitch while he was gone. She testifies, further, as to several trips made by Fitch for Major. On cross-examination as to the account she testifies that Major wanted to see it, and said that as far as he knew everything appeared all right. She could not say,

however, whether it was on page 77 or some other page, but knows it was in the same book. John P. Finley, who had an office in the Karbach Block, testifies that he knew of Fitch doing business for Major; that he saw Major in Fitch's office frequently. Robert Herrick testifies that before Major received his inheritance from his brother he owned a number of vacant lots and other property that was of no great value; that from 1894 on Major was buying and selling property and trading; that he was in Herrick's office nearly every day for two years; that he looked up titles and abstracts for him, and that he now has a claim against the estate for this work; that Major did a good deal of outside business that he did not know anything about; that in 1899 Major received property from his brother's estate. The witness testifies that he learned from Major that Fitch had this claim against him; that he learned this before Major went south and before he inherited this money. W. R. Buck was acquainted with Fitch and Major, and testifies that at one time he showed Major some property which he was trying to sell him; that he told Major he would furnish an abstract, and let his attorney look it over and see whether it was all right or not; and that Major said that Fitch looked after his abstract business and all that kind of thing—all his transactions. This was in October or November, 1901. He testifies, further, that he had often seen Major in Fitch's office, and other witnesses testify that they often saw Major and Fitch together at Fitch's office. Mr. Hutchison testifies that he had known Major for 27 years; that in the last part of 1898 he tried to sell Major a house and lot adjoining his own; that he had a conversation with him in regard to selling the property, and that in the course of the conversation Major said that he was paying Fitch $400 a year to do his business. This witness came from the same place as Fitch and Major, had known Fitch since he was a boy, and knew Major as a lumber dealer in Atlantic. He said he would often find Major in Fitch's office. Exhibit numbered 1, which was admitted in evi-

dence, consists of two pages of a book of account. The entries from 1894 to 1902, inclusive, consist of one entry for each year in the form of a summary of services performed, with a single charge of $400 for each year's services. The defendant introduced evidence to show that Major left a large number of papers among his effects, in none of which was there any reference to Fitch or anything whatever regarding Fitch. The administrator testifies that Fitch came to him and told him that if he was employed as attorney for the estate he would present no claim, but this is denied by Fitch. Other testimony was introduced tending to prove that up to the time that Major received the property from his brother's estate he had very little property, mostly vacant lots or wild lands in western Nebraska, all of which was of little value; that he was employed in the post office during all this time, and that it was necessary for him to be there practically all the time that the post office was open. Certain other evidence was received as to whether the books of account offered at this trial were introduced in evidence in the county court at the hearing before the county judge. As to this there was a conflict of testimony.

The administrator urges that, this being a claim against the estate of a deceased person, it should be carefully scrutinized and only admitted upon very satisfactory proof, and that there is no satisfactory proof whatever of a single service rendered the deceased by the claimant as his attorney during the entire period he asserts his employment continued. In this connection his counsel have ably discussed in the briefs and oral argument the weight and credibility of the evidence, have pointed out inconsistencies between the testimony of the witnesses Karbach and Mrs. Dunham, and have called the attention of the court to the improbability of other facts which have been testified to by the plaintiff's witnesses. These considerations were proper to have been urged to a jury, and might have great weight in affecting the minds of the jurors as to the justness of the claim. Granting, however, all that has

been urged in this connection, the fact remains that there is evidence which tends at least to support a part of plaintiff's case. We have testimony that a contract was made between Major and Fitch for legal services to be performed for an annual compensation of $400. We have testimony that Fitch performed some services; that Major told several parties that Fitch was his attorney and attended to his business, and one witness testifies that Major told him he was paying Fitch $400 a year to act as his attorney. It is true there are inconsistencies between the stories of different witnesses, and that there may be considerable doubt as to certain of the facts testified to, when we take into consideration Major's circumstances. But, even as to Major's financial condition during the years prior to the receipt of the inheritance from his brother, there is a conflict in the evidence, and the whole matter was one for the jury to determine, and not for the court. We think that in the laudable zeal of the trial court to preserve the deceased's estate it overlooked the principle that questions of fact are for the jury, and that, if the testimony upon the part of the plaintiff alone, viewed in the light most favorable to him, would support a verdict, he is entitled to have the whole matter submitted to a jury. While the evidence is not free from doubt, we cannot say that it would not support a verdict. Counsel for the administrator, if the case were submitted to a jury, would be entitled to present to that body as forcibly and clearly the objections to the weight and credibility of the evidence as they have done in their brief and argument before this court, and there is no reason to suppose that they would not receive proper and due consideration.

Error is assigned on account of the exclusion by the court of the testimony of Fitch with reference to what he did concerning the examination of title to certain property belonging to the deceased; and also as to the exclusion of evidence showing that Fitch made several journeys to different localities for the purpose of examining into the title to lands situated there; also as to whether

or not he examined certain abstracts. All this testimony was objected to and excluded upon the ground that it involved a personal transaction with the deceased. The question is whether this testimony is a "transaction" between the deceased person and the witness. We have said that the word "transaction," as used in the code, embraces every variety of affairs the subject of negotiations, actions or contracts between the parties. *Smith v. Perry,* 52 Neb. 738. The witness Fitch did not testify that any contract was ever entered into between him and the deceased with reference to his employment as counsel or attorney, and the matters which it was sought to elicit by this proffered testimony were independent facts, which, standing alone, would have no probative value in the case. The fact that the plaintiff made a trip to Atlantic, Iowa, or that he examined a certain abstract, if unaccompanied by any testimony on his part that this was done in consequence of a contract of employment with the deceased or at the deceased's request, would not be a transaction with the deceased. The testimony might corroborate the evidence given by other witnesses as to the existence of a transaction, but it would not be evidence of the transaction itself. To illustrate: A contractor might agree to build a house for a person who afterwards died. After the house was built and the death of the person with whom he contracted, the builder could not testify as to the making of any contract or agreement with reference to the building of the house, but there is nothing in the statute which would prevent him from testifying that he actually built a house upon a certain lot of ground. Unless this evidence was connected with the deceased by the testimony of other witnesses showing that the house was built upon this ground at the request of or with the knowledge of the deceased, no recovery could be had. The testimony of the contractor that the house was built would not be proof of a transaction with the deceased and would not be incompetent under the rule.

In the case of *Lerche v. Brasher,* 104 N. Y. 157, 10 N. E.

58, the court held, in an action against an executor by an attorney to recover for services rendered his testator, where the employment has been competently proved, the plaintiff may describe the things which he did, provided such acts were done in the absence of the deceased and without his immediate or personal participation, and the deceased, if living, could not, for that reason, contradict such testimony. In that case the attorney was permitted to testify that he went to an office and got the papers in a case in which deceased was a party, and went to Albany to prepare the case with another attorney for the court of appeals. The court was of the opinion that these were independent facts in which the deceased was not personally a participator, and which, if living, he could not for that reason have contradicted. They might have been done without his authority or knowledge, and did not necessarily involve a personal transaction with him. And so, in this case, any examination of title by Fitch or journeys to other points made by him upon business, the nature of which is shown to be connected with the deceased's affairs and as to which the deceased did not personally participate, are proper to be admitted in evidence as independent facts. The line, however, should be carefully drawn by the trial court, so that the protection thrown around the estate of deceased persons by the statute may be preserved, and yet the rights of the living be not interfered with. Where the act was one with which the deceased had no personal connection so far as disclosed by the evidence of the interested witness, it is admissible, if it tends to establish the truth of the claim he makes; but, if any act or conversation of the deceased is involved, the statute excludes it.

Under these considerations, we recommend that the judgment of the district court 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.

LEXINGTON BANK V. PHENIX INSURANCE COMPANY ET AL.

FILED OCTOBER 5, 1905. No. 13,865.

Debt: CANCELATION: PRESUMPTION. In the absence of evidence, an agent for collection who cancels the obligation of the debtor is presumed to have done so in consideration of the face amount of the claim.

ERROR to the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

E. A. Cook, for plaintiff in error.

W. W. Leek and *H. D. Rhea, contra.*

AMES, C.

The Phenix Insurance Company recovered a judgment against John Everson, which was assigned by its attorneys without consideration, but for collection only, to the Lexington bank, and the assignment was afterwards ratified by the company. After the assignment, Everson sued the the bank upon a money demand for $800, and the bank pleaded set-offs, including the judgment, to the aggregate amount of about $1,000. The suit never came to trial, but was settled and dismissed, and as a part of the settlement the bank satisfied and discharged of record the insurance company's judgment. What specific gain or advantage the bank obtained in the settlement by reason of such discharge is not shown by the evidence, and as to whether Everson was at the time pecuniarily responsible there is some conflict; but we think the latter question is immaterial. In the absence of evidence, an agent for col-

lection who cancels the obligation of the debtor must be presumed to have done so in consideration of the face amount of the claim. This is an action by the insurance company against the bank to recover the amount of the judgment and interest. There is a conflict in the evidence as to whether the judgment was purchased and owned by the bank, or assigned to it for collection as alleged in the petition, but the jury determined this and all other issues in favor of the plaintiff, and returned a verdict accordingly, upon which a judgment was rendered, which this proceeding is prosecuted to reverse.

The plaintiff in error complains of the action of the court in the giving and refusal of instructions, but the main contention of counsel is that the verdict is unsupported by evidence. We are not only not able to agree with him, but are of opinion that it is the only verdict which the evidence would have supported, and that errors in instructions, if there are any, were without prejudice.

We therefore 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.

JOHNSON COUNTY V. CHAMBERLAIN BANKING HOUSE ET AL.

FILED OCTOBER 5, 1905. No. 13,911.

1. **Counties: RIGHT TO SUE.** A county in its corporate character is a competent and proper party to sue for the enforcement of all contracts and obligations in its behalf, unless the statute expressly provides otherwise. This right is not impaired by the fact that the obligation may be, or is required by law to be, discharged by payment of a liquidated sum to the county treasurer or to his order, upon demand.

2. **Pleading.** A petition which alleges that a contract of a corporation was made, executed and delivered by it by its officer and agent, naming him, is not demurrable on the ground that authority by the agent does not sufficiently appear.

ERROR to the district court for Johnson county: ALBERT H. BABCOCK, JUDGE. *Reversed.*

J. C. Moore and *Hugh La Master,* for plaintiff in error.

L. C. Chapman, J. B. Douglas, Frank L. Dinsmore, S. P. Davidson and *Ed. M. Tracy, contra.*

AMES, C.

This is an action against the principal and sureties upon a bond executed pursuant to the statute to secure the deposit of moneys by the treasurer of Johnson county in the defendant bank. The district court sustained a demurrer and dimissed the action upon the two grounds: First, that the plaintiff was without right to maintain suit upon the instrument for a breach of its conditions, upholding the contention of the defendants that the county treasurer, being the sole official custodian of county funds, can alone prosecute an action. We think the objection is clearly insufficient. The statute expressly provides, and this court has repeatedly held, that the treasurer is not the custodian of and is not responsible for the safe-keeping of moneys deposited in a bank pursuant to the statute, if the bank has given a bond as the law prescribes. *In re State Treasurer's Settlement,* 51 Neb. 116; *County of Hall v. Thomssen,* 63 Neb. 787. When a bank has executed such a bond as the statute prescribes, the duty of the treasurer to deposit the public funds therein becomes an imperative one, performance of which will, if necessary, be compelled by mandamus (*State v. Bartley,* 39 Neb. 353), and the relation between the bank and the county becomes the ordinary one of debtor and creditor. We think that neither argument nor citation of authority is requisite for the support of the proposition that the county in its corporate capacity

is a competent and proper party to sue for the enforcement of all contracts and obligations in its behalf, unless the statute expressly provides otherwise. This right is not impaired by the fact that the obligation may be, or is required by law to be, discharged by payment of a liquidated sum to the treasurer or to his order, upon demand.

The second ground of demurrer is that the bond, a copy of which is set out in the petition, was signed by the corporate name of the principal, "by Charles M. Chamberlain, Cash."; and it is urged that it does not sufficiently appear that Chamberlain had authority to execute the instrument. That, however, is an objection to be made by answer and evidence, and not by demurrer. The petition alleges, in substance, that the corporation by its cashier made, executed and delivered the bond for the uses and upon the considerations pleaded. If such is the fact the bank, which can contract only by its agents, is, without doubt, bound, and the fact, in the present state of the case, stands admitted upon the face of the record.

We recommend therefore that the judgment of the district court be reversed and the cause remanded for further proceedings.

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 for further proceedings.

REVERSED.

MARY A. WALTERS, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

FILED OCTOBER 5, 1905. No. 13,922.

Insurance: ELECTION. When the certificate of membership in a railway relief department expressly provides that the indemnity therein provided shall be waived or forfeited by an action for

damages against the railway company itself, the terms of the contract, and not the general rules of law relative to the election of remedies, will determine the consequences of such an election.

ERROR to the district court for Red Willow county: ROBERT C. ORR, JUDGE. *Affirmed.*

J. F. Cordeal, C. H. Boyle and *Berge, Morning & Ledwith,* for plaintiff in error.

W. S. Morlan, J. W. Deweese and *F. E. Bishop, contra.*

AMES, C.

There is no dispute of fact and but a single question of law involved in this case, which is a proceeding in error for the reversal of a judgment for the defendant in the district court. The action is against the relief or insurance department of the defendant company for a recovery by a beneficiary named in a certificate of membership on account of the accidental death of a member, and was submitted at the trial upon a stipulation of facts of which the following is a copy:

"It is hereby stipulated and agreed by and between the plaintiff and the defendant in the above entitled action: (1) That the defendant, the Chicago, Burlington & Quincy Railway Company, is a corporation duly organized and existing under the laws of the state of Iowa, and that as such it has possession and control of the lines of railroad formerly owned and controlled by the Chicago, Burlington & Quincy Railroad Company, running from Chicago through the state of Illinois, Iowa, Nebraska and elsewhere. That there exists in connection with said railway company what is known as the Burlington Voluntary Relief Department, originally organized by the employees of, and in connection with, the Chicago, Burlington and Quincy Railroad Company, and that the defendant railway company has succeeded to all the obligations and liabilities of the said railroad company in connection with said relief department and is responsible for any and all

obligations and liabilities of said railroad company under the same terms and conditions of contracts of members in the said relief department as they exist with the railroad company. (2) That on the 23d day of September, 1897, said Burlington Voluntary Relief Department issued and delivered to one Edward Walters its certificate No. 40,991, which is attached hereto as a part hereof, marked 'Exhibit A.' That the said Edward Walters was a member of the Burlington Voluntary Relief Department in good standing at the time of his death. That he was killed by an engine and cars operated by the Chicago, Burlington & Quincy Railroad Company, while an employee of said company, on the 6th day of October, 1898. That the deceased at the time of his death left no widow or issue or father, but did leave surviving him his mother, the plaintiff herein, as his beneficiary under the terms and conditions of his membership in said relief department. (3) That under the contract and rules and regulations governing the membership of said Edward Walters he became a member of the second class, and his beneficiary was entitled to a death benefit in the sum of $500, in accordance with the terms of said contract and rules and regulations governing the membership. (4) That a copy of the regulations of said relief department is attached hereto, marked 'Exhibit B,' and made a part hereof. That the certificate of membership in said relief department was issued to said Edward Walters upon an application made and executed by him in the form as prescribed by section 33 of the regulations, a copy of which application is hereto attached and made a part hereof, marked 'Exhibit C.' (5) That the plaintiff was on the 19th day of June, 1899, duly appointed administratrix of the estate of Edward Walters, deceased, and thereafter, to wit, on or about the 1st day of March, 1900, the plaintiff as such administratrix commenced an action in the district court for Greeley county, Nebraska, against the Chicago, Burlington & Quincy Railroad Company to recover the sum of $5,000 as damages sustained on account of the death of her said son, Edward Walters; that said cause

was removed to the circuit court of the United States for the district of Nebraska, and was there tried on its merits; that on said trial it was pleaded and proved by the defendant that it was in nowise responsible or liable to the plaintiff in said action in damages by reason of the death of the said Edward Walters, and on the 24th day of October, 1900, judgment was duly rendered in said action in favor of the defendant therein and against the plaintiff therein, finally and conclusively determining and adjudicating that the said defendant was not responsible or liable in damages for the death of said Edward Walters, and that the plaintiff had no legal right to recover any damages whatever from the defendant by reason of his death; and that the said defendant should go hence without day and recover of the plaintiff therein its costs expended in said cause. That an appeal was duly taken from said judgment by the plaintiff as administratrix of the estate of Edward Walters, deceased, to the supreme court of the United States, and on or about the 14th day of April, 1902, the judgment of the lower court was affirmed by the supreme court of the United States, and a judgment on mandate rendered in the circuit court of the United States for the district of Nebraska against the plaintiff for costs in said proceedings. That said judgment has never been vacated, set aside, canceled or modified in any way, and still stands in full force and effect as a valid adjudication of a claim of plaintiff as administratrix in that proceeding to recover damages against the said railroad company. (6) No judgment for damages by reason of the death of said Edward Walters has been rendered in any action in said federal court, or any other court, against the defendant and in favor of the plaintiff. (7) That no demand was ever made by this plaintiff, or any one for her, for the payment of the death benefit provided in said contract of membership, until after the final adjudication of the said action brought by the administratrix of said estate for damages as above set forth, and no death benefit has ever been paid by the defendant company, or its

successor, on account of the death of said Edward Walters."

The clause in the regulations of the department mentioned as "Exhibit B" in the foregoing stipulation, and upon which the defendant relies, and which the lower court adjudged as in the circumstances of the case a sufficient defense, is as follows:

"If any suit shall be brought against the company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to a member, the benefits otherwise payable and all obligations of the relief department and of the company created by the membership of such member in the relief fund shall thereupon be forfeited, without any declaration or other act by the relief department or the company."

The ingenious argument of counsel for the plaintiff in error succinctly stated is this: It is a settled rule of law, established by the decisions of this and many other courts, that the doctrine of the election of remedies is inapplicable in an instance in which the facts alleged or the nature of the obligation asserted in the former and latter suits are not mutually inconsistent. Hence, it is argued, using the circumstances of the present litigation for an illustration, the plaintiff had a right to recover either from the railway company or from the relief department upon the facts which are agreed in the stipulation to have occurred, and the single additional fact of negligence alleged in the unsuccessful suit against the former is supplemental to but in no respect or particular inconsistent with all or any of such agreed facts, and the rule is invoked that, in the absence of such inconsistence, one is not barred of his real remedy merely because he has mistakenly sought the use of one to which he was not entitled or which the law did not give him. About these rules of law there is no dispute or doubt, but we think that the argument of counsel is fallacious, and that they are inapplicable to this case. It is true, as has been held by this court in cases cited by counsel, that upon

the happening of an accidental injury or death to a member, for which his certificate provides indemnity, he or his beneficiary has an election whether such indemnity shall be demanded from the relief department or whether an action in tort shall be prosecuted against the railway company, and, for the purpose of determining whether such an election has been made, the rules of evidence relative to the general doctrine of the election of remedies are applicable. *Chicago, B. & Q. R. Co. v. Bigley,* 1 Neb. (Unof.) 225; *Chicago, B. & Q. R. Co. v. Olsen,* 70 Neb. 559. But the consequences of an election in two classes of cases may be very different. It may be that if the contract sued upon had omitted any reference to such consequences the position of counsel would have been tenable. That is to say, if the railroad company and its relief department are substantially identical, and the certificate of membership had simply provided indemnity in case of the death of the deceased, it may be (we do not decide) that an unsuccessful action in tort would not have barred a subsequent suit on the contract, but in this instance the regulations which are a part of the contract expressly covenant that an action in tort shall operate as a bar. In the absence of the contract, no suit would have been maintained against the relief department at all, and, of course, none can now be maintained against it except such as the contract gives, and under such circumstances as it prescribes. The plaintiff was quite as much at liberty to choose whether she would sue the railway company or the relief department as she would have been in any other imaginable case, but the consequences of such choice are to be determined, not by the general rules of law, but by the terms of the contract by which the deceased had bound himself and her.

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.

H. E. MILLER v. LOVERENE & BROWNE COMPANY.

FILED OCTOBER 5, 1905. No. 13,923.

1. **Error Without Prejudice.** When the answer fails to state a defense, but admits the plaintiff's cause of action, and the verdict and judgment are supported by the petition, errors occurring at the trial and in the giving and refusal of instructions are without prejudice.
2. **Pleading: ADMISSIONS.** If a defendant admits by answer or demurrer that he entered into a contract with plaintiffs by an associate name in which the suit is brought, such admission, without further explanation, is equivalent to an admission that the plaintiffs have sufficient capacity to bind and to be bound by the instrument, and to enforce the same in the contract name.

ERROR to the district court for Frontier county: ROBERT C. ORR, JUDGE. *Affirmed.*

J. H. Lincoln and *E. B. Perry,* for plaintiff in error.

J. A. Williams and *J. L. White, contra.*

AMES, C.

The petition alleges the execution and delivery by the defendants of two written guaranties to the effect that they would be bound to the plaintiffs to the extent of $342.49 for the payment of the purchase price of goods thereafter to be sold upon credit by the latter to one J. W. Moore, and that in consideration of and reliance upon said guaranties the plaintiffs had sold and delivered to said Moore goods upon credit to an amount exceeding said sum, for which payment had not been made, and for which judgment was prayed. The answer of defendant Miller "admits the execution of the guaranties herein sued upon; admits the selling of the goods mentioned in the

petition to J. W. Moore, and that said Moore paid thereon the sum of $101.24 (the amount of partial payment in excess of the amount sued for, alleged in the petition), and denies each and every other allegation contained in the petition not hereinafter admitted." The answer then alleges that at the time said guaranties were executed the defendants, or at least Miller, had some understandings and agreements with Moore respecting the purpose and effect of the instruments, and the extent and conditions of the liabilities of the guarantors, not expressed or implied by the language of the papers themselves, but it is not alleged that the plaintiffs were present or represented in person or by agent at the time the conversation or conversations were had, or knew of them until after the sale and delivery of the goods. It is further alleged that the plaintiffs were negligent in selling Moore upon credit goods to the amount of $447, or $105 in excess of the sum guranteed, thus contributing to his insolvency—but it is not alleged that he is in fact insolvent—and in neglecting and refusing to prosecute actions for the recovery of the amount from their principal. There was a reply and a trial, and a verdict and judgment for the plaintiff, from which defendant Miller prosecutes error.

Several errors are assigned for rulings admitting and excluding evidence, and for instructions given and refused, and because of alleged insufficiency of the evidence to support the verdict, but we think it quite clear that the answer not only fails to state a defense, but admits the plaintiffs' cause of action, and such errors, if any, were therefore without prejudice.

It is also objected that it is not alleged that the plaintiffs are a partnership doing business in this state, or a corporation either domestic or foreign, or for any such reason authorized to sue in their associate name. There was a demurrer on the ground that the plaintiffs have not legal capacity to sue, but it was overruled, and we think properly so, because it was disclosed on the face of the petition, and admitted by a general demurrer, and after-

wards by the answer, that the defendant had entered into the contracts with the plaintiffs by that name, which we think is equivalent, without further explanation, to an admission that the plaintiffs have sufficient capacity to bind and to be bound by the instruments, and to enforce the same in the contract name. If there are any facts or circumstances rebutting such presumption they should have been pleaded by the answer, and are now to be treated as waived.

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.

JAMES S. MORRISON, APPELLANT, V. JAMES HUNTER ET AL., APPELLEES.

FILED OCTOBER 5, 1905. No. 13,932.

1. **Principal and Agent: GOOD FAITH.** One occupying confidential relations toward another is held to the exercise of scrupulous good faith, and will not be permitted to make use of knowledge or opportunities to his own advantage and the injury of the party with whom he is dealing, from which the latter is in good conscience entitled to profit.
2. **Evidence** examined, and *held* to entitle the plaintiff to the relief prayed in his petition.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Reversed with directions.*

R. L. Keester, J. G. Thompson and *Flansburg & Williams*, for appellant.

F. B. Beall, John Everson and *Stewart & Munger, contra.*

AMES, C.

D. S. Gray, a nonresident, was the owner of a quarter section of land in Harlan county, in this state, which was in the possession of a tenant named Smith. Gray wrote to James Hunter, who lived at Republican City, near the land, a letter authorizing the latter to sell or lease the land to Leannah Berry and Lee L. Berry for a term of years. The Berrys were in possession under Smith, and pursuant to this authority Hunter executed and delivered to them a lease containing the following covenants: "It is further expressly agreed between the parties hereto that the parties of the second part are to have the refusal of buying said premises, if any other party wants to buy them. It is further agreed by the parties of the second part that they will not sublet or in any manner release without the written consent of the party of the first part." Rent was reserved, payable annually, with a provision for forfeiture of the residue of the term for nonpayment when due. Appellant Morrison owned an adjoining tract of land and was desirous of purchasing the premises in question. With that end in view he had several conversations with the Berrys and with Hunter, and the latter assured him that, by purchasing and taking an assignment of the lease and the residue of the term from the former, he would succeed to their option of purchase contained in the covenant first above quoted. After some negotiation and in reliance upon these assurances Morrison did make the purchase, paying the Berrys $200 for improvements they had put upon the premises and $175 for the unexpired portion of the term, and taking a written assignment of the lease, which was indorsed in the instrument by Hunter, and went into possession. During the progress of these negotiations, and afterwards, Morrison was also in negotiation with Hunter and with Gray for the purchase of the title to the premises. Gray also offered to sell the land to Hunter for $1,200, but Hunter, instead of com-

municating that fact to Morrison, told the latter that the lowest price for which it could be bought was $1,500. Morrison opened correspondence with Gray through an agent named Buchanan, to whom Gray also offered to make sale for $1,200. This last offer Morrison communicated to Hunter, who denied that the land could be purchased for that price, but on the same day he accepted by telegram the offer by Gray to sell to himself for $1,200, and within a few days and in due course of the mails forwarded the purchase price and received a deed, which he put upon the records of the county. Shortly afterwards Hunter conveyed the "east eighty" of the land by a quit-claim deed to A. B. Heath, and the latter conveyance was made of record also.

There is a considerable mass of evidence which is somewhat conflicting as to minor details, but the foregoing are the ultimate facts disclosed by the record, with little or no substantial conflict. This action was brought by Morrison against Hunter, Heath and Gray to compel a conveyance of the land to him upon payment of the sum of $1,200. Gray was not served with summons and is not a necessary party. Heath filed an answer, alleging that prior to the purchase of the lease by Morrison it was agreed between the two that they would buy the lease and improvements at equal expense and then divide the occupancy of the land between them, he taking the east eighty and Morrison the other, and that he paid his share of the purchase price to Morrison, who obtained the assignment of the lease to himself in violation of the agreement; but it does not appear that he suffered any injury by that fact, because he says that he entered into possession and has remained in possession of the east eighty under the assignment until the present time, and that repeatedly before the purchase of the land by Hunter he (Heath) requested Morrison to unite with him in the purchase of the quarter section on joint account, which the latter refused to do. He further alleged that he purposely refused or neglected to contribute his share of an instalment of rent falling due

on March 1, 1902, and that by reason of such failure that instalment was not paid and the term was forfeited, and that the purchase from Gray and his own purchase from Hunter were made after the occurrence of the forfeiture, and that both of them were, or at any rate the latter was, in good faith. But the conveyance by Hunter to Heath was a quitclaim deed, and the answer merely alleges that the latter paid "a valuable consideration" therefor, which is denied by the reply, and our attention has not been called to any evidence on the subject, so that we think that Heath must be treated as standing in the shoes of Hunter. Moreover, his testimony concerning other features of the transaction is denied by Morrison and but illy harmonizes with admitted facts.

Hunter relies mainly, if not solely, upon the above quoted covenants against subletting and releasing and the alleged forfeiture for nonpayment of rent, but we doubt very much if there was a substantial breach of the former, and no attempt was made to enforce the forfeiture, and we are satisfied that in no event, under the circumstances disclosed by the record, is Hunter in a position to avail himself of either breach or forfeiture to the injury of the plaintiff for his own benefit. He occupied a somewhat inconsistent attitude with Morrison, on the one side, and Gray, on the other, which put him in confidential relations with both and required of him the exercise of the most scrupulous good faith toward both. He knew that Gray was willing to sell the land for $1,200, but concealed that fact from the plaintiff, whom he knew to be relying upon his assistance in making the purchase, until he learned that the latter had ascertained the price from another source, and then speedily availed himself of an opportunity to procure the title for the same sum for himself, so as to deprive the plaintiff of his opportunity. This, we think, he ought not to be permitted to do. In thus deciding we place no stress upon the clause in the lease giving the lessee the "refusal of buying," but base our decision entirely upon the confidential relations between the parties. The district

court dismissed the action. We recommend that the judgment be reversed and the cause remanded, with instructions to render a decree for the plaintiff, pursuant to the prayer of the petition, upon his paying to the parties entitled thereto the purchase price of $1,200, with interest.

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 render a decree for the plaintiff, pursuant to the prayer of the petition, upon his paying to the parties entitled thereto the purchase price of $1,200, with interest.

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. RICHARD MITCHELL ET AL.

FILED OCTOBER 5, 1905. No. 13,874.

1. **Petition** examined, and *held* to definitely state a good cause of action.
2. **Evidence** examined, and *held* sufficient to support the judgment of the trial court.
3. **Limitation of Actions**: EMBANKMENTS: WATERS. Where an injury to the crops and lands of one is caused by the negligent construction of a railroad embankment, which arrested and held upon said lands the flood waters of a natural stream, such party's cause of action accrues at the date of the injury, and not at the date of the negligent construction of the improvement. *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, followed and approved.
4. **Instructions** examined and approved.
5. **Harmless Error.** Action of the trial court in admission of evidence examined, and *held* not prejudicial.

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

Francis Martin, J. W. Deweese and *Frank E. Bishop*, for plaintiff in error.

E. Falloon and A. J. Weaver, contra.

OLDHAM, C.

This was an action for damages for injuries to growing crops on about 60 acres of land owned by the plaintiffs out of the E. ½ of the N. W. ¼ and the W. ½ of the N. E. ¼ of section 11, township 2, range 13 east, in Richardson county, Nebraska, which damages were alleged to have been occasioned by the negligent construction of a ditch along defendant's right of way, which diverted the waters from their natural channel in the Nemaha river, and discharged the same upon plaintiffs' land to the injury of the growing crops thereon, in the years, 1893, 1895 and 1896. Defendant's line of railroad runs through the above mentioned section from a point a short distance south of the northwest corner of the section, in a southeasterly direction, and traverses a small portion of the southwest corner of plaintiffs' land. Near the point of entrance of the railroad upon section 11, it crosses the Nemaha river, which, at the point of intersection, flows eastward in a meandering channel to a point near the eastern boundary of plaintiffs' land. From this point it meanders in a southwesterly direction through plaintiffs' land and crosses the line of the defendant's right of way eight or ten rods south of the plaintiffs' land. Accordingly, this land and a portion of other lands are inclosed in an irregular triangle by defendant's right of way and the bend of the river. When the defendant's railroad was constructed in the year 1872, a ditch or borrow-pit was dug on the east side of the right of way from the bank of the Nemaha river along the right of way for a distance of about 200 feet. This ditch, according to the testimony offered by the plaintiffs, was about 4 feet deep and 15 feet wide at the mar-

gin of the river, and was excavated for the purpose of procuring dirt for filling the railroad track, and not for purposes of drainage. The petition alleges that this ditch diverted the waters of the Nemaha river from their natural course, and discharged them on the portion of plaintiffs' lands lying immediately east of defendant's right of way, to the injury of their crops in the years above mentioned. Defendant's answer was, in substance, a general denial, and on issues thus joined there was a trial to a jury, a verdict for the plaintiffs for $200, and judgment on the verdict. To reverse this judgment defendant brings error to this court.

The first question called to our attention in the brief of the railroad company is that the court erred in overruling a motion to require plaintiffs to make their amended petition more definite and certain, in stating wherein the defendant had negligently constructed its roadbed. We think this motion without merit. The petition alleged that the defendant in construction of its roadbed dug a ditch 4 feet deep and 15 feet wide into the bank of the Nemaha river, excavated it back along its right of way in such a manner as to divert the waters which would naturally flow, if unimpeded, in the channel of the river into the ditch, and by this means discharged these waters onto plaintiffs' land. There is no complaint in the petition that defendant failed to make a good and substantial roadbed, but that in doing so it diverted the waters of the Nemaha river from their natural flow to the plaintiffs' damage.

The next question urged is that the evidence is not sufficient to sustain the judgment. A review of the testimony offered by the plaintiffs shows that numerous witnesses sworn in their behalf testify that they saw the water flowing down from the river through defendant's ditch, and flowing from the mouth of the ditch to and over the submerged land of the plaintiffs in the years in which the injury is alleged to have been received. There was evidence, however, that in times of high water the river

would overflow at points surrounding plaintiffs' land below the point of the diversion by defendant's ditch, but the evidence offered by plaintiffs was confined to the years in which there was not a general overflow of the river. Defendant offered the testimony of an experienced civil engineer who made a thorough survey of the ditch or borrow-pit and the banks of the river which meandered plaintiffs' land in the year 1900. From this survey it appeared that the ditch at the bank of the river was several inches higher than the lowest point in the river bank below the ditch and adjacent to plaintiffs' land. From this testimony, which was undisputed, it is urged that the ditch could not have been the proximate cause of the injury to the crops. There would be much weight in this contention, had the survey been made at the time of the injury complained of; but the evidence shows, on the plaintiffs' part, that the ditch had been filled at least two feet after the injury and before the survey was made. Consequently, the question as to whether the injury was occasioned by the ditch or by the natural overflow of the river was one of fact for the determination of the jury.

It is next urged that, because the testimony shows that the borrow-pit or ditch complained of was constructed more than ten years before the injury complained of, the action was barred by the statute of limitations. In support of this contention we are cited to the decision of this court in *Gartner v. Chicago, R. I. & P. R. Co.*, 71 Neb. 444. In that case the second cause of action reviewed in the opinion was for injuries to land alleged to have resulted from the negligent construction of defendant's roadbed, whereby surface water was thrown back and over the lands. As a defense to this cause of action, the company pleaded a judgment rendered in favor of the former owner of the premises and against it on a similar cause of action. It was held that the former judgment was for damages to the land, both present and prospective, by reason of the construction of the roadbed, and was binding on the then plaintiff and his privies, the subsequent purchasers

of the land. In the case at bar, no former judgment was pleaded or proved and the damages alleged were for injuries to the growing crops—not to the land—for the years named in the petition. So that this case does not fall within the reason of the rule announced in *Gartner v. Chicago, R. I. & P. R. Co., supra.* It is rather governed by the doctrine announced in *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237, in which the court said:

"Where an injury to the crops and lands of one is caused by the negligent construction of a railway enbankment, which arrested and held upon said lands the flood waters of a natural stream, such party's cause of action accrues at the date of the injury and not at the date of the negligent construction of the improvement." *Fremont, E. & M. V. R. Co. v. Harlin,* 50 Neb. 698.

Objection is urged against the action of the trial court in giving and refusing instructions. The instructions, as a whole, clearly submitted to the jury the question to be determined, that is, whether or not the water of the Nemaha river was diverted from its natural channel by defendant's ditch, and discharged upon plaintiff's land, by reason of such diversion, when, but for such ditch, the water would have remained in its natural channel. On an affirmative determination of this question from a preponderance of the evidence plaintiffs' right to recover was predicated. The court gave every instruction requested by defendant except a peremptory one directing a verdict. The instructions given at defendant's request presented every defense offered as favorable to defendant's contention as the law would permit. There is no material conflict in the instructions given at the request of the plaintiffs and those given at the request of the defendant. We therefore conclude that the cause was fairly submitted and fully covered by the instructions given.

Complaint is urged against the action of the trial court in the admission of evidence on the measure of damages to the plaintiffs. These objections are technical and specious, and are urged against the court allowing wit-

nesses to testify as to the productive powers and the character of the soil on the land alleged to have been overflowed. The proposition to be established was: What was the value of the growing crops before and after the overflow? This is a question that is always difficult to accurately determine, as the value of growing crops depends on the probability of their subsequent maturity. It was well said in the case of *Wallace v. Goodall,* 18 N. H. 439:

"The value of young timber, like the value of a growing crop, may be but little when separated from the soil. The land stripped of its trees may be valueless. The trees considered as timber may, from their youth, be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated, unless he could receive a sum that would be equal to their value to him while standing upon the soil."

The court in his instructions fixed the measure of damages as "the difference in the fair market value of the crop just before the land was flooded, in the manner above alleged, if proved, and immediately thereafter." This was the proper measure, and an examination of the whole record shows that the jury in their award administered only a homeopathic dose of damages in the treatment of the plaintiffs' injuries. We are therefore convinced that defendant was not prejudiced in the admisssion of evidence on this branch of the case.

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 given in the above opinion, the judgment of the district court is

AFFIRMED.

MARIA BRANDON, APPELLEE, V. JENS JENSEN, APPELLANT.

FILED OCTOBER 5, 1905. No. 13,900.

1. **Administrator's Sale.** The provisions of section 117, chapter 23, Compiled Statutes 1903, apply to irregular administrative sales, but not to sales that are absolutely void.
2. **Case Distinguished.** *Seward v. Didier*, 16 Neb. 58, examined and distinguished.
3. **Administrator's Sale: HOMESTEAD.** A homestead of less value than $2,000 cannot be disposed of at administrator's sale, either for the discharge of incumbrances thereon or for the payment of debts against the estate of the decedent, and a license granted by the district court purporting to authorize such a sale is absolutely void. *Tindall v. Peterson*, 71 Neb. 160, followed and approved.

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

J. L. McPheely, for appellant.

John C. Stevens, contra.

OLDHAM, C.

The dispute involved in this action is of law and not of fact. The undisputed facts are: That on the 10th day of November, 1896, Warren Whitesel departed this life seized of 80 acres of land situated in Kearney county, Nebraska, of less value than $2,000, which he had occupied with his wife as a homestead for several years preceding his death. These lands were subject to a mortgage of $500 and interest. The deceased was the illegitimate son of Maria Brandon, the plaintiff in this cause of action, and died intestate, leaving a widow, Percilla Whitesel, but no children. The wife procured letters of administration on the estate, and claims of a general nature were allowed against the estate in the sum of about $700. On October 5, 1897, the administratrix applied to the district court for a license to sell the real property of the deceased to pay the indebtedness of the estate. The license was

granted, and the lands were sold on December 4, 1897, at public sale, and purchased by the mortgagee, Jens Jensen, who is the defendant in this suit. The sale was confirmed on the 7th day of December, 1897. On March 1, 1900, Percilla Whitesel departed this life, and on the 7th day of August, 1903, the plaintiff, Maria Brandon, the sole heir at law of Warren Whitesel, instituted this cause of action against the defendant to quiet her title to the premises owned by her son at his death, and to remove the cloud cast thereon by the administrator's sale and the deed issued pursuant thereto. Defendant, for answer, denied plaintiff's right to bring the action, and alleged that he was the owner of the premises under the purchase at the administrator's sale, and that the plaintiff was barred by the statute of limitations from maintaining the action, because more than five years had elapsed between the confirmation of the sale and the institution of the suit. On issues thus joined the court found in favor of the plaintiff, and entered a decree quieting her title to the premises in dispute. An accounting was taken of the amount due the defendant on the note and mortgage, and defendant was charged with the value of the rents and profits on the premises from the time of the death of Percilla Whitesel, and it was found that there was due the defendant on his mortgage the sum of $168, which was declared a first lien on the premises. There is no complaint as to the amounts found, if it is determined that the plaintiff had a right to recover.

The right of the mother to inherit the property of her illegitimate child, as fixed by our statute, is conceded. It is also recognized that, under our statute, the homestead selected from the husband's lands descends to *his* heirs after the death of his widow. So the only question to determine is whether or not plaintiff's action in the instant suit is barred by section 117, chapter 23, Compiled Statutes 1903. (Ann. St. 4982), which provides as follows: "No action for the recovery of any estate sold by an executor or administrator, under the provisions of this sub-

division, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within five years next after the sale." It is contended by counsel for appellant that this section of the statute is an absolute bar against any action to set aside such sale, whether void or voidable. On the other hand, it is contended by counsel for the appellee that this section is only intended to aid irregular and voidable sales and can have no effect on a sale made by one having no authority or semblance thereof. The identical question, under a similar statute, has been twice before the supreme court of the state of Iowa for determination. It was first considered in the case of *Good v. Norley,* 28 Ia. 188, and the court at that time was divided in its opinion on the question. Beck, J., delivered a very able and exhaustive opinion holding that the statute could have no application to a sale that was absolutely void. Cole, J., concurred in this view. Dillon, C. J., was of the opinion that the statute applied to all sales. Wright, J., was of the opinion that, under the facts of the case considered, the sale sought to be set aside was not void. On this division of the court, a judgment of the lower court holding the action barred was sustained; but when the same question was considered by that court in the later case of *Boyles v. Boyles,* 37 Ia. 592, the court unanimously sustained the opinion of Justice Beck and held that the statute applied to irregular and voidable sales alone. This latter decision is supported by the holdings in *Staples v. Connor,* 79 Cal. 14, and *Chadbourne v. Rackliff*, 30 Me. 354, and has received the approval of such standard text writers as Freeman and Black. This question was discussed in this court by MAXWELL, J., in *Seward v. Didier,* 16 Neb. 64, and the language used would indicate that the writer of the opinion was favorably impressed with the language of Chief Justice Dillon in *Good v. Norley, supra.* The case under discussion, however, only presented questions involved in an irregular, rather than a void, sale, and as applicable to the case decided by this court, the quotation from the

opinion of Chief Justice Dillon was well chosen. But we think the suggestion that the statute "would be robbed of its virtue if it were confined to cases where the sale was valid, for such sales do not need the protection of the statute," was aptly met in the *contra* opinion by Beck, J., when he said:

"It is also said that 'it is the infirm and defective title, the one that could otherwise not stand the test of an action by the heir to recover, which was intended to be cured' by the statute. To this proposition I assent, and I have just pointed out that this kind of titles the statute is designed to aid. An 'infirm and defective title' is a very different thing, as we have just seen, from a void title. The first is a *title,* the second is *no title* at all. The first may grow into a perfect title, for it has the germ of life in it; the second can never become a title, for it wants the life, the essential element of a title."

The next question to consider is: Was the attempted sale of the homestead by the administratrix of the estate void, or merely a voidable proceeding? Freeman, Void Judicial Sales (4th ed.), sec. 35, says: "If, under the statute of a state, the homestead of a decedent does not come within the control of its probate courts, an administrator's sale thereof, though ordered and confirmed by the court, is an idle proceeding." Citing *Yarboro v. Brewster*, 38 Tex. 397; *Howe v. McGivern,* 25 Wis. 525; *Wehrle v. Wehrle,* 39 Ohio St. 365. The question of the right of an administrator to sell a homestead for the payment of the debts of his decedent in this state was determined in a very able opinion by my brother AMES, in the recent case of *Tindall v. Peterson,* 71 Neb. 160, wherein it was held, after a careful review of all the authorities:

"A homestead of less value than $2,000 cannot be disposed of at administrator's sale either for the discharge of incumbrances thereon, or for the payment of debts against the estate of the decedent, and a license granted by the district court, purporting to authorize such a sale, is absolutely void."

We are therefore of opinion that the sale of the homestead in the instant case was a void, and not a voidable, sale, and that the learned trial court was fully justified in holding that the action by the heir to recover the land was not barred by section 117, *supra*. We therefore recommend that the decree of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

WILLIAM KINKEAD V. C. W. TURGEON ET AL.*

FILED OCTOBER 5, 1905. No. 13,904.

1. **Navigable Waters**: RIPARIAN PROPRIETORS. The title to the bed of a navigable river in Nebraska is in the state, and the rights of a riparian proprietor on such stream are bounded by the banks of the river.
2. **Case of *Bouvier v. Stricklett***, 40 Neb. 792, criticised.

ERROR to the district court for Dakota county: GUY T. GRAVES, JUDGE. *Affirmed.*

John T. Spencer and *R. E. Evans*, for plaintiff in error.

J. J. McAllister, Edwin J. Stason and *J. C. McConkey, contra.*

OLDHAM, C.

This was a suit in ejectment, which was tried to the court and a jury on the following stipulation of facts: "It is hereby stipulated by and between the parties hereto: That the plaintiff is, and in 1876 was, the owner of so much of the land described in his petition as was above the line of ordinary high water mark of the Missouri river in May, 1876; that in May, 1876, the Missouri river, which

* Rehearing allowed. See opinion, p. 580, *post*.

is a navigable state boundary river, suddenly abandoned its permanent channel adjacent to plaintiff's said land, leaving its former channel and forming a new channel by suddenly cutting through a neck of land to the south of plaintiff's said land; that all the land in controversy in this action, and occupied by the defendants C. W. Turgeon, V. C. Turgeon, N. Turgeon, Charles Bray, and Caleb Marsh at the time this action was commenced and at the present time, is wholly below and outside of the ordinary high water mark of the Missouri river, as it flowed at the time of said sudden change, and cut off the permanent bed of said river, and is now the dry, abandoned bed of the said river; that the lands occupied by the defendants at the commencement of this action and at the present time constitute the abandoned river bed of the Missouri river as said river flowed prior to the cut-off in 1876, being that part of said bed between the center of the channel where said river then ran and the high bank of the land owned and occupied by the plaintiff on the Nebraska side, and described in plaintiff's petition." The court directed a verdict for the defendants. There was judgment on the verdict, and to set aside this judgment plaintiff brings error to this court.

The stipulation of facts in this case is exceedingly meager, and the most that can be gathered from it is that in and since 1876 the plaintiff was the owner of riparian lands on the Missouri river, a navigable stream; that, by a sudden change of channel, the waters receded from plaintiff's land and left an abandoned river bottom between the former high water mark of the river and the middle of its former channel, which is now occupied by the defendants. Plaintiff's claim to the land rests solely on the doctrine that the riparian owners of lands bordering on the Missouri river take to the middle thread of the stream, notwithstanding the fact of its navigability. Had the addition to these lands formed by gradual accretion or reliction, a different question would have been presented, since even the riparian owners on tide-water rivers at common law

took the alluvium formed by slow and imperceptible accretion. But under the stipulation the lands in question were admitted to have been formed by a sudden change of the channel of the river. Consequently, plaintiff's claim to the bed of the river turns on his right as a riparian owner to take to the middle thread of a navigable river that bounds his land. At common law the title to the bed of navigable tide-water rivers is in the king, who holds it in trust for his subjects. In the states of the American Union in which the English common law prevails there is a conflict of opinions in the courts of last resort as to whether the title to the beds of fresh-water rivers, which are navigable in fact, remains in the state or is in the riparian owners of the stream. This conflict arose when some of the colonial courts, and later the supreme court of the United States, made a departure from the common law test of navigability (that it should be a stream in which the tide ebbs and flows, or an "arm of the sea"), and made the test a practical question of fact as to whether or not the stream was actually navigated. When this departure was made, the conflict arose in the different states as to what rule should be applied to the ownership of the beds of streams which were navigable in fact, but not at common law.

As has been stated, at common law the bed of a river in which the tide ebbed and flowed was held by the king, while the title to the bed of all fresh-water rivers was in the riparian owners. Some of the American courts, notably Illinois, Connecticut, Delaware, Georgia, Kentucky, Maryland and Maine, applied the doctrine that, as these fresh-water streams were nonnavigable at common law, the common law rule as to the title to fresh-water streams should apply, and, consequently, that each riparian owner took to the middle thread of the stream. *Adams v. Pease,* 2 Conn. 481; *Braxon v. Bressler,* 64 Ill. 488; *Delaney v. Boston,* 2 Harr. (Del.) 489; *Hendrick v. Cook,* 4 Ga. 241. The opposite view found favor in the decisions of the supreme courts of Pennsylvania, Iowa, Missouri,

Kansas, Minnesota, California, Nevada, Arkansas, Alabama, Tennessee, Indiana and others. *McManus v. Carmichael,* 3 Ia. 1; *Carson v. Blazer,* 2 Binn. (Pa.) 475; *Wood v. Fowler,* 26 Kan. 682; *Lamme v. Buse,* 70 Mo. 463; *Schurmeier v. St. Paul & P. R. Co.,* 10 Minn. 59, affirmed in supreme court of the United States, 7 Wall. (U. S.) 272; *Packer v. Bird,* 71 Cal. 134; *Shoemaker v. Hatch,* 13 Nev. 261; *Bullock v. Wilson,* 2 Port. (Ala.) 436; *St. Louis, I. M. & S. R. Co. v. Ramsey,* 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559; *Elder v. Burrus,* 6 Humph. (Tenn.) 358; *Bainbridge v. Sherlock,* 29 Ind. 364. This line of decisions proceeds on the theory that, as these streams, although not "arms of the sea," have been determined to be in fact navigable, the rule applicable to the bed of navigable tidewater streams at common law should govern them, and that, as the beds of navigable streams were reserved by the states when the constitution of the United States was adopted, the title to the beds of those rivers is in the states. The supreme court of the United States has held, in *Barney v. Keokuk,* 94 U. S. 324, and *Packer v. Bird,* 137 U. S. 661, that it is for the states to determine the question of the title to the beds of these rivers as between itself and the riparian proprietors.

It is plain that we stand at the parting of the ways in regard to the decisions of the state courts of this country on the question of title to river beds of the class in dispute. It is also apparent that each of these two divergent lines of authority start from a basis both sound and sane, and that the results of each of these lines of decisions have been sanctioned and approved by the supreme court of the United States. It then devolves upon us to examine carefully the decisions of our own court, and determine from them, if possible, which of the diverging paths we shall follow. The first decision of this court called to our attention is the case of *Lammers v. Nissen,* 4 Neb. 245. This was a dispute over lands on the banks of the Missouri river claimed as accretions by alluvial deposits. The case, however, was determined on the evidence, which tended to

show that the lands had not been formed as alluvium after the survey by the general government. The case also involved a question of meandered lines, not in point in the instant case. The next case cited is *Bissel v. Fletcher,* 19 Neb. 725. This was a controversy over riparian rights on a nonnavigable stream, and turned on a question of fact as to whether or not the lands claimed were formed by accretion. The question of riparian rights was next brought before this court in *Wiggenhorn v. Kountz,* 23 Neb. 690. There the dispute arose over the cutting of timber from an island in the Platte river. While the case was carefully considered and the authorities reviewed by the court, yet the question as to the title to the bed of a navigable river was not in issue and in no way adverted to. Consequently, this case is of little assistance in reaching a conclusion. In *Gill v. Lydick,* 40 Neb. 508, again the question was as to the right to accretions on the Missouri river, where the "river recedes slowly and imperceptibly, changing the channel of the stream and leaving the land dry theretofore covered by water." It was held that the alluvium so formed belonged to the riparian owner, but that, if the alteration takes places suddenly, the ownership would remain according to the former bounds. This case, while not in point, excludes any claim to the land by plaintiff in this cause of action on the doctrine of accretion. The next case, *Bouvier v. Stricklett,* 40 Neb. 792, was a dispute over an island in the Missouri river, claimed by the riparian owner as an accretion to his land. A judgment entered in the court below in favor of the defendant was affirmed by this court. In reaching the conclusion, many authorities are quoted in the opinion relative to the character of testimony necessary to establish the formation of land by accretion. For this purpose the decision of the supreme court of the United States in *County of St. Clair v. Lovingston,* 23 Wall. (U. S.) 46, is quoted from, because it discusses with great learning the peculiar character of the Missouri river with reference to changes in its channel. The result reached by the opinion was that the

evidence in the case then considered was not sufficient to show that the island had been formed by accretion. But, plainly by some oversight, it is said in the first lines of the fourth paragraph of the syllabus: "Where the middle of the channel of a stream of water constitutes the boundary line of a tract of land." While the syllabus, as a whole, properly states the law, yet so much of it as seems to hold that the title to lands on the banks of the Missouri river extends to the middle of the stream is purely *obiter dictum,* and unfounded on any question necessarily decided in the opinion. In *Clark v. Cambridge & A. I. & I. Co.,* 45 Neb. 798, a contest between a mill owner and an irrigation company over the waters of the Republican river, POST, J., speaking for the court, clearly indicated his adherence to the doctrine that the title to the beds of navigable rivers is in the state and not the riparian owners. But this question was not adjudicated, because it was held that the Republican river was a nonnavigable stream in fact, as well as at common law. In *Crawford Co. v. Hathaway,* 60 Neb. 754, 61 Neb. 317, 67 Neb. 325, again the contest was between a mill owner and an irrigation company over the use of the waters of a nonnavigable stream. The opinion in this case gives a very thorough and lucid discussion of the law of running waters and, while the bed of a navigable stream was not in issue, the author clearly expressed his views on this question. Citing many authorities for his position, he said:

"While this subject received slight attention in the case of *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.,* 45 Neb. 798, it was not determined, as a decision of the case turned on another point. As to navigable streams, the doctrine seems to be that the water and the soil thereunder belong to the state, and are under its sovereignty and domain, in trust for the people, and cannot, therefore, be the subject of a claim of property therein, or the right to the use thereof by an adjoining landowner. When the government, in its survey, runs meander lines along the banks of a stream and parts with its title to the

adjoining land, the boundary of which would be the high-water mark, then it would seem permissible to classify the stream as navigable, in which case the waters thereof and the bed thereunder would belong to the state, and be held by it in trust for the people. The waters in such streams would be held to be *publici juris;* and not subject to riparian claims by the adjoining landowner." *Crawford Co. v. Hathaway,* 67 Neb. 325, 350.

In *McBride v. Whitaker,* 65 Neb. 137, the controversy was over an island in the Platte river. The learned commissioner who wrote the opinion in the case specifically called attention to the fact that he was only determining the rights of the litigants in that case, from which no impression should go out that any claims of the state to the bed of the Platte river, or any unsurveyed island therein, were to be affected.

While it is probably true, as contended by counsel for plaintiff in error before us, that there has never been a final adjudication by this court of the rights of a riparian owner to take to the middle thread of the stream of the Missouri river, yet we think that the language used in rendering the opinions in *Clark v. Cambridge & A. I. & I. Co., supra,* and *Crawford Co. v. Hathaway, supra,* leaves little reason to doubt that Nebraska should be added to the list of states which hold that the title to the beds of fresh-water rivers, which are navigable in fact, is in the state, and that the right of the riparian owner is bounded by the banks of the stream.

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 foregoing opinion the judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed November 10, 1906. *Reversed:*

1. **Common Law.** By statute so much of the common law of England as is applicable and not inconsistent with the constitution of the United States or the constitution and statutes of this state is in force in this state.

2. ———: RIPARIAN RIGHTS. Under the common law a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and, if the river suddenly changes its channel and leaves its former bed, the boundary does not change, and he still holds to the same line. This is also the rule of of the civil law.

3. ———: ———. The common law relating to the rights of such riparian owners is applicable in this state, and is not inconsistent with the constitution or statutes of Nebraska or the constitution of the United States.

4. ———: ———. Where the Missouri river suddenly changes its course and abandons its former bed, the respective riparian owners are entitled to the possession and ownership of the soil formerly under its waters as far as the thread of the stream, and may maintain ejectment to oust squatters within such limits.

5. **Former opinion,** *ante,* **p. 573, vacated.**

LETTON, J.

The facts in this case are set forth in a former opinion by OLDHAM, C., reported *ante,* p. 573. On account of the fact that at the former hearing the commission was not favored with an oral argument of the case, and, further, for the reason that the question involved is of great public importance, a rehearing was allowed, and the case is again presented for consideration. As was pointed out in the former opinion, the question presented is here for the first time, though cases involving the rights of riparian owners to lands formed by accretion as alluvium have heretofore been considered by the court, and in deciding some of these cases certain expressions of opinion have been incidentally made by the writers of the several opin-

ions upon the question here presented. In none of them, however, was the determination of this question necessary to the disposition of the case, nor was any argument made or authorities presented upon the point. In *Clark v. Cambridge & A. I. & I. Co.*, 45 Neb. 798, the writer of the opinion indicates his personal views upon this question, but, since the case expressly holds that the Republican river is not a navigable stream, the expression was purely *obiter*. In *Crawford Co. v. Hathaway*, 67 Neb. 325, opinion by HOLCOMB, J., the writer of the opinion says:

"Whether the common law rule fixing the rights of riparian proprietors applies to the larger streams of the state, such as may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, presents an entirely different question, and it would seem that riparian rights would not attach to the waters of such rivers. A final determination of the question, however, is not here made, as this should be left to be decided in a proper case, where the subject is fairly presented and considered after opportunity for thorough investigation, aided by the researches and arguments of counsel."

It will be seen therefore that we approach the question unhampered by any previous adjudication.

There is an irreconcilable conflict between the decisions of the courts of different states of this country upon this question. From a somewhat extended examination of the various opinions, the writer believes that much of the confusion has resulted, partly from a mistaken idea as to what the supreme court of the United States had decided upon the question, partly from an idea that meander lines in maps of original surveys limited and bounded the estate of the riparian owner by the bank of the stream, and partly from a mistaken idea of the necessities of the case, based upon the differences in length, volume and navigability of the great rivers of America above tide water as compared with the inconsiderable extent of those English rivers which are navigable both above and below

the flow of the tide. See *Mayor and Aldermen of the City of Mobile v. Eslava,* 9 Porter (Ala.), 578; *McManus v. Carmichael,* 3 Ia. 1, 56; *Cooley v. Golden,* 117 Mo. 33.

The statute of this state provides: "So much of the common law of England as is applicable and not inconsistent with the constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory is adopted and declared to be law within said territory." Comp. St. 1903, ch. 15*a*, sec. 1; Ann. St. 6950. In this connection we have said:

"The power of the courts to declare established doctrines of the common law inapplicable to this state should be used somewhat sparingly, and its exercise is not to be justified unless the inapplicability of a rule is general, extending to the whole or the greater part of the state, or, at least, to an area capable of definite judicial ascertainment. The common law rules as to the rights and duties of riparian owners are in force in every part of the state, except as altered or modified by statutes." *Meng v. Coffee,* 67 Neb. 500; *Slattery v. Harley,* 58 Neb. 575.

The statutory provision above set forth has been in force in the territory and state of Nebraska for over 50 years, and during that period of more than half a century the courts have declared the common law inapplicable in but few instances, and in several of the instances that portion of the common law held inapplicable to our changed conditions has been that part thereof consisting of statutes enacted long before the American revolution. *Meng v. Coffee, supra.* The cases in which the applicability of the common law as to the rights of riparian owners has been challenged heretofore in this state have all been concerned with the subject of the rights of the riparian owner to the unimpaired use of the water in the stream in resistance to a right claimed by appropriators to take it for purposes of irrigation or power; and the language used in *Meng v. Coffee, supra,* and other cases dealing with the same subject, while declaring as a general rule the su-

premacy of the common law doctrine, is hardly applicable upon the question here presented, for, when deciding that the right of the riparian owner to the use of the running water in a stream was superior to the right of a person seeking to divert the water from the stream for irrigation purposes, it can hardly be said that the court had in mind the question here presented as to the right of a riparian owner to an abandoned river bed of a navigable stream. We think the question, therefore, must be considered open and not settled by the prior decisions. They are worthy of consideration, however, and must be given weight as determining the general policy of this court with reference to the question of the rejection of the common law rule.

The questions, then, necessary for determination in this case are: First, what is the common law of England as to the rights of riparian proprietors in such a case as this; and, second, are the provisions of the common law applicable, and, if applicable, are they in any way inconsistent with the constitution of the United States, with the organic law of this state or with any law passed by the legislature of this state? These being the questions presented, it is obvious that the weight to be attached to the opinions of the courts of other states upon the question of the rights of riparian proprietors in an abandoned river bed depends upon how far the constitution and statutes of such state correspond with those of this state, as well as upon the persuasiveness of the reasoning set forth in the opinions.

Under the common law of England the title to the bed of the sea below high water mark, and to the bed of all rivers as far as the flow of the tide extended, was in the crown, but the title to the bed of all fresh water rivers above the ebb and flow of the tide, whether navigable or nonnavigable, where the river formed the boundary between adjoining proprietors, was in the riparian owner to the thread of the stream. Lord Hale, De Jure Maris, Hargrave Law Tracts, 5; *King v. Wharton,* 12 Mod. (Eng.) 510; *Hardin v. Jordan,* 140 U. S. 371, 11 Sup. Ct.

Rep. 808; Farnham, Waters, sec. 48; *Shively v. Bowlby*, 152 U. S. 1. Chancellor Kent says: "The right of sovereignty in public rivers above the flow of the tide is the same as in tide waters; they are *juris publici*, except that the proprietors adjoining such rivers own the soil, *ad filum aquæ*. But grants of land, bounded on rivers, or upon margins of the same, or along the same, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum* as a public highway. The proprietors of the adjoining banks have a right to use the land and water of the river, as regards the public, in any way not inconsistent with the easement." 3 Kent's Commentaries (13th ed.), p. *427. This also is the rule of the civil law. Ware, Roman Water Law, secs. 22, 94. There appears, then, to be no controversy as to what constitutes the common law of England in regard to fresh waters or navigable rivers above the flow of the tide. Some of the cases in this country fail to draw a distinction between the rule of the common law with reference to rivers which are navigable in fact above the flow of the tide, and those navigable only where the tide flows, and adopted the idea that by the common law no rivers were navigable or considered as navigable in law except those in which the tide rose and fell. Comparing, then, the diminutive size and length and volume of the rivers of England with the magnificent waterways of this country, it was held that the common law as to navigable rivers was inapplicable to the situation in this country, and that our great rivers, which are navigable in fact for hundreds or perhaps thousands of miles, are to be treated in law as were navigable rivers of England, meaning thereby the rivers in which the flow of the tide was perceptible. Much reasoning has been indulged in, based upon the apparent disproportion of the rivers of England

and America, to show the necessity of abrogating the common law rule on account of the actual navigability of our rivers above tide water. However, the rule of the common law has been adopted in Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, partly in New York, and in Ohio, South Carolina and Wisconsin. It is rejected in Pennsylvannia, Virginia, North Carolina, Alabama, Florida, Texas, Tennessee, Iowa, Kansas, Minnesota, Missouri, Oregon, Nevada and California. In some of the states which reject the rule the rejection is based upon the system of land surveys of the United States, it being held that, where in the original survey the boundary next the stream is meandered, the government has parted with its title only to the extent of the meander line, and has reserved to itself, or to the state which afterwards was created, the title to the bed of the stream. Later decisions of the United States supreme court, however, have settled that the meander line along the bank of a navigable river is not a monument of title or boundary line, but merely marks the place where the water flowed at the time of the survey (*Hardin v. Jordan,* 140 U. S. 371; *Jefferis v. East Omaha Land Co.,* 134 U. S. 178, 10 Sup. Ct. Rep. 518), and the doctrine of that court now is that, by the admission of the several states, whatever right or title the United States had to the bed of such navigable streams passed to the state government, and that the local law of each state determines the question whether the bed of such streams belongs to the state or to the riparian owner. *Barney v. Keokuk,* 94 U. S. 324; *St. Louis v. Myers,* 113 U. S. 566, 5 Sup. Ct. Rep. 640; *Hardin v. Jordan, supra; St. Anthony Falls Water-Power Co. v. Board of Water Commissioners,* 168 U. S. 349. These decisions of the supreme court of the United States conclusively establish the fact, therefore, that the common law with reference to riparian ownership in navigable streams is not inconsistent with the constitution of the United States nor with the organic law of this state, and, since

no law upon this subject has been passed by the legislature of the territory of Nebraska or of the state of Nebraska, the common law is not inconsistent with the statutory law of the state.

The only remaining question, then, is whether or not the common law rule is applicable to the conditions in this state with reference to the rights of riparian owners upon the Missouri river. As to a portion of such riparian rights this court has already spoken. We have held that the rights of riparian owners upon the Missouri river to land formed by accretion are the same as if the river were not navigable, and that the common law applies in full force. *Gill v. Lydick*, 40 Neb. 508. The same doctrine has been declared by the supreme court of the United States in the case of *Jefferis v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. Rep. 518, citing *Jones v. Soulard*, 24 How. (U. S.) 41, and other cases. In passing upon the applicability of the common law to our conditions, in the first place it is well to observe that for upwards of half a century the people of the territory of Nebraska and the state of Nebraska have been in occupancy of the west bank of the Missouri river. The first settlement of the territory was along the Missouri river, and its fertile valley has been the home of thrifty farmers ever since. It is a matter of public knowledge, of which the court will take judicial notice, that that great river in this locality takes its course through a wide valley composed, in the main, of loose, sandy and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous; that sometimes, during flood periods, its current will strike or impinge upon its banks at such an angle and with such effect as, even in a single day, to undermine the same, and cause large masses of soil to fall into the stream and be disintegrated, and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the

northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed, and left the former peninsula, with the abandoned bed, entirely across the river upon the eastern or northern bank, and thus physically dissevered from the state of Nebraska and conjoined to Dakota, Iowa or Missouri. See *Nebraska v. Iowa,* 143 U. S. 359; *Missouri v. Nebraska,* 196 U. S. 23, 25 Sup. Ct. Rep. 155. These processes have been going on for fifty years. During the whole period of time the state of Nebraska has existed it has never asserted any title or dominion over the abandoned river bed, but has left the riparian owner in full possession and control of the same to the thread of the stream, and many fertile farms now occupy the place where the waters once flowed. When the river abandoned the bed the riparian owner occupied it, claiming title thereto, and as fast as it became subject to useful purposes reclaimed it for agriculture. For so long a period, therefore, it has been considered by the authorities of the state of Nebraska that the common law is applicable to the conditions along the Missouri river, and the fact of this administrative construction of the law by the state authorities, extending over so many years, is entitled to great, if not controlling, weight upon this question. No evil consequences have been pointed out to us in the brief of defendant in error, which are liable to occur to the public welfare by the continuance of this policy, nor are we able to discern wherein there is any such change in conditions from those which have so long prevailed along this boundary, as would warrant the court in giving a new construction to the rights of riparian proprietors other than that which has been, at leastly tacitly, given by the public authorities for so long a time. Further, we see nothing in this doctrine which in anywise impairs or interferes with the public right of navigation over these waters. It is true that, while the Missouri river has been declared by congress to be a navigable stream, and while for many years during the early history of the great Northwest its

waters furnished almost the only channel of communication between the settled portions of the United States and the vast territory lying along its course and around its headwaters, still in later years, while intermittent attempts have been made to reestablish the river as a highway of commerce, the difficulties and disadvantages caused by its rapid current, its variable, erratic and inconstant course, and the crumbling nature of the soil upon its banks, have been so great that commerce has abandoned its waters and betaken itself to the more reliable, though perhaps more expensive, method of transportation by rail. Theoretically, therefore, the Missouri river is a navigable stream along the Nebraska boundary. Practically, at the present time, its usefulness as a public waterway has departed. However, in the consideration of this case we have treated it as if it were practically navigable, because, while improbable, it is not impossible that at some time in the future, under changed conditions, these waters may again become a channel of communication and intercourse.

We have seen that the common law rights of riparian owners as to accretions along the bank of this river is in force in this state; and it is a fact within the personal observation of the writer of this opinion that at some points on the boundary of this state, by virtue of the rapid accretions which sometimes take place along this stream, the present channel of the river is removed to a distance of more than a mile from where it was thirty years ago. If no injury is done to the public right by reason of the rapid and numerous changes of the channel of the Missouri river by the action of accretion, by the growth of sand bars and islands, and the gradual filling up of the intervening space between them and the bank, by which changes the bed where the river actually flowed is even more fully and effectually abandoned than where, by a sudden change, the river has left its bed and sought a new one, how can the public be in anywise injured by the latter form of abandonment? The effect is the same in both cases. Along the Missouri river the change of the

bed to dry land in the case of accretion is sometimes even more rapidly performed than the changes of the abandoned bed to dry land in the case of avulsion, for in such case the abandoned bed is usually full of water, which gradually evaporates, and which in many instances forms lakes which stand for years, occasionally filled again by the river in flood periods, a number of these "cut-off lakes," as they are locally termed, extending from three to eight or ten miles long and occupying practically the whole of the abandoned bed for many years.

The fact that the rights of riparian owners are preserved *ad filum aquæ* is not inconsistent with, and does not interfere with, the right of navigation. The public retains its easement of the right of passage along and over the waters of the river as a public highway. This is the interest of the public in connection with such rivers which is paramount, and which is and should be protected by the courts. If, however, the river ceases to be navigable at any particular point, whether by the gradual filling up of its old bed, or a part of it, by the process of accretion, or by a sudden change of its bed by the carving out of a new channel, the public right attaches to the waters of the new channel to the same extent as it did while it flowed in the former bed. The public, then, has lost nothing by the change of channel. All its rights have been retained. As was said long ago by Ulpian: "In like manner if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in a public river, as the bed belongs to the neighbors on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly the bed ceases to be public. Also the new channel which the river has made, although it was private, begins, nevertheless, to be public, because it is impossible that the channel of a public river should not be public." Ware, Roman Water Law, sec. 22. To hold otherwise in case of a stream of the characteristics of the Missouri river might well lead, by way of repeated changes of the

river's channel, to additions to the public domain at the expense of adjoining proprietors. For example, if in this case we should hold that the bed of the abandoned stream belonged to the state of Nebraska, by the same reasoning the bed of the new channel belongs to the state, and if the river should again change its channel near by, by another avulsion, thus leaving the new bed dry, the state then would be the owner of the land in two abandoned river beds and also of the bed of the new channel. The property in the second and third bed then would be wrested without compensation from the property of private individuals. A doctrine which might work such an injustice as this ought never to be adopted by a court if any other view is reasonable. The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it has over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with or opposed to the public easement. When the public entirely abandons a public road either by virtue of nonuser or by its vacation through proper proceedings, it does not retain the title to the land over which the easement of travel existed, but it reverts to the adjoining owners to the middle of the road. And so with a navigable river of this class, when by reason of natural changes the stream abandons the bed over which, through the instrumentality of its waters, the public has the right to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road, and its right and privilege to pass over the old one revert to the abutting owners; and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which

alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed. For these reasons, we are satisfied that the common law as to the rights of riparian owners to the abandoned channel of a navigable fresh water stream is applicable in Nebraska, and not inconsistent with our laws or constitution, and that therefore the plaintiff is the owner of the property in controversy in this action.

We have not deemed it necessary to cite or particularize more than a few of the large number of cases bearing upon the proposition hereinbefore discussed. They may be found collated and distinguished in Farnham, Waters; Gould, Waters; note to 23 English Ruling Cases, 158; Am. & Eng. Ency. Law (2d ed.), as well as in other standard works of reference. In several instances the courts of a state lying upon the one side of one of our great rivers hold and enforce the rule of the common law, and on the other side of the same river the courts of a sister state declare that the riparian owner only takes to high water or low water mark, as the case may be. On the whole matter, we deem it best to let well enough alone, and adhere to the custom and policy of this state since its earliest settlement. The former opinion in this case is set aside, the judgment of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED.

C. H. LEE ET AL. V. F. F. BRITTAIN.

FILED OCTOBER 5, 1905. No. 13,935.

1. **Liquor Licenses: APPEAL.** A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on a hearing of an appeal taken from the order of a

license board granting or refusing a license to sell intoxicating liquors. *Bennett v. Otto*, 68 Neb. 652, followed and approved.

2. ———: STATUTES: AMENDMENT: BOND. The act of 1895 (laws 1895, ch. 22) is ineffectual as an amendment or repeal of section 6, chapter 50, Compiled Statutes 1903, which requires an applicant for liquor license to sell intoxicating liquors to give a bond in the sum of $5,000, with at least two good and sufficient sureties, freeholders of the county in which the license is granted. *Fidelity & Deposit Co. of Maryland v. Libby*, 72 Neb. 850, followed and approved.

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

W. T. Thompson, for plaintiffs in error.

John Patterson, contra.

OLDHAM, C.

Plaintiffs herein were remonstrators against the application of the defendant for a license to sell intoxicating liquors in the village of Silver Creek, Nebraska. The license was granted by the village board, and an appeal taken by the remonstrators to the district court, where the action of the board was affirmed. To reverse this judgment of the district court, the remonstrators bring error to this court. The application was for a license beginning June 25, 1904, and ending May 1, 1905.

It is urged in the first instance by the defendant in error that we cannot review the proceedings had in the district court, because no motion for a new trial was filed in such court. This question, however, has been settled by this court in the case of *Bennett v. Otto,* 68 Neb. 652, in which we said:

"A motion for a new trial is not necessary in order to obtain a review of the judgment of the district court entered on the hearing of an appeal taken from the order of a license board granting or refusing a license to sell intoxicating liquors."

It is urged by the remonstrators that the court erred in

approving the action of the village board, because no bond was filed by the applicant with at least two good and sufficient sureties, freeholders of the county, before the license was granted, as required by section 6, chapter 50, Compiled Statutes 1903 (Ann. St. 7155). The bond filed and approved by the board was signed by the applicant, as principal, and by the Metropolitan Mutual Bond and Surety Company, as security. It is contended by counsel for the defendant in error that the bond given is sufficient under the provisions of chapter 22, laws 1895, authorizing the acceptance of certain corporations as sureties thereon. This contention, we think, is foreclosed by the opinion of this court in *Fidelity & Deposit Co. v. Libby,* 72 Neb. 850, in which we held that chapter 22, laws 1895, did not effect a repeal of section 9, chapter 10, Compiled Statutes of 1903 (Ann. St. 9008), which enacts that the official bonds of all county officers shall be executed by the principal "and at least two sufficient sureties, who shall be freeholders of the county." This provision, we held, referred to natural persons, and, as section 6, *supra,* contains the same requirement with reference to the bond of an applicant for a liquor license that section 9, *supra,* contains for official bonds, it would seem that we must hold the bond given insufficient.

It is therefore recommended 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 forgoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

F. C. SMITH V. JOHN DELANE.

FILED OCTOBER 5, 1905. No. 13,852.

1. **Process: OBJECTIONS TO SERVICE.** Where a party makes a special appearance, objecting to the jurisdiction of the court because of irregularities in the service, it is incumbent upon him to point out the defects upon which he relies.

2. **Review: TRANSCRIPT.** In proceedings in error, the plaintiff is required to file a transcript of the proceedings of the lower court with his petition in error, and the original papers cannot be used as a substitute therefor nor as a supplement thereto, and, if filed, should be disregarded by the reviewing court.

ERROR to the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sullivan, for plaintiff in error.

C. L. Gutterson and *Hall, Woods & Pound, contra.*

DUFFIE, C.

It appears from the record that the defendant in error brought suit against the plaintiff in error in a justice's court. There was some irregularity in the service of summons, and the plaintiff in error entered a special appearance and filed a motion to quash the service, which was overruled. The plaintiff in error made no further appearance in the case, and the defendant in error took judgment, from which the plaintiff in error prosecuted error to the district court. The district court affirmed the judgment of the justice of the peace, and the plaintiff in error brings the record here for review.

We think the judgment must be affirmed. The law is well settled that, where a party makes a special appearance, objecting to irregularities in the service of process, such objections must be specifically pointed out. *Bucklin v. Strickler,* 32 Neb. 602. One of the things necessary, then, in order to entitle the plaintiff in error to a judgment of reversal in the district court, was that he should present

a record showing that he had specifically pointed out to the justice the defects on which he relied. This he failed to do. Section 586 of the code provides that "the plaintiff in error shall file with his petition a transcript of the proceedings." In *Moore v. Waterman,* 40 Neb. 498, this court held that the original papers could not be made to take the place of a transcript. In the case at bar, the plaintiff in error filed a transcript of the docket entries of the justice, and the original papers. As we have seen, there is no authority for the latter, and it will be presumed that the district court disregarded them and confined itself to the transcript. The transcript fails to state the grounds upon which the motion to quash was based. Consequently, confined as it was to the transcript, there was but one proper course for the district court, in the face of *Bucklin v. Strickler, supra,* and that was to affirm the judgment. We have not overlooked section 1008 of the code, which provides for filing the original papers with the transcript in cases appealed to the district court. But that section relates exclusively to appeals, whereas section 586, *supra,* relates exclusively to proceedings in error, and rules this case.

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

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

THOMAS BAKER V. PETER A. MCDONALD.

FILED OCTOBER 5, 1905. No. 13,892.

1. **Sales: WHEN COMPLETE.** The general rule is that, when the terms of sale of personal property have been ageed on and the bargain is struck, and everything the seller has to do with the goods

is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer.

2. ——: POSSESSION, RIGHT TO. Where the time of payment is not fixed by the contract of sale, the law presumes a cash sale, and, while title may have passed to the buyer, he is not entitled to possession until the full purchase price has been paid or tendered.

3. ———: ———: FRAUD. Where the amount to be paid is to be determined by measurement of the property to be made by the parties, a measurement which is grossly unfair, as the result of fraud or mistake, is not binding, and a tender based thereon does not entitle the purchaser to possession.

4. ———: REPLEVIN: RESCISSION. Where the property has been set apart and identified, and title vested in the purchaser, who has paid part of the purchase price, but because of fraud or mistake in the measurement his tender of the balance due is not sufficient in amount, the seller may recover possession of the property from the purchaser by an action in replevin on the ground of special ownership and right of possession, but he cannot maintain such action under the claim of absolute ownership without rescinding the contract of sale and tendering back the amount paid.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

John P. Breen and *C. E. Abbott,* for plaintiff in error.

R. J. Stinson, H. C. Maynard and *George L. Loomis, contra.*

DUFFIE, C.

McDonald brought this action in replevin to recover from Baker certain hay of which he claims to be the absolute owner. On a trial to the court without a jury, judgment went in his favor, and Baker has brought the case here on error.

The parties entered into a contract relating to the hay in question and signed the following memorandum:

"FREMONT, NEB., Oct. 9, 1902.

"This day I have sold to Thomas Baker thirty stacks of hay at $2.75 per ton in the stack, for which I have re-

ceived $100. The hay is to be measured in the stack. This hay is to be moved off the ground before March 1, 1903.

"THOMAS BAKER.
"P. A. MCDONALD."

There were more than 30 stacks in the field at the time the contract was made, and the particular stacks which Baker was to have were not set apart or designated, but it was understood that Baker might select them from the whole number in the field. Sometime after the contract was made, and before the hay was measured, Baker, at the request of McDonald, made a further payment of $200, making $300 paid on the contract price. Baker was unable to be present in person when the hay was measured, but was represented by a man of his own selection, who participated in that part of the transaction. The measurement was made of 31 stacks instead of 30, but of this no complaint is made by Baker. Baker took the figures of the measurements with him to Omaha and, after some delay, made a computation and found, as he claims, that the stacks contained 112 tons and a fraction. He then wrote the plaintiff, giving the measurements and result of his computation, and inclosing his check for $8.40 as the balance due on the hay according to his measurements and computation. McDonald immediately returned the check, with a letter to the effect that he was not satisfied with the measurements. On receipt of this letter, Baker answered, saying that, if McDonald was not satisfied with the measurements, he could return the $300 and have the hay. In the meantime Baker had commenced to bale the hay, and had shipped about 14 tons of it to Omaha. On receipt of Baker's last letter, McDonald went to the field where the hay was stacked, notified Baker's men not to press or ship any more of it, and then brought this action to recover possession of the hay, alleging that he was the absolute owner thereof.

The case was brought and tried on the theory that there was fraud or mistake in the measurement of the hay, and

that, instead of 112 tons, as claimed by Baker, there were in fact 140 tons. As the evidence supports the claim of McDonald that the stacks contained about 140 tons, the questions involved will have to be considered upon the theory that McDonald's claim of fraud or mistake in the measurement has been established. That McDonald was entitled to the possession of the hay until paid the purchase price is not a question open to dispute. The written memorandum of contract, as well as the contract itself, so far as appears from the oral evidence in the record, are silent as to the time of payment of the price of hay. The law, therefore, presumes a cash sale, that is, that payment and delivery were to be concurrent. Consequently, Baker was entitled to possession only upon payment in full or tender of the agreed price, unless there was a waiver of such payment by McDonald, and such waiver is not to be presumed by Baker's selection of the stacks that were to become his under the contract. McDonald replevied upon the ground of absolute ownership, and his right to recover depends upon the question of whether he had title to the hay when the action was commenced, or whether such title was in Baker. As before stated, McDonald undoubtedly had the right of possession until paid for the hay, but such right of possession, if title had passed to Baker, could not support his claim of absolute ownership, and would not allow evidence in support of his petition. An allegation of general ownership in an action of replevin is not supported by proof of a mere lien or other special ownership. *Sharp v. Johnson*, 44 Neb. 165, and cases cited in 2 Page's Digest, p. 1,815.

The material question to be determined, then, is, who held title to the hay at the time this action was commenced? The modern doctrine undoubtedly is that neither delivery nor payment of the purchase money is generally requisite for vesting title to personal property in the buyer under a contract of sale, it being necessary only that the identical goods which are the subject of the contract should be ascertained and the price fixed. New-

mark, Sales, sec. 159, gives the rule in the following language: "When the terms of sale are agreed on, and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer." 2 Schouler, Personal Property (3d ed.), sec. 243, is as follows: "Where specific chattels are embraced under a contract of immediate sale, and nothing remains to be done to them, the presumed intent of the parties is, that the right of property shall become transferred to the buyer and vest in him, immediately upon completion of the bargain by mutual assent. And even though the seller subsequently continue in possession of the goods, the presumption remains the same as between the parties; his possession being that of a bailee, with a right to recover his price."

When the contract for the sale of this hay was made between the parties, title did not then vest in Baker, because the stacks were thereafter to be selected by him; but, when his selection was made and the hay definitely ascertained and measured, then he became vested with the title and took all the risk of ownership. Had the hay been burned or otherwise destroyed, Baker, instead of McDonald, would have sustained the loss; and there can be no question that McDonald, immediately after the selection and measurement, might have sustained an action against Baker to recover the balance of the purchase price, and this on the theory that the title had passed. *Allen v. Rushfort,* 72 Neb. 907; *Barker v. Davies,* 47 Neb. 78. Had McDonald brought this action, claiming a special interest in the hay, there is no doubt that, upon proof of fraud or mistake in the measurement made, he would be entitled to a judgment giving him possession and determining the extent of his interest. His claim is that by a fraudulent or mistaken measurement it is sought to deprive him of about 28 tons of hay, of the value of $77. Had his action been brought upon this theory, Baker could have tendered

the amount, with costs, and retained possession of the hay, or, after the trial, could have paid the judgment given by the court, and both parties would have their full due—Baker the hay, and McDonald his money. Under the judgment appealed from, McDonald has $300 of Baker's money and is found to be the absolute owner of the hay, in part payment of which that money was given him. We have no doubt, under the circumstances of this case, that McDonald could not recover as absolute owner without rescinding the contract of sale and tendering back the $300 received on the purchase. His action, if he desired to replevy the hay, instead of suing for the amount due him, should have been for possession as the owner of a special interest in the hay, and not as the unqualified owner.

We recommend that the judgment be reversed and the cause remanded.

ALBERT and JACKSON, CC., concur.

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

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. DORA M. DOWHOWER.

FILED OCTOBER 5, 1905. No. 13,924.

1. **Railroads: CROSSINGS: FENCING.** A railroad company is not required to fence its right of way across a public highway whether such highway is established by legal authority or by adverse user for the statutory time.
2. **Evidence** examined, and *held* not to show negligence in the operation of a train.

ERROR to the district court for Valley county: JOHN R. HANNA, JUDGE. *Reversed.*

A. M. Robbins, J. W. Deweese and *Frank E. Bishop,* for plaintiff in error.

Victor O. Johnson, contra.

DUFFIE, C.

Dora Dowhower sued the Chicago, Burlington & Quincy Railroad Company to recover the value of two cows killed by the engine of a train running between Ord and Burwell. The plaintiff is the owner of 80 acres of land, through which the railroad track runs in a northwesterly and southeasterly direction, crossing the north line of her 80 acre tract a short distance east of its northwest corner. There is a public road on the west side of this 80 acre tract, and a traveled road on the north line of the 80, which crosses the right of way and tracks of the railroad company adjacent to the plaintiff's land. It is upon this road on the north side of the land where the cows were struck and killed by a freight train running northwest against a snow storm and heavy wind on the evening of December 2, 1902. The plaintiff seeks to recover upon two grounds: First, that the place where the cows were killed is not a public road, and the railroad company neglected to build a fence along its right of way at that point; and, second, that the engineer in charge of the engine was negligent in not using diligence to discover the cows in time to bring his engine to a stop before reaching them.

A careful reading of the evidence contained in the bill of exceptions convinces us that neither of these contentions can be sustained. While it is true that there is no public record of an established highway along the north line of the 80 acre tract owned by the plaintiff below, the evidence is uncontradicted that at the time of the construction of the railroad and since its construction a road has been maintained and traveled at this place. The railroad company undoubtedly thought that a public highway had been established along the north line of this 80, and

constructed a cattle guard on the south side of such publicly traveled road. There is no conflict in the evidence that for 12 years or more this road has been maintained and traveled, and, if not regularly laid out by the county authorities, it has become by user a public highway. In *Roberts v. Quincy, O. & K. C. R. Co.* 43 Mo. App. 287, it is said:

"The statutory obligation of a railroad to fence the road does not extend to crossing of highways, whether *de jure* or *de facto*. *Held*, accordingly, in an action for the killing of stock, predicated on the failure of the railroad company to fence where its road crossed a highway, that it was immaterial whether the highway was maintained by work under a road overseer or not."

And in *Soward v. Chicago & N. W. R. Co.*, 33 Ia. 386, the court said:

"Shall we now so construe the statute requiring railroad companies to fence their roads, as to compel them to fence across these highways thus laid, which are not highways *de jure*, but only highways *de facto*? The statement of the question begets its own negation."

It is clear, therefore, that a public highway existed at the point where the cows were killed, and the railroad company was not required to fence its right of way at that point. The evidence is also conclusive that the employees in charge of the engine used all reasonable diligence to discover obstructions on the track and to halt the train as soon as danger to the cows was discovered. The record is clear that there was no negligence on the part of the company or its employees which caused the injury complained of, and we recommend that the judgment of the district court be reversed and the cause remanded.

ALBERT and JACKSON, CC., concur.

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

REVERSED.

MARGARET WALL ET AL. V. JAMES KERR ET AL.

FILED OCTOBER 5, 1905. No. 13,929.

ERROR to the district court for Howard county: JOHN R. HANNA, JUDGE. *Dismissed.*

A. A. Kendall, Frank J. Taylor and *A. Wall,* for plaintiffs in error.

W. H. Thompson, T. T. Bell and *Rasmus Hannibal, contra.*

DUFFIE, C.

The plaintiffs in error appealed from an order of the probate court for Howard county admitting to probate the will of Sarah Kerr. A trial was had in the district court, and a verdict returned sustaining the will. An appeal was taken by the contestants to this court. The transcript shows the verdict and a motion for a new trial, but no order disposing of the motion and no final judgment of the district court appear. For this reason, this court is without jurisdiction to entertain the case, and we recommend a dismissal of the appeal.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated above, the appeal is

DISMISSED.

WILLIAM L. WINSTON, APPELLANT, V. THOMAS A. ARMSTRONG ET AL., APPELLEES.

FILED OCTOBER 5, 1905. No. 13,857.

Evidence examined, and *held* insufficient to sustain the finding of the trial court.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Reversed with directions.*

John J. Sullivan and *W. W. Wood*, for appellant.

C. Patterson, contra.

ALBERT, C.

This suit was brought for the foreclosure of a mortgage made by the defendant, Thomas A. Armstrong, on the 24th day of June, 1890, to secure a note of even date given by him to his father, payable in five years. The note was indorsed and the mortgage assigned to the plaintiff after maturity. Sometime after giving the note, the maker thereof married, and his wife is his codefendant in this suit. The defense is a want of consideration for the note. The court found generally for the defendants and entered a decree accordingly. The plaintiff brings the case here on appeal.

The plaintiff claims that the note was given for a half interest in a lot and store, stock of merchandise and some other personal property sold to the defendant, Thomas A. Armstrong, by his father. It is conclusively established that from 1888 to 1890 the defendant, Thomas A. Armstrong, and his father conducted a mercantile business under the firm name of T. A. Armstrong & Co., and the property in question was a part of the assets of the firm; that in 1890 the property was invoiced at $4,200, and the father then transferred an undivided interest thereof to a third party; whereupon he retired, and Thomas A. and a

third party continued the business. The contention of the plaintiff is that, at the time the father transferred the half interest to such third party, he also transferred the remaining half interest to Thomas A., and that such was the consideration for the note in question. The testimony of Thomas A. is, in effect, that for some years after becoming of age he remained with his father, and assisted him in farming, and later in the sheep business, under an indefinite arrangement that he should have an interest therein; that afterwards, in 1888, they engaged as equal partners in the mercantile business in this state, as above mentioned, for which the father furnished the capital, and in which his father gave him a half interest in consideration of his services after becoming of age; that they continued in this business for about two years, when the father sold his interest to a third party, as hereinbefore mentioned; that afterwards, to relieve the father's mind of the fear of want in his old age, he gave him the note in question, with the understanding that the mortgage securing it should not be recorded, and that the principal should not be paid, but the interest should be paid during his father's lifetime, when the note should be returned to Thomas A. Thomas A. is corroborated by a witness who testified to statements made by Thomas A.'s father, some two years before the note was given, that he had given Thomas A. a half interest in the business in consideration for his services after he was of age. The same witness testified that after the note was given the father told him that it was given voluntarily and to guarantee him a life support. These alleged conversations took place more than ten years before the suit was tried. The witness was a stranger to the transaction, and it will not be presumed that he especially charged his memory with the conversations. Under such circumstances it would be next to impossible for the witness to recall the conversations as they actually occurred, and, of necessity, he would omit many of the details which, if recalled, might give the conversation a different meaning from that which

he, at this late day, gathers from it. Another witness, produced to corroborate Thomas A., testified to his understanding that the note was merely given for the support of the father, and not as a part of the purchase money for the half interest in the business; but he gave none of the conversations upon which his understanding in this behalf is based, nor does it appear that he had any conversations with the father upon which it could be based. Consequently, his evidence on this point is of no value.

On the other hand, Thomas A.'s testimony is flatly contradicted by that of his father, who testified positively that the consideration therefor was a half interest in the lot, building and personal property to which we have heretofore referred. It is further contradicted by the testimony of his brother, who drew the instruments in question, was present when they were executed, and heard the conversation, and who corroborates his father as to the consideration for the note. A sister, who was a member of the family at the time, testified to conversations had between her father and Thomas A. immediately prior to the giving of the note, to the effect that Thomas A. should give her father a note for the half interest in the business. She was not present when the transaction was finally consummated, but her evidence is entitled to weight, because it contradicts that of Thomas A., in which he claims to have been given the half interest in consideration of his past services to his father, because the conversations to which she testified took place long after the time at which he claims the half interest was thus transferred to him. Besides, the circumstances seem to corroborate the testimony of the father. It does not seem likely that a son, intending to provide a life income of some $200 a year for his father, to that end would give his note, secured by mortgage, for $2,100 with interest at 10 per cent., payable in five years. Again, the face of the note is for just one-half the value of the property mentioned, as shown by the invoice, and for precisely the same amount as that paid by the third party for the one-half interest in the prop-

erty in question which the father transferred to him. These coincidences are highly significant.

We have not overlooked the fact that for two years the mercantile business was carried on by Thomas A. and his father, under the firm name of T. A. Armstrong & Co. At first sight this would appear to corroborate Thomas A.'s version of the transaction strongly. But he was a member of his father's household. For years he had been the active manager of his father's affairs. Considerable sums of money belonging to his father had passed into his hands, and at least one considerable debt of his had been paid by his father. It does not appear that any settlement was ever had between them, unless it was at the close of the mercantile venture. At the close of that venture, as before stated, an inventory was taken, and the property was invoiced at $4,200. For an undivided one-half a third party paid $2,100, and at about the same time Thomas A. gave the note in suit for a like sum. From the history of the transaction we are satisfied that, whatever may have been the interest of Thomas A. in the firm of T. A. Armstrong & Co., he had none in the property in question, which alone is claimed to have furnished the consideration for the note, and which had been bought with his father's money, save such additions as had been bought out of the proceeds of the business.

The case is here for trial *de novo,* and, in view of all the facts and circumstances, the conclusion is forced upon us that the note was given for an undivided one-half of the building, lot, stock of merchandise and other personal property, as claimed by the plaintiff, and that the finding of the trial court that it was given without consideration is not sustained by sufficient evidence. It is therefore recommended that the decree of the district court be reversed and the cause remanded, with directions that an account be taken of the amount due on the note and a decree accordingly entered.

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, with directions that an account be taken of the amount due on the note and a decree entered accordingly.

JUDGMENT ACCORDINGLY.

J. PETER JESSEN ET AL. V. CAROLINE M. WILLHITE.

FILED OCTOBER 5, 1905. No. 13,914.

1. **Intoxicating Liquors**: SELLER'S LIABILITY. One selling intoxicating liquor is liable, not only for the actual results of the sale, but for all damages growing out of the disqualification resulting from or contributed to by such sale, without reference to the time through which such disqualification may continue.
2. **Loss of Support**: QUESTION FOR JURY. Where a husband becomes an habitual drunkard, and abandons his family and ceases to provide for its support, whether such loss of support is permanent or otherwise is a question of fact for the jury.
3. ———: ACTION: MITIGATION OF DAMAGES. In an action by a wife to recover in behalf of herself and children for damages on account of the sale of liquor to her husband, in consequence of which sales he has become an habitual drunkard and has abandoned his family, the defendant is not entitled to show in mitigation of damages that the wife, since such abandonment, has commenced proceedings for divorce.
4. **New Trial**: AFFIDAVITS. Affidavits in support of a motion for a new trial on the ground of newly discovered evidence, which state that the defendant had used reasonable diligence to discover such testimony before the trial, but which fail to state the facts constituting such diligence, are insufficient.

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

J. B. Strode, E. F. Pettis and *E. J. Murfin,* for plaintiffs in error.

Stewart & Munger, contra.

ALBERT, C.

This action was brought by Caroline M. Willhite, in her own behalf and in behalf of her three minor children, against J. Peter Jessen and Henry Gies, saloon-keepers, and the American Bonding Company, surety on their license bonds, to recover for damages alleged to have been sustained by the plaintiff and her children by reason of sales of intoxicating liquors to the husband of the plaintiff and the father of said children. It is charged in the petition that on or about the 15th day of April, 1902, and from that day thereafter until April 15, 1903, the defendant saloon-keepers sold and furnished the said husband intoxicating liquors, and thereby caused him to become an habitual drunkard, and that from the 15th day of April, 1903, until August 1, 1903, the defendant Jessen continued to furnish said husband with intoxicating liquors in sufficient quantities to cause his intoxication, whereby he became an habitual drunkard. It is further charged that, by reason of his habitual drunkenness, said James A. Willhite was rendered unfit to labor and carry on his business, and it caused him to squander his earnings and rendered him unable and incapable to furnish the plaintiff and her children any support, and caused him to abscond, abandon and desert his said family, and thereby deprived his family of his earnings, support and maintenance. The action was commenced in 1903, and at the time the oldest child of the plaintiff was 13 and the youngest 8 years of age. The evidence shows that the plaintiff was married to her husband and resided with him in the state of Kansas until the spring of 1902, when he came to the city of Lincoln, in this state, where he found employment as a stone-mason. He resided with his family in this state for something more than a year, when he absconded and abandoned his family. It sufficiently appears that, although he occasionally drank to excess before coming to Lincoln, he spent his evenings at home, was kind to his family and contributed from $50 to $60 a month to their support, and had an

earning capacity of about $4.50 a day; that he brought with him to Lincoln something like $250 in money. Shortly after his arrival in Lincoln, he began to frequent the saloons of the defendants Jessen and Gies, and to drink to excess, and in consequence became an habitual drunkard, unfit to work or follow his trade, and in consequence contributed practically nothing to the support of his family, and since his abandonment of his family has contributed nothing whatever to their support; and the plaintiff, although she has made diligent inquiry, has been unable to ascertain his whereabouts. The $250 which he brought with him to Lincoln, as well as $25 which he borrowed and for which he pledged the household furniture as security, were squandered in drink. At the date of the trial he was 36 years of age. The jury returned a verdict for the full amount claimed, but the court ordered a remittitur of $1,000, which was entered, and judgment was given for $4,000. The defendants bring error.

That the evidence is sufficient to sustain a verdict in favor of the plaintiff is tacitly conceded, but the defendants contend that the judgment is excessive, and their contention on this point is thus summed up in their brief: "We contend that the defendants Jessen and Gies would not be liable in damages for making Willhite a drunkard, but only for the loss of the means of support during the period they continued to furnish him liquors. This period of time was less than 18 months." We do not believe that contention can be upheld, in view of the construction which this court has heretofore placed on that portion of our liquor laws relating to civil damages. In *Wardell v. McConnell*, 23 Neb. 152, the court, referring to the traffic in intoxicants, said:

"If such sale is made, the person making it is not only liable for the actual results of that sale, but liable for all damages growing out of the disqualification, without reference to the length of time through which it may continue."

In *Stahnke v. Kreitle*, 66 Neb. 829, the following lan-

guage of Mr. Commissioner AMES was approved by the court:

"One who has converted another from a sober and industrious life into an habitual drunkard is responsible for all the financial losses due to his act, including those caused by the subsequent thriftless and dissipated career of his victim, directly resulting therefrom."

When damages result from the sale of intoxicating liquors, every one who contributes to such result is a wrongdoer and liable. *Elshire v. Schuyler,* 15 Neb. 561; *McClellan v. Hein,* 56 Neb. 600, and cases cited. It is true that in this case the defendant saloon-keepers did not transform the husband from a sober man into an habitual drunkard, because he was more or less addicted to the excessive use of intoxicants before they sold to him. But they did take up the work when others had left off, and as a result of their sales his appetite for strong drink was fed and encouraged, until he was transformed from a man who, although addicted to the excessive use of intoxicating drinks, was kind to his family, and supported them by working at his trade, to one who became unfit for work, contributed practically nothing to the support of his wife and children, and who, regardless of the ties of nature, abandoned his family and became a vagabond. Whether such conditions will continue seems to be purely a question of fact for the jury, to be determined from all the facts and circumstances in evidence. And we are satisfied from the record in this case that the jury were fully warranted in finding that the plaintiff and her children were permanently deprived of the means of support which the husband would have furnished, but for his habitual drunkenness. That being true, in view of his age, his earning capacity before the defendants began to supply him with liquors, and the other facts and circumstances shown in evidence, a judgment of $4,000 cannot be regarded as excessive.

Our attention has been called to *Roberts v. Taylor,* 19 Neb. 184, where, on a state of facts in many respects similar to those involved in the case at bar, on a judgment of

$995.66⅔, this court ordered a remittitur of all in excess of $700. But that case differs from the present in two important particulars: There the husband still continued to reside with his family and to contribute to some extent to their support; his earning capacity was but $1.50 a day. In the case at bar the husband, whose earning capacity was $4.50 a day, has abandoned his family and contributes nothing to their support. Besides, it would appear that in the former case the court was influenced to some extent by the fact that a portion of the time the liquor was furnished with the wife's consent. In this case it does not appear that the wife consented to any of the sales of liquor to her husband, and, if she had, under *Gran v. Houston*, 45 Neb. 815, decided long after the *Roberts* case, it would be no defense.

The evidence shows that sometime after the husband deserted his family, the plaintiff instituted a suit for divorce on the grounds of drunkenness and nonsupport. This suit was pending when the case at bar was tried, and there is evidence tending to show that the plaintiff would not live with her husband, even if he should return sober. The following instruction, based on the foregoing evidence, was tendered by the defendants: "The jury are instructed that if you find from the evidence that the plaintiff has commenced an action for divorce against her husband, James A. Willhite, and you further find from the evidence that she would not live with him again under any circumstances as his wife, if he should return to her, then you cannot allow her damages for the loss of the means of support beyond the date of the commencement of such action for divorce." The instruction was properly refused. The action is not for damages for the loss of the society and companionship of the husband, but for damages to the means of support of the plaintiff and her children. If they have been permanently deprived of his support, and the jury were warranted in finding that they were, the sentiments the plaintiff may entertain toward her husband at this time, as well as her speculations as to whether she

would receive him, should he return sober, are wholly immaterial.

Another contention of the defendants is that their motions for a new trial on the ground of newly discovered evidence were overruled. The motions are supported by affidavits. The alleged newly discovered evidence relates to the habits of the plaintiff's husband before coming to Lincoln. All these affidavits, with the possible exception of two, instead of setting out the particular efforts which had been made to procure the evidence for use at the trial, aver the bare conclusion that the defendants had used due diligence, and are clearly insufficient. *Goracke v. Hintz,* 13 Neb. 390; *Tomer v. Densmore,* 8 Neb. 384; *Heady v. Fishburn,* 3 Neb. 263. The two affidavits mentioned as possible exceptions were made by one of the defendants and his attorney, and show of themselves that the affiants were informed before the trial where the husband had resided with his family before coming to Lincoln, and that they were put in possession of information which, had they used it with reasonable diligence, would have led to the discovery of the evidence which they now claim would be forthcoming on another trial. A new trial on the grounds of newly discovered evidence is only allowable when such evidence "could not, with reasonable diligence, have been discovered and produced at the trial." As reasonable diligence was not shown, the motions were properly overruled.

Complaint is made of certain instructions given by the court on its own motion, but such complaint is disposed of, we think, by what has been said with respect to the defendants' first contention.

It is therefore recommended 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.

J. W. TEMPLIN V. GEORGIA KIMSEY.

FILED OCTOBER 5, 1905. No. 13,933.

1. **Pleading: JURISDICTION, WANT OF.** Where the want of jurisdiction does not appear upon the face of the record, it may be pleaded with other defenses in the answer.
2. ———: ———. That the defendant in a case of that kind first raised the question of jurisdiction on a special appearance, which was overruled, does not affect his right to include a plea to the jurisdiction with other defenses in his answer.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed.*

Tibbets & Anderson, for plaintiff in error.

George A. Adams, contra.

ALBERT, C.

This suit was brought before a justice of the peace of Lancaster county. The return to the summons is regular on its face, and shows that service was made on the defendant by leaving a copy at his usual place of residence in said county. On the return day the defendant entered a special appearance, objecting to the jurisdiction of the court on the ground that he was a resident of Merrick county, and had no place of residence in Lancaster county at the time the summons purports to have been served. The objection was overruled, and the defendant entered no further appearance at that time. The justice gave judgment in favor of the plaintiff, and within 10 days thereafter the defendant appeared before the justice, paid the costs, and asked to have the judgment set aside in pursuance of the provisions of section 1,001 of the code relating to the setting aside of judgments taken by default before a justice of the peace, at the same time filing an answer, containing, among other things, a plea to the

jurisdiction of the justice based on the same ground as that urged in his special appearance. The justice set aside the judgment, and upon the hearing of the cause gave judgment in favor of the defendant. The plaintiff appealed to the district court, where the defendant, among other defenses, again entered a plea to the jurisdiction of the court. On plaintiff's motion this plea was stricken from the answer, and upon a trial on the merits the jury found for the plaintiff, and the court gave judgment accordingly.

The sole question in the case arises on the ruling of the court on the plaintiff's motion to strike the plea to the jurisdiction of the court from the answer. The plaintiff contends that, when the defendant appeared before the justice for the purpose of having the judgment set aside, he submitted himself to the jurisdiction of the court, and waived the want of due service of process. In urging this proposition there is a failure to distinguish between those cases where the want of service, or some defect or irregularity therein, appears on the face of the record, and involves merely a question of law, and those where such want or defect does not thus appear, but is based on a state of facts *dehors* the record. In the latter class of cases it is well settled that the want of jurisdiction may be pleaded with other defenses in the answer. The rule is exhaustively discussed by Commissioner RYAN in *Hurlburt v. Palmer,* 39 Neb. 158, and has been reaffirmed in the following cases: *Herbert v. Wortendyke,* 49 Neb. 182; *Kyd v. Exchange Bank,* 56 Neb. 557; *Barry v. Wachosky,* 57 Neb. 534; *Anheuser-Busch Brewing Ass'n v. Peterson,* 41 Neb. 897; *Baker v. Union Stock Yards Nat. Bank,* 63 Neb. 801. That the defendant appeared specially for the purpose of objecting to the jurisdiction of the justice, and such objection was overruled before the filing of the answer including a plea to the jurisdiction, however material to other questions, is immaterial for the purposes of the question under discussion, or any question presented in the argument. *Barry v. Wachosky, supra.* That the de-

fendant had a right to interpose a plea to the jurisdiction in the district court is clear from the authorities cited, and it follows that the court erred in sustaining the motion to strike that plea from the answer.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

FIRST STATE BANK OF OVERTON V. STEPHENS BROTHERS.

FILED OCTOBER 5, 1905. No. 13,830.

Estoppel. Where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped after litigation has begun from changing his ground and putting his conduct on another and different consideration.

ERROR to the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

E. A. Cook, for plaintiff in error.

Warrington & Stewart, contra.

JACKSON, C.

On September 24, 1902, J. T. Bend drew a check on the First State Bank of Overton for the sum of $111.35, payable to Stephens Brothers. Two days later this check was presented at the bank for payment by one of the members of the firm of Stephens Brothers and payment was refused, thereupon Stephens Brothers sued the bank

to recover the amount of the check. In their petition they set out the corporate capacity of the bank, the execution and delivery of the check, the presentation thereof at the bank and the demand for the payment thereof, and alleged "that said defendant bank refused to pay said check, and stated as the reason for refusing to pay the same that said Bend had instructed it not to pay the same, and gave no other reason for not paying the same." They further alleged that Bend had on deposit in the bank money sufficient to pay the check, and that no part of the same had been paid, and prayed judgment for the amount of the check with interest and costs. The bank answered, admitting its corporate capacity, the making and presentation of the check, and that the same was not paid, and denied all other allegations in the petition. At the trial it was conclusively proved by competent evidence, and in fact admitted by the cashier of the bank, that at the time the check was presented the bank refused payment, and gave as the only reason why the check was not paid that payment had been stopped by the maker. The member of the firm of Stephens Brothers who presented the check for payment testified that at the time the bank refused to pay the check he inquired of the cashier whether Bend had money on deposit in the bank, and that the cashier answered that Bend always had funds in the bank. On behalf of the defendant the cashier testified that at the time the check was presented for payment Bend had no money on deposit in the bank, and he denied having made the statement to the plaintiff at the time the check was presented that Bend always had funds in the bank. There was a total failure to prove any fact justifying the course of the drawer of the check in attempting to stop the payment thereof. The trial resulted in a verdict and judgment for the plaintiff for the amount of the check, with interest, and the bank prosecutes error.

The principal contention of the bank is that the maker of the check had no funds in the bank at the time the check was presented for payment, and that by reason of

that fact no liability was incurred by reason of the refusal of the bank to pay the check. If the claim of a lack of funds was well founded, it would have been a complete defense in this action had it disclosed that fact to the payee at the time the check was presented for payment, but instead of doing so the bank chose to base its refusal upon the ground that payment thereof had been stopped by the maker, and the claim of a lack of funds was first made after the litigation had commenced. The rule in this jurisdiction is that, where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct on another and different consideration. *Ballou v. Sherwood,* 32 Neb. 666; *Frenzer v. Dufrene,* 58 Neb. 431; *State v. Board of County Commissioners,* 60 Neb. 566; *Hixson Map Co. v. Nebraska Post Co.,* 5 Neb. (Unof.) 388. The judgment in this case might well be permitted to stand solely on account of the reason given by the bank for the nonpayment of the check at the time it was presented for payment. It is worthy of notice, however, that the testimony on behalf of the plaintiff tends to prove that the maker of the check did have funds in the bank at the time the check was presented, and, while the cashier of the bank denies having made the statement that Bend always had funds in the bank, and testified that he had no money on deposit there at the time the check was presented, it cannot be said that the jury might not, with considerable reason, have found against the bank on that contention. The conclusion already reached disposes of assignments of error numbered 1, 2, 3, 4, 14 and 16.

In the cross-examination of the cashier of the bank, counsel for plaintiff inquired if he would not have paid the check, in any event, had the maker not ordered payment stopped. An objecton was interposed that this was improper cross-examination; the objection was overruled, and the witness answered that he would probably have paid the check. The admission of this evidence on cross-

examination is assigned as error. If the court erred in admitting this evidence it was entirely without prejudice to the bank, because under the admitted facts the verdict could not have been otherwise than for the plaintiff.

There was also a request to instruct the jury that the giving of the check by Bend to plaintiff was not a payment of the account owed by Bend to the plaintiff. This instruction was refused, and upon the refusal error is assigned. It is said by counsel that this instruction was necessary, because the jury may have understood that the giving of the check by Bend was an absolute payment, and that he was thereby released, and that they probably found for the plaintiff on that theory. This contention cannot be sustained. The court properly refused to give the instruction requested.

Complaint is also made of the giving of instruction numbered 4 as follows: "You are instructed as a matter of law that J. T. Bend, after giving said check, could not arbitrarily countermand the payment of the same." It is said that this instruction tended to mislead the jury. There seems to be no force in the contention, and it doubtless states a correct principle of law as applied to the facts in this case.

Instruction numbered 6 is as follows: "You are instructed that the burden of proof is upon the plaintiff, and he must satisfy you by a preponderance of all the material allegations of his petition, and if you find the evidence evenly balanced, or that it preponderates in favor of the defendant, then your verdict should be for the defendant." A similar instruction was under consideration in *City of Lexington v. Fleharty,* p. 626, *post,* in an opinion delivered at the present sitting of the court, and was there held not to be erroneous, although faulty, because of the omission of the words "of all the evidence" after the word "preponderance." In this case it might be said that the instruction, whether erroneous or not, must be held to be without prejudice, because the evidence would have justified a peremptory instruction to find for the plaintiff.

We discover no prejudicial error in the record, and 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.

EDNA ARNOUT, APPELLEE, V. WILLIAM J. CHADWICK, APPELLANT.

FILED OCTOBER 5, 1905. No. 13,877.

1. **Judgment: VACATING: FRAUD.** To justify a trial court in setting aside a decree rendered at a former term on the ground of fraud, it is not necessary that actual fraud should be found. It is sufficient if facts and circumstances are proved from which constructive fraud can be inferred, if by reason of such facts and circumstances the party seeking to avoid the decree was induced to make no appearance in the cause in which the decree was rendered.
2. **Evidence** examined, and *held* sufficient to justify the district court in vacating a former decree of that court.

APPEAL from the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

T. J. Nolan and *F. A. Brogan,* for appellant.

Jefferis & Howell, contra.

JACKSON, C.

This is an appeal from a decree of the district court for Douglas county, setting aside a former decree rendered in that court. It appears from the pleadings and the evidence that the appellant, defendant herein, on November 7, 1903, filed a petition in equity against the appellee,

plaintiff herein, to compel the conveyance of certain real estate in Douglas county, which it was alleged the appellee held for him in trust. Personal service of summons was had on the appellee, who failed to appear, and on the 28th day of December of that year the appellee was defaulted, and upon a hearing to the court a decree was entered conforming to the prayer of the petition. After the adjournment of the term in which said decree was entered, and on the 19th day of March, 1904, the appellee filed a petition containing allegations which, if true, would constitute a complete defense to the appellant's cause of action in the cause in which the decree was entered, and, as a reason for not appearing and defending in that action, alleged that on the day after the process therein had been served upon her she called upon the appellant for an explanation of the proceeding, and that thereupon the appellant stated "that his temper had been aroused; that he had gone to an attorney, who advised him to bring suit, but that he would have the case thrown out of court and dismissed, and received from this plaintiff a copy of the order of court before served upon her, as above mentioned, and put the same in his pocket, and told this plaintiff that it was all right, that there would be nothing more to the case, and that this plaintiff should not bother any more about it; that plaintiff relied upon the statements and representations of this defendant, and believed that he was acting in good faith, and that the case which the defendant had brought in court would be dismissed, and that she would have no further trouble in relation to the matter." She further alleged that, relying upon the statements and representations of the appellant, she made no appearance, by answer or otherwise, in said action, and believed that the case had been dismissed, until some four or five days prior to the filing of her petition for a new trial. She further alleged that the decree obtained by the appellant was procured upon perjured testimony. Upon her petition for a new trial issue was joined, and after a hearing to the court the decree assailed by her petition was vacated

and a new trial ordered. From the judgment vacating the decree and allowing a new trial an appeal was taken to this court, and we are asked to reverse the judgment of vacation for two reasons: First, because the decree is not supported by the evidence and is contrary to the evidence, and, second, because the district court did not find the existence of fraud alleged in the plaintiff's petition. We will consider these questions in order as they are presented.

The evidence upon controverted questions of fact was adduced through the examination of witnesses in open court. There was a sharp conflict in the testimony of these witnesses, and it is impossible to reconcile their statements upon the theory that they all adhered rigidly to the truth. For that reason, considerable weight will be given to the findings of the trial judge, who saw the witnesses in court, observed their demeanor and deportment while testifying, and who, for that reason, was, by far, better qualified to form a correct conclusion as to the weight to be given to their testimony. The appellee, as a witness in her own behalf, testified, in substance, that the process in the action instituted against her by appellant was served on the 9th day of November; that on the following day she went to the place of business of the appellant, took the papers to him and asked him what he meant; that he said to her that she need not pay any attention, that he was a little riled in temper and had consulted a lawyer and told him to go ahead, that she should pay no more attention to it, and that he would throw it out of court; that she handed the papers back to him and did not pay any more attention to it; that she did not know of his having proceeded with the case and procured a decree until the 8th day of March following; that the decree was entered while she was away on her wedding trip. Her testimony is to some extent sustained by facts and circumstances proved at the hearing. The appellant on his own behalf, in substance, testified that the appellee came to his store with the papers which had been served on her in the suit instituted by him, and said: "This is a nice thing for a

man like you, that thinks he is a gentleman, to try and bring a lady into court. I am too much of a lady to bring a lady into court, if you are not more of a gentleman to bring a lady into court." She took the papers and fired them on top of the show-case. I said: "You had better take the papers and see some attorney and defend yourself, if you have a claim to this property." We had a few different words. He denied the statements made by the appellee relative to the conversation on that occasion. The evidence disclosed some facts and circumstances tending to support his statements. We have, however, examined the entire record with considerable care, and, taking into consideration the opportunities for determining the truth enjoyed by the trial judge, which by reason of circumstances are denied to this court, we do not feel justified in disturbing the decree as being against the weight of evidence.

This brings us to a consideration of the second ground urged for a reversal of the decree, that the court did not find the existence of fraud alleged in the plaintiff's petition. The finding of the district court in that respect is in the following language: "That the plaintiff herein, defendant therein, in the cause in which said decree was entered, was served with summons thereon on the 9th day of November, 1903, and that thereafter, to wit, on the 10th day of November, 1903, this plaintiff, then Edna Howell, took the summons to the plaintiff therein, defendant herein, and then and there, at the place of business of the defendant herein, plaintiff therein, delivered said summons to the defendant herein, plaintiff therein, and at said time the said Chadwick and this plaintiff had a conversation concerning the suit in which the said summons was issued and served, wherein the said Chadwick, by words, acts and conduct, induced this plaintiff to believe that he had commenced said suit while in anger, and that he did not intend to prosecute the same to decree, and that he would not so prosecute said cause, and further induced this plaintiff to believe that he would cause said suit to be dismissed and

thrown out of court, and further informed this plaintiff that she need give no further attention to said suit, and that this plaintiff relied upon said statements, conduct, and inducements, and, by reason thereof, gave no further attention to said litigation, and made no appearance therein to protect her rights in the property in question, and that this plaintiff, defendant therein, was justified, by reason of the conversation with said plaintiff therein, his acts and conduct, in relying upon her belief that said action would not be further prosecuted, and would be dismissed without proceeding to decree. This court does not deem it necessary to find that the defendant herein, in said conversation mentioned, deliberately, purposely and wilfully, intended, by his said acts and conduct, to work a fraud upon this plaintiff, but does find that the acts, conduct and conversation on the said 10th day November between said parties, and the subsequent taking of said decree, as herein found, were such as to constitute a fraud in law upon this plaintiff, the defendant therein."

It is contended by appellant that, to justify a court of equity in setting aside a former decree and judgment rendered upon proper process and pleadings, it is necessary that there should exist actual fraud, not legal or technical fraud, and that the findings of the district court do not come within that rule. We do not think it important to inquire into the reasons given by the trial court for the conclusion which followed. If the conclusion is right, then it should be sustained, notwithstanding the fact that the district court may have given a wrong reason. We cannot agree with counsel, however, in their contention that actual fraud must be shown. In *Klabunde v. Byron Reed Co.*, 69 Neb. 126, 136, it is held that equity will relieve against a judgment or decree on the ground of fraud, actual or constructive, committed by the successful party, or where, from excusable neglect, a defendant has been prevented from interposing a meritorious defense or establishing grounds entitling him to affirmative relief in such action, and Mr. Justice HOLCOMB, in delivering the

opinion of the court, made use of the following language:

"We do not say there has been any action on the part of defendant or for which it should be held responsible, which worked an actual fraud on the plaintiff's rights. It is not necessary that we should, nor do we think we would be warranted in so saying. There is, however, sufficient in the record to warrant the inference that he has suffered a wrong which equity will relieve against. There is at least constructive fraud. The plaintiff was lulled into a feeling of ease and safety, because of what he understood and what he was justified in believing was the promise and agreement of the defendant and because of the information received from its counsel, who undertook to represent him also in the litigation."

The rule there announced is an appropriate one for the case at bar. We hold, therefore, that the findings of the district court were amply sufficient upon which to base the judgment vacating the former decree.

No question is raised in this hearing as to the sufficiency of the showing on the part of the appellee that she had a good and meritorious defense to the action instituted against her by appellant.

We recommend that the judgment of the district court vacating its former decree be affirmed and that the cause be remanded for further proceedings.

DUFFIE, C., concurs. ALBERT, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court vacating its former decree is affirmed and the cause is remanded for further proceedings.

AFFIRMED.

CITY OF LEXINGTON V. HENRY C. FLEHARTY.

FILED OCTOBER 5, 1905. No. 13,910.

1. **Res Gestae.** A declaration to be part of the *res gestæ* need not necessarily be coincident in point of time with the main fact proved; it is enough that the two are so clearly connected that the declaration can be said to be a spontaneous expression of the fact or condition.
2. **Instructions** examined, and *held* to have fairly stated the law applicable to the case; and the evidence examined, and found to have justified the submission of the case to the jury.

ERROR to the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

G. W. Fox and *E. A. Cook,* for plaintiff in error.

H. D. Rhea and *H. B. Fleharty, contra.*

JACKSON, C.

The city of Lexington prosecutes error from the district court for Dawson county to reverse a judgment of that court against the city and in favor of the defendant in error. The parties will be designated as they were in the court below, the defendant in error herein being described as plaintiff, and the plaintiff in error as defendant.

Plaintiff's cause of action was based on a personal injury which he claims to have sustained by reason of a defective sidewalk. The statement in his petition, omitting the formal allegations, is, substantially: That Washington street, between Fifth and Sixth streets, is one of the main public thoroughfares and business streets in the city of Lexington, and is at a place where there is much travel, and that condition had existed for a long time prior to the injury complained of; that the sidewalk on the west side of the street at the place stated was built on supports running lengthwise of the street, with planks nailed thereon, six inches in width and twelve feet in length;

that by reason of the standing of water under the walk and improper supports the walk had settled in the center and remained in a swayed and sunken condition, and that thereby the ends of the planks had tipped up and were there higher than in the center of the walk; that for the reasons stated the walk had become defective and badly out of repair, and in a dangerous and unsafe condition, uneven on the surface; that some of the planks had been allowed to become loose and had remained loose for a long time prior to the injury, and that the defendant had neglected to keep the same in suitable repair and in a safe condition for travel thereon; that some of the planks had been removed, and left dangerous holes in the walk, and the planks that were remaining in their apparent places in such loosened condition were so concealed as to position that a person walking along on said sidewalk could not observe such condition without close inspection thereof, and the walk was thereby extrahazardous and dangerous to travel upon; that the city had actual and constructive notice of the defect in the walk at the time of the accident, and for a long time prior thereto; that by reason of not having the same repaired, and providing to warn persons passing over the same, it was guilty of want of proper care and of gross negligence; that on the 12th day of December, 1902, while the plaintiff was passing along over this walk to the post office, in company with another person, the person with whom he was walking stepped on one of the loosened planks, which was apparently in a proper position; that the plank was forced upward in front of the plaintiff, who did not observe the same; that his foot was caught, and he tripped and was thereby thrown down onto the walk with great force and violence, and sustained a serious injury; that the injury was caused without negligence on his part; that it was of a permanent nature, and as a result he had suffered great pain constantly since the accident, and had been rendered unable to properly attend to his business. The defendant's answer was a denial of all of the allegations of the petition,

except the corporate capacity of the defendant, and an allegation that, by the use of reasonable care and caution, the plaintiff would not have fallen and been injured. The reply was a general denial. The trial was to the court and a jury, resulting in a verdict and judgment for $1,500, favorable to the plaintiff. The questions presented for consideration to this court, taken in their natural order, are: First, the rulings of the court on the admission of evidence; second, instructions by the court; and lastly, the sufficiency of the proof to sustain the verdict and judgment.

George Auble, a witness on behalf of the plaintiff, after having testified that he was with the plaintiff when the injury occurred, and to the circumstances of the fall sustained by the plaintiff, was asked: "Q. Did you learn the result of that fall? A. No, sir. Q. I mean, did you make any inquiry? A. I asked him if he was hurt, and he said he was." The defendants moved to strike out the last answer as incompetent and immaterial. The motion was overruled and exception taken. It is claimed that this statement by the plaintiff was not a part of the *res gestæ;* that it was not a spontaneous explanation, as the witness did not ask the plaintiff if he was hurt until after he got up. This contention cannot be sustained. The authorities cited by defendant are *City of Friend v. Burleigh,* 53 Neb. 674, and *Union P. R. Co. v. Elliott,* 54 Neb. 299. In neither case do we find support for the rule which we are asked to apply here. In the former it did not appear when the declaration was made or how soon after the injury, and it was held that the declaration was properly excluded. In the latter a declaration made at the place and within a few moments after the injury was sustained was held to have been properly admitted as a part of the *res gestæ.* From the testimony of the witness it appears that plaintiff got up almost immediately after the fall, and that it was just after he got up that this statement was made, and the admission of the statement was clearly within the rule that the declaration to

be a part of the *res gestæ* need not necessarily be coincident in point of time with the main fact proved; it is enough that the two are so clearly connected that the declaration can in the ordinary course of affairs be said to be a spontaneous expression.

Complaint is also made of the ruling of the court on the admission of the evidence of the witness Malcolm, who was marshal and street commissioner of defendant at the time the accident occurred, and had been for some months prior thereto. The evidence complained of relates to the condition of the sidewalk at the place where the plaintiff fell, and to some extent the condition of the walks generally in the city for some months prior to the time of the accident, and the efforts made by the street commissioner to induce the city council to repair the same, and was, in our judgment, admissible for the purpose of charging the defendant with notice of the dangerous condition of the walk. It is probably true that evidence of the condition of the sidewalks generally in the city would not be sufficient to entitle the plaintiff to recover, but where, as in this case, the testimony of the witness did cover the condition of the walk at the exact place where the injury was sustained, and disclosed that the walk was out of repair and in an unfit and dangerous condition, no prejudice could arise by reason of the statement of the witness with reference to walks generally in the city.

In the first paragraph of the instructions the court defined the issues as presented by the petition, and in doing so quoted largely from the allegations of the petition, and included an allegation found in the petition in this language: "Plaintiff further alleges that he made out an account in writing, setting forth the character of his injury and the time and place of its occurrence, as required by law, on the 11th day of June, 1903, filed the same with the city council of the city of Lexington, and said council on the 24th day of June, 1903, disallowed the same." It is said that, as the law does not require claims such as the plaintiff makes in this case to be presented to the council

of cities of the class of the defendant, the giving of this instruction was erroneous, and authorities are cited by counsel for defendant, holding that in such cases a sworn statement of the injury presented to the city council is not admissible in a subsequent action for such injury. It appears, however, that at the trial all evidence offered on behalf of the plaintiff with respect to the filing of this claim and the action of the city council with reference thereto was, on objection, excluded, so that the authorities cited are not in point. By section 80, article I, chapter 14, Compiled Statutes, 1903 (Ann. St. 8759), it is provided 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," and in view of that provision of the code the allegation complained of was properly included in the petition, although not necessarily so, and, while all reference to that allegation might well have been omitted from the instruction, it is difficult to see how the jury could have been prejudiced by its incorporation into the instruction, especially in view of the fact that the court in the presence of the jury excluded all evidence tending to sustain the allegation.

Complaint is also made about paragraph 4 of the instructions, which recites: "You are instructed that this action is founded upon certain alleged acts of negligence and failure to use ordinary care." It is said that this instruction is wrong, because its effect is to leave the jury to guess at something, and it might as easily have guessed wrong as right. Instructions 5 and 6 which immediately follow are devoted, however, to defining negligence and ordinary care. No complaint is made about the definitions given by the court, and we fail to see any force in the objection to instruction 4.

In instruction 10 the court said to the jury: "You are instructed that, before you can find for the plaintiff, you must find that the plaintiff has suffered injury, that the

injury was caused by a defect in the sidewalk, that said defect left the sidewalk in an unreasonably dangerous condition, that the plaintiff did not contribute to the said injury by any negligence on his part, that the city authorities had actual knowledge of said defect in time to have repaired same before the accident happened, or that the defect had been notorious and continued for a length of time within which the city authorities, in the exercise of reasonable care and diligence, could have known of the same." The complaint about this instruction is that it does not require the jury to find the facts stated from the evidence. It is conceded in the brief of counsel for defendant that this instruction sets out the essential facts that the jury must find to entitle the plaintiff to recover. The jury were, however, properly instructed by other instructions as to the burden of proof, and the instruction in question is hardly susceptible of the construction placed upon it by counsel.

Defendant complains again of the giving of instruction 11. This instruction is as follows: "You are instructed that ordinary and reasonable care required of plaintiff is that degree of care which might reasonably be expected from an ordinarily prudent person under the circumstances surrounding him at the time. If you should find from the evidence that at the time and prior thereto plaintiff knew of the defective and dangerous sidewalk, and where it was located, he was required to use more care than if he had not such knowledge, and if he neglected to do so, and such neglect contributed to the injury, he cannot recover; but if he did use more than he would be required to do in case he had no such knowledge, and was injured by reason of defendant's neglect, and no fault of plaintiff contributed to the injury, you should find for the plaintiff." It is contended that this instruction is erroneous, because under the evidence in the case the jury should have been instructed that the burden of proof was on the plaintiff to establish the fact that he by his own act did not contribute to the injury. Such is not the law.

Instruction 15 given by the court was devoted to advising the jury of the different elements of damages which they might consider if they found for the plaintiff, and contained this language: "You should allow not only for damages already passed, but for all damages which would naturally and reasonably result from the injury, whether in the past or future." Complaint is made to the last part of the instruction, because it is alleged that the testimony was that, if the plaintiff wore a truss that would fit and kept it adjusted, no danger or inability to work would result from the injury. It is true that in the testimony of two physicians they gave it as their opinion that a truss, properly fitted and kept adjusted, would avoid any inability to work; but one of these physicians fitted the truss which the plaintiff wore on account of a rupture which he claims to have sustained by reason of the injury complained of, and the plaintiff's testimony was to the effect that after he had sustained the injury and while wearing the truss, if he undertook to perform manual labor, such labor would cause pain near the injured part, and he would be obliged to desist and rest; but pain would follow any exertion on his part, and, in our view of the case, it would certainly have been erroneous not to have submitted to the jury the question suggested by the instruction complained of.

In this instruction the court also said to the jury: "You should find from the evidence how much money plaintiff would reasonably have been able and reasonably expected to earn if he had not been injured as alleged, and how much he was and is and will be able to earn with his reduced capacity resulting from such injury, and the difference between these two amounts will be the measure of this element of his damages." Counsel insist that there is no evidence in the record as to the amount of money, if any, plaintiff made before his alleged injury, nor is there anything in the record as to the amount of money that he made afterwards, and that the portion of the instruction just quoted is erroneous for that reason. It is true that

the evidence is not very satisfactory on that branch of the case. There is, however, in the record evidence of what it cost the plaintiff to live, and from which the jury might reasonably infer that he earned at least that amount, prior to the time of his injury, out of his business. There is also evidence that his business had fallen off at least one-half since the injury, and that he had been unable to give his business such attention as it deserved since that time, and we think it can hardly be said that there is such an absolute failure of proof on that branch of the case as to make the giving of this part of the instruction erroneous.

Instruction 17 is as follows: "You are instructed that the burden of proof is upon the plaintiff, and he must satisfy you by a preponderance of all the material allegations of his petition, and if you find that the evidence is evenly balanced, or if it preponderates in favor of the defendant, then your verdict should be for the defendant." It is said that the instruction is erroneous, because the court, evidently through an inadvertence, omitted the words "of all the evidence" after the word "preponderance" in the second line of the instruction. The instruction, however, should be considered as a whole, and when so considered the purpose and meaning of the instruction could not be misunderstood. By the following paragraph the jury were instructed as to the meaning of the term, "the preponderance of the evidence," concerning which instruction there is no complaint. We think upon the whole, that the case was fairly submitted to the jury by the instructions.

As to the complaint that the verdict and judgment are contrary to law and excessive, it is sufficient to say that the evidence, in our mind, is such as to justify the submission of the case to the jury. The question of whether the negligence of the plaintiff was the proximate cause of the injury was a question of fact to be submitted to the jury, and, while a contrary verdict on the evidence would doubtless have been sustained, the court is not justified in invading the province of the jury and overturning its

verdict, because the court might differ in its conclusions of fact.

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.

FRANK H. DODD ET AL. V. JOHN KEMNITZ.

FILED OCTOBER 5, 1905. No. 13,917.

1. **Oral Evidence:** WRITTEN CONTRACT. The admission of oral evidence to explain the possession of and to prove that the delivery of a written contract was conditional, and that such delivery was not to become effective until the happening of some other event, is not a violation of the rule which would prohibit the introduction of oral evidence to contradict or vary the terms of the contract.

2. **Contract:** POSSESSION: PRESUMPTION. The possession of a written contract is *prima facie* evidence of its delivery, but the presumption of delivery arising from such possession may be explained or rebutted by oral evidence.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Henry M. Kidder, for plaintiffs in error.

H. C. Maynard and *George L. Loomis, contra.*

JACKSON, C.

The plaintiffs sued the defendant in the district court for Dodge county on a written contract for the purchase of one set of International Cyclopædia. The contract was signed John Kemnitz, Director. In the petition the plain-

tiff set out the execution and delivery of the contract, the approval by the plaintiffs; that the books were shipped as directed; that they had performed all the conditions of the contract on their part to be performed; that the defendant had failed to accept, take and pay for the books, and prayed judgment for the amount of the purchase price. The defendant admitted the execution of the contract, but alleged that it had never been delivered; also alleged that the books were being purchased for a school district, of which he was director of the board; that the contract was conditionally delivered upon an agreement that it should not become effective until approved by other members of the school board; that it had never been approved, and for that reason he had refused to accept and pay for the books. It was proved without contradiction at the trial that the books were ordered by the defendant for the school district, as set out in his answer; that the defendant signed the contract and placed it in the hands of plaintiff's agent, under an oral agreement that if the contract was approved by another member of the board it should become effective, otherwise that it should not, and that the other member of the board referred to did not approve of the contract. At the close of the evidence the court directed a verdict for the defendant, and the plaintiffs prosecute error.

Several assignments of error are presented and discussed by counsel for plaintiffs. The only one, however, that it seems necessary to notice is the claim that the admission of oral evidence to prove the conditional delivery is a violation of the rule which prohibits the admission of oral evidence to vary or contradict the terms of a written contract, because if the trial court was correct in admitting oral evidence for the purpose stated, and the delivery was in fact conditional, and such condition had never been performed, the plaintiffs could not recover in any event, and all errors, if any, were without prejudice. It is the claim of plaintiffs that their possession of the contract in suit, the defendant having voluntarily placed it

in their possession, conclusively shows a delivery for all purposes. With that contention we do not agree. In *Gandy v. Estate of Bissell,* 72 Neb. 356, Mr. Justice SEDGWICK, who delivered the opinion of the court, clearly demonstrates that the possession of a written agreement is *prima facie* evidence only of a delivery. This is in accord with the general rule. The delivery of a written instrument is one of intention, and to constitute a complete delivery thereof it must be made in a manner evincing an intention to part presently and unconditionally with all control over it, and thereby give it effect. *Streissguth v. Kroll,* 86 Minn. 325, 90 N. W. 577. A contract may be delivered subject to an oral condition or agreement that it shall not take effect until a future time, or until something else has been done that the parties have agreed upon, and in such case the instrument will have no operation until the condition or agreement has been performed, even if the delivery is made to the other party himself, and the giving of effect to the oral agreement or condition does not infringe the rule against admitting oral evidence to vary or contradict a written agreement. Story, Promissory Notes (7th ed.), note to sec. 56. As already stated, the evidence discloses without dispute that the delivery of the contract in suit was conditional, and that the condition imposed had never been met.

It is clear that the judgment of the district court was right, and we recommend that it 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.

GEORGE HORNUNG, APPELLEE, V. O. A. HERRING ET AL., APPELLANTS.

FILED OCTOBER 5, 1905. No. 13,926.

Injunction: REPEATED TRESPASS. A court of equity will interfere by injunction to restrain repeated acts of trespass, such as the forcible entry of a dwelling-house by breaking or removing locks from the doors, the forcible removal of fastenings from gates, and assaults upon those in possession; and in such case it is unnecessary to prove that the trespassing parties are insolvent.

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

George A. Adams and *G. W. Berge,* for appellants.

G. E. Hager, contra.

JACKSON, C.

The plaintiff obtained a permanent injunction in the district court for Lancaster county, restraining the defendants from entering upon or trespassing on a tract of farm land in that county, and from entering or attempting to enter the residence of the plaintiff on the premises, and from interfering with the plaintiff in his occupation thereof. The defendants appeal.

In an amended petition plaintiff claimed possession and the right of possession under a written lease from Emma Simon, the owner of the land; that he entered into the possession thereof on the 13th day of February, 1904; that the land was inclosed by a barbed wire fence, and that on the land were several small buildings, including a dwelling-house where the plaintiff lived; that on the 1st day of March, 1904, the defendants forcibly and unlawfully entered upon the premises and commenced to farm the land; that the plaintiff forbade them to enter and ordered them to vacate and leave the premises, but the defendants violently and unlawfully assaulted the

plaintiff, his agents and servants, and unlawfully and forcibly broke open the doors to the dwelling-house occupied by the plaintiff and placed some of their own goods in the house, and forcibly tried to put the plaintiff off of the premises and out of the possession of the same, and out of the dwelling-house; and threatened the plaintiff with bodily harm. That again, on the 2d day of March, the defendants came to the premises, and, after being forbidden by the plaintiff to enter thereon, the defendants forcibly assaulted the plaintiff, his agents and servants, and broke open the gate and entered the premises; that they used vile, profane and indecent language, and threatened to do great bodily harm to the plaintiff, his agents and servants; and that they proposed to farm the land, and that they would come each day and take like possession of the premises. Plaintiff further alleged, unless the defendants were restrained by the court, they would continue to forcibly and unlawfully enter the premises and do great and irreparable injury to the plaintiff. Attached to the petition was a copy of a written lease of the premises from March 1, 1904, to March 1, 1905. The defendants answered, claiming that the defendant O. A. Herring was the owner of the premises by virtue of a written contract with Emma Simon, entered into on the 27th day of November, 1903, wherein Emma Simon agreed to sell and convey to Herring the land in controversy for the sum of $5,600, to be paid, $500 on March 1, 1904, and $500 on the 1st day of March of each year thereafter until the 1st day of March, 1909, when the balance remaining unpaid was to be paid in full; that by the terms of the contract defendant Herring was to have possession of the premises on March 1, 1904; and alleged a tender of the sum of $500 to meet the payment due on March 1, 1904; that the contract was filed and recorded in the office of the register of deeds of Lancaster county on the 16th day of January, 1904; that the said Emma Simon refused to accept the payment tendered by said defendant; that he had kept and performed on his part all of the conditions and provisions

of the contract, and was still willing to perform the same. They denied that the plaintiff was in possession of the premises, and alleged that he lived with his grandmother on a farm about a mile distant from the land in dispute; further alleged that on the 1st day of March, 1904, they went to the premises with a load of furniture and placed the same in the house, and commenced farming the land; that they remained in possession for the period of two days, and during all that time neither the plaintiff nor any member of his family were living on the premises. They further alleged that the lease to the plaintiff was executed and received by him with knowledge of the defendants' rights, and that the plaintiff took no right thereunder. There was a trial to the court upon affidavits and oral evidence, and a finding and judgment for the plaintiff, as above stated.

The appellants insist that the evidence is not sufficient under the law to sustain a judgment. It would serve no useful purpose to quote from the testimony at length. There is competent evidence in the record tending to establish these facts: That on the 16th day of February, 1904, the plaintiff moved household goods into the dwelling-house on the land in dispute, repaired the barn on the premises, and hauled and stored there feed for his horses; that on the 1st day of March, 1904, while the plaintiff was temporarily absent from the premises, and while the premises were in charge of his brother, the defendant O. A. Herring entered upon the farm and demanded possession, which was refused; that he forcibly took off the locks and fastenings from the door of the dwelling-house and from the gate, and placed other locks thereon; and that upon the plaintiff's return he undertook to persuade the defendants to leave, and notified them to leave, and that they did leave; that on the following day the defendants again appeared while the plaintiff was preparing his breakfast in the dwelling-house; that the plaintiff forbade them entering upon the premises; that they forcibly opened the gate and threatened to assault the plaintiff, stating that

they proposed to come each day and take possession of and farm the land. This defendant also served a written notice on the plaintiff to vacate the premises. The evidence produced on behalf of the defendants tended to contradict in some respects the evidence of the plaintiff and his witnesses. Upon a careful consideration, however, of all of the evidence, we are satisfied that, in the main, the facts are as claimed by the plaintiff.

It is also contended that, because the evidence does not disclose that the defendants are insolvent, the injunction should not have been allowed. In *Pohlman v. Evangelical Lutheran Trinity Church,* 60 Neb. 364, it was held:

"The destruction of a fence, and threatened repetition thereof by a trespasser as often as the fence should be replaced, entitles the owner to relief by injunction against the invader, even though the latter may not be insolvent."

The rule in that case is applicable to the case now under consideration.

A court of equity will interfere to restrain repeated acts of trespass, because the remedy by action at law is not adequate, as it would require the injured party to bring such an action every time the injury was repeated. *Shaffer v. Stull,* 32 Neb. 94.

We are satisfied that the judgment of the district court was right, and recommend that it 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.

STATE OF NEBRASKA, EX REL. WILLIAM A. SAUNDERS, V. ROBERT O. FINK, TREASURER.

FILED OCTOBER 5, 1905. No. 14,310.

1. Statutes: CONSTRUCTION. In construing a statute, an imperative rule is that effect, if possible, must be given to every clause and part of the statute.
2. Tax Sale Certificate, Sale of. Section 26, chapter 75, laws of 1903, construed, and *held* not to authorize the sale of tax sale certificates owned by the state, or by any county or city, for less than the amount due thereon, and that the amount due thereon is to be determined by adding to the face of the certificate interest computed at the rate provided in section 27 of the act.

ERROR to the district court for Douglas county: ALEX. C. TROUP, JUDGE. *Affirmed.*

W. A. Saunders and *Wharton, Adams & Morgan*, for plaintiff in error.

W. W. Slabaugh, John P. Breen, W. H. Herdman and *A. G. Ellick, contra.*

JACKSON, C.

In a proceeding by the county of Douglas under chapter 75, laws of 1903 (popularly known as the "Scavenger Law"), the city of Omaha, on the 24th day of March, 1905, purchased lots 15 and 16 of J. E. Riley's Subdivision, an addition to the city of Omaha, the bid of the city on lot 15 being $80.80, and on lot 16 $100. By the decree under which the property was sold it was determined that the tax on lot 15 amounted to $80.80, and on lot 16 to $315.34. The county treasurer issued certificates to the city of Omaha according to the provisions of section 22 of the act under consideration, the certificate covering lot 15 being numbered 5,095, and the one covering lot 16 numbered 3,898. Proceeding under section 32 of the act the county treasurer, respondent herein, in the month of April,

1905, caused notice to be published of the sale required by him to be held, commencing on the first Monday of May, and included in the notice the certificates issued to the city of Omaha, as above recited. The property not having been redeemed prior to the sale, the relator bid at the sale for tax sale certificate No. 5,095, covering lot 15, the sum of $75, and for tax sale certificate No. 3,898, covering lot 16, the sum of $90, and at the same time offered to pay all unpaid subsequent taxes on both lots. There were no other bidders for either of these certificates, unless the city of Omaha was a bidder, concerning which we will determine later in this opinion. The respondent refused to accept the bid of the relator, and thereupon the relater applied to the district court for Douglas county for a writ of mandamus to compel the respondent to accept his bid and assign the two tax sale certificates in dispute to him.

In the petition the relator set out in full all of the proceedings of the county of Douglas leading up to the sale of the two lots described, the sale of these lots to the city of Omaha, and the issuance of the certificates therefor, the publication of the notice in April, 1905, and his bid for the two tax sale certificates, and alleged: "That there were no other bidders for either of said certificates, except the city of Omaha pretended to bid the sum of $80.80 for certificate No. 5,095, and to bid the sum of $100 for certificate No. 3,898; that the relator at the time of making said bid tendered cash therefor and offered to pay all taxes not covered by the certificates on the real estate covered by the certificates, and demanded that said bids be accepted and the certificates assigned to him; that the county treasurer, in violation of law, refused and declined to accept the bid of the relator, or to assign the certificates to him, but pretended to accept the bid of the city of Omaha, although the city of Omaha did not offer to pay cash therefor; that the certificates are still in the possession of the respondent; that the relator was the highest and best bidder at the sale, and the only one that offered to pay cash for said certificates." He also chal-

lenged the right of the city to bid on the tax certificates, and the right of the respondent to accept the bid of the city, and alleged that he had no interest in the property except such as he acquired by reason of his bids. To the petition the respondent demurred. The demurrer was sustained by the district court, and the writ refused, and, the relator electing to stand upon his petition, the case was dismissed. The relator appeals.

The contention of the relator is: First, that the city of Omaha could not become a bidder at the sale for the tax certificates in question, and, second, that, as he was the only bidder at the sale, his bid should have been accepted and the certificates assigned to him. The respondent contends that, as the bid of the relator did not cover the amount due on the certificates, he was not authorized to accept the bid, and for that reason the writ was properly denied. The questions thus presented call for a construction of the provisions of section 26 of the act under which the proceedings were had. This section is as follows: "Any person desiring to purchase any certificate of tax sale owned by the state or by any county or city, either at public or private sale, may secure an assignment thereof by paying to the county treasurer the amount due thereon, as well as all subsequent taxes and assessments on the property then delinquent, provided, a premium sale may be purchased at public sale for less than the amount of the decree and such sale shall be subject to the provisions of section twenty-three. Such assignment shall be made by indorsement of the county treasurer in his official capacity, countersigned by the county clerk. A record shall be kept of such assignments by the county treasurer and the county clerk. The effect of such assignment shall be to vest in the assignee the same rights which would have been secured to such assignee had he been the original purchaser at the sale." The term "premium sale" as used in this act applies to such sales as are made for less than the amount of the decree.

In the consideration of the case it does not seem impor-

tant to inquire into the right of the city of Omaha to become a bidder at the sale of the tax certificates, unless the respondent is mistaken as to the rights of the relator, because, if the contention of the respondent is correct, it was unnecessary for the city to become a bidder at the sale in order to protect its rights. We shall therefore first determine as to the contention of the respondent. In the construction of a statute an imperative rule is that effect, if possible, must be given to every clause and part of the statute. *Franklin v. Kelley,* 2 Neb. 79; *McCann v. McLennan,* 2 Neb. 286; *Union P. R. Co. v. Burlington & M. R. R. Co.,* 19 Neb. 386; *State v. Babcock,* 21 Neb. 599; *State v. Bartley,* 39 Neb. 353; *McIntosh v. Johnson,* 51 Neb. 33. In the construction, therefore, of section 26, authorizing any person to purchase tax certificates of tax sale owned by the state or by any county or city, effect should be given to that part of the section preceding the proviso, as well as the proviso itself, and the two parts should be harmonized, if possible, so that neither will be violated, because, if it may be said that there is an apparent contradiction, it is the duty of the court, if a reasonable construction can be found which avoids such contradiction, to adopt such construction. *Franklin v. Kelley,* 2 Neb. 79. If, therefore, the proviso may be construed to give it force without changing or modifying the plain meaning of what precedes, then such construction should be adopted. By that part of the section preceding the proviso, the relator was authorized to purchase the tax sale certificates at either public or private sale, by paying the amount *due thereon,* and all subsequent taxes. Evidently "the amount due thereon" was the face of the certificates, with interest, as provided by section 27 of the act, and, keeping in view the meaning of the term "premium sale," it becomes evident at once that the amount due on the certificates might differ materially from the amount due on the decree, as it did in this case. With that distinction in mind, the right of the relator may readily be determined by giving effect to every clause and part of the section under consid-

eration. He had the right to purchase at the sale tax certificates in dispute for the amount due thereon, although that amount might be less than the amount of the decree. To hold that he had any other or greater right would be to indulge in conjecture as to the object which the legislature had in view, and no such conjecture of the object is permissible, unless such object can be clearly ascertained from the language of the statute. *Nebraska R. Co. v. Van Dusen,* 6 Neb. 160. It seems clear that the respondent was right in declining the bid of the relator, and in refusing to assign the certificates upon such bid.

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 foreging opinion, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, EX REL. JOHN C. PENTZER ET AL., RELATORS, V. ROBERT MALONE ET AL., RESPONDENTS; JOHN R. BENNETT ET AL., INTERVENERS.

FILED OCTOBER 19, 1905. No. 14,326.

ORIGINAL application for a writ of mandamus to compel respondents to meet and canvass returns of election. *Writ allowed.*

Stewart & Munger and *R. J. Greene,* for relators.

Tibbets & Anderson, for respondents.

E. C. Strode and *A. G. Greenlee,* for interveners.

PER CURIAM.

Peremptory writ of mandamus allowed as prayed by in-

terveners. Writ not to issue until the further order of the court. Opinion to be filed later.

The following opinion was filed November 11, 1905:

1. Statutes: VALIDITY. Conceding the provisions of sections 12 and 13 of the amendatory act of the legislature (laws 1905, ch. 76) relating to the election of police judge to be invalid, which is not determined, the remainder of such act would not be affected thereby. Such provisions, it is held, were not an inducement to the passage of the remainder.

2. ———: ———. The provision found in said act (sec. 12) for an election of city aldermen on the first Tuesday in June, 1905, is not special legislation inhibited by the constitution, because applicable to the one city only which at such time comes under the operaton of the law.

3. ———: ENFORCEMENT. Invalid provisions of an act, not operating to avoid the whole, cannot be relied on to excuse the performance of a duty enjoined by the valid portions of the act.

HOLCOMB, C. J.

The interveners pray for a peremptory writ of mandamus to compel the respondents to meet and canvass the votes cast for city alderman at an election held in the city of Lincoln on the first Tuesday of June, 1905, and to declare the result of such canvass. The respondents seek to justify their refusal to canvass such vote, so cast, on the ground that the law providing for such an election is invalid. The election was held under the provisions of an amendatory act of the last legislature, the same being laws 1905, chapter 16, entitled "An act to amend sections 9, 12, 13, 15, 21, 33, 34, 63, 76, 97, 115, subdivisions 1, 8, 14 and 26 of section 129, all of chapter 13, article I, of the Compiled Statutes of Nebraska, 1903, entitled 'An act to incorporate cities of the first class having a population of more than forty thousand and less than one hundred thousand inhabitants; to define, regulate and prescribe their organization, duties, liabilities, powers and government, and to repeal article I of chapter 13*a* of the Compiled Statutes of 1889, and to repeal the sections so

amended, and to declare an emergency.'" Section 12 of the amendatory act provides: "The general city elections in cities governed by the provisions of this act shall be held on the first Tuesday in April in the year 1905, and on the first Tuesday in May every two years thereafter. Provided, however, that a special city election shall be held on the first Tuesday in June, 1905, for the purpose of electing seven city aldermen as provided by this act. At all general and special city elections held under the provisions of this act the polls shall be opened in each election district at such places as may be designated by the mayor, or fixed by the ordinance, and shall be kept open between the hours of eight o'clock A. M. and seven o'clock P. M. and no longer. Provided further, that all incumbents in office, including the seven councilmen, whose terms of office under operation of existing law expire in the year 1906, shall be privileged to continue in office until the general city election to be held in the year 1907."

1. It is contended by respondents, in justification of their course, that the law is invalid because it operates to extend the term of the police judge for a period of one year contrary to the constitutional provision concerning that office, which fixes the term thereof at two years. It is said that a police judge has been elected in the city of Lincoln in the even numbered years for many years past. It is the law, as settled by several adjudications, that a police judge is a constitutional officer whose term is fixed by that instrument at two years, and that it is not competent for the legislature to extend or abridge the term as thus fixed in the paramount law. It is also held that these provisions of the constitution are self-executing, and that an election to the office of police judge at a general election at the expiration of the term of the incumbent vests in the successful candidate a perfect title to the office, and that such elections shall be had at a general election as specified in the constitution, rather than at the time of holding city elections as may be provided by statute at a time different than that when the general

elections are held. *State v. Stuht,* 52 Neb. 209; *State v. Moores,* 70 Neb. 48, 57; *State v. Nolan,* 71 Neb. 136. Assuming then, without deciding the question, that the provisions of the section under consideration relating to the election of police judge is void because conflicting with the constitution, it by no means follows that the entire amendatory act must fall. In fact it at once becomes apparent that these provisions with reference to the election of a police judge are wholly foreign to the act, and their elimination in no way affects the remainder, nor interferes in the least with the legislative purpose in its passage of the law, or in its execution. The act is yet complete in all its parts, and the invalid part, if it be invalid, is quite separable from the remainder, which is in nowise dependent thereon, nor does it appear that the invalid part is such as to warrant the belief that the legislature would not have acted had it not been incorporated in the act. *State v. Stuht, supra; Trumble v. Trumble,* 37 Neb. 340; *State v. Moore,* 48 Neb. 870.

2. It is also contended that the provisions of section 12 for an election of aldermen on the first Tuesday of June, 1905, is special legislation inimical to the constitution relating to that subject, which inhibits special legislation or local laws regarding the specified subjects therein enumerated, and in all cases where a general law can be made applicable. Const., art. III, sec. 15. The argument is built on the theory that there can be but one such election, and that it applies only to one city, the city of Lincoln, and that the court will take judicial cognizance of the fact that but the one city can ever come under its provisions; that is, that at the special election provided for in June for city aldermen, Lincoln will be the only city participating in such election or that ever will participate therein, and that it therefore applies especially to Lincoln and can never apply to any other city, whatever may be their growth in the future. This may be granted, and yet the conclusion contended for does not follow. The classification of cities according to population, even though but one

city may come under the provisions of the act at the time of its adoption, is permissible under an unbroken line of decisions in this jurisdiction, beginning with *State v. Graham,* 16 Neb. 74. The general classification, then, being in harmony with the fundamental law, can it be successfully contended that the provision for the first election to be held in April or in June contravenes that instrument? The election provided for in April, 1905, would be equally special legislation as that to be held in June. In either case there can be but the one election and it can apply to but the one city. These are simply temporary provisions incorporated for the purpose of putting a law, general in its scope and effect, and admittedly constitutional in its main objects and purposes, into operation and effect. It is for the purpose of effecting a transformation from the old to the new order of things. In this respect a general law, such as contended for, cannot be made applicable. The constitution, it will be observed, recognizes that all laws and all provisions of a law cannot be made general in their operation. The authorities cited by counsel for respondent from Illinois and Minnesota (*Devine v. Board of Commissioners,* 84 Ill. 590, and *Thomas v. City of St. Cloud,* 90 Minn. 477, 97 N. W. 125), are not in point. In each case cited the law was condemned as a whole because applicable for all time to but one city or county. The language of each of the acts held invalid was such that at no future time could any municipality, even though having attained the required population, enjoy the benefits of any of its provisions. In other words, there was no classification of cities generally, but only an act, special in its nature, applying for all time to but the one city or county then in existence of the required population. *State v. Scott,* 70 Neb. 685, recently decided by this court is analogous in principle to the cases last decided. In the case at bar the act applies to all cities now or hereafter having the population therein specified. This, as we have seen, does not infringe on the constitutional inhibition against special legislation. The provisions for the first

elections under the amendatory act to be held in April and June are incidental to the main objects of the law, and do not, because they become obsolete after such elections and therefore applicable only to the city, render the act special legislation within the meaning of the term as used in the fundamental law. In many statutes, we doubt not, will be found provisions of a temporary character which, when they have served their purpose, become of no further use, and which, if consideration be had of them, standing alone and as independent legislation, would be special or local in their nature, scope and effect. Indeed, in the section as it stood before the present amendment, and in the section following, will be found provisions equally objectionable as the one under consideration, and yet we have never heard of them being questioned on the ground of being special legislation inimical to the constitution.

3. It is further argued that the amendatory act in question cannot be upheld because of matters not germane to the original section found in section 13, as amended. It is insisted that the provision therein found which says: "The mayor shall be ex officio president of said council, and shall preside at the meetings thereof, and shall appoint the standing committees of said council, and in the event of a tie vote shall cast the deciding vote. Provided, however, that the council shall have the power to elect a president *pro tempore,* who shall preside over the meeting of a council in the absence of the mayor and who shall exercise the powers of the mayor on his absence from the city" is in violation of the rule now well established in this jurisdiction to the effect that, where the title to a bill is to amend a particular section or sections, no amendatory legislation not germane to the subject matter of the original section proposed to be changed is permissible. *Armstrong v. Mayer,* 60 Neb. 423; *State v. Bowen,* 54 Neb. 211. The original section provided for the election of city officers, including the mayor and a city council, and fixed the terms of their respective offices. The subject embraced in the section, and to which it relates, was in part the formation

of the city council. The amended section making the mayor the presiding officer of that body and to that extent an ex officio member appears clearly, as it appears to us, germane to the subject of legislation embraced in the section before amended. Each relates to the composition of the body denominated the city council. It would also seem that the provision giving the mayor the deciding vote in the event of a tie is not so foreign to the subject matter embraced in the section as to render the same invaild. The mayor is not made a member of that body in the fullest sense of the word. His membership is limited to certain purposes, that is, presiding over the deliberations of the council, and casting the deciding vote in the event of an evenly divided vote by the members of the body proper. It is our duty to uphold the law, unless it is clearly and beyond reasonable doubt in conflict with the fundamental law. If a reasonable doubt exists, it must be solved in favor of the validity of the statute. Whenever a legislative act can be so construed as to avoid a conflict with the constitution and give it the force of law it will be so construed, although such construction may not be the most obvious and natural one. *State v. Poynter*, 59 Neb. 417; *State v. Smith*, 35 Neb. 13. Whether, however, the added powers which are conferred on the mayor in the section amended are germane to the subject matter of the original section we need not here determine. If not so, the statute would only yield to the extent of the repugnancy, and no further. The respondents could not avail themselves of such invalid portions of the section. Conceding them to be such, it can hardly be said that it is apparent from the act itself that these provisions, if treated as invalid, were such an inducement to the passage of the act as to avoid the whole. The legislature will be presumed to have intended to act within its constitutional limitations, and if it has exceeded its powers the provisions in excess thereof only will be declared inoperative, except it be apparent that the rejected part was an inducement to the adoption of the remainder.

It is also argued that these provisions conferring certain powers on the mayor and providing for the selection of a temporary presiding officer are amendatory of other sections of the act not referred to, or set out in the amended sections, and for that reason the section must go down, and with it the whole amendatory act. If these provisions be not germane to the original section amended, which we do not decide, then they alone would, as we have seen, be held invalid; and if they are germane, then, we are satisfied that they are not amendatory of other sections as contended for in the constitutional sense, wherein it is declared that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." *De France v. Harmer,* 66 Neb. 14.

We find nothing in the act, the validity of which is challenged, requiring us to condemn it in its entirety or to declare the law as a whole void, nor that would excuse the respondents from discharging the duty imposed upon them by law to canvass the vote cast at the election for aldermen; and a writ of mandamus is accordingly ordered issued as prayed.

WRIT ALLOWED.

STATE OF NEBRASKA, EX REL. C. B. HENSLEY, RELATOR, V. JAMES PLASTERS, CLERK, RESPONDENT.

FILED OCTOBER 19, 1905. No. 14,468.

ORIGINAL application for a writ of mandamus to compel respondent to file certificate of nomination and place name of relator on election ballot. *Writ allowed.*

E. N. Kauffman and *M. B. Davis,* for relator.

S. D. Killen, Samuel Rinaker, Norris Brown, Attorney General, W. T. Thompson and *R. S. Bibb,* for respondent.

Fawcett & Abbott, amici curiæ.

PER CURIAM.

Writ of mandamus allowed. Opinion to be filed later.

BARNES, J., *dissents.*

The following opinion was filed December 6, 1905:

1. Officers: LEGISLATIVE POWER. The legislature cannot appoint county officers, nor by an act solely for that purpose extend the terms of such officers.

2. Constitutional Law. Chapter 47 of the laws of 1905 is unconstitutional and void.

SEDGWICK, J.

The last legislature enacted what was known as the biennial election law, the purpose of which was to dispense with annual elections and to provide for the holding of a general election on each alternate year. The act in express terms provided for the filling of many offices by election in the year 1906, which elections would otherwise have been held in the year 1905. The office of register of deeds was expressly included in this provision. The statute was held to be unconstitutional in *State v. Galusha, ante,* p. 188. There were also several independent acts of the legislature making precisely the same provisions for various different offices, among them being chapter 47, laws 1905, which provides for the office of register of deeds. This chapter purports to amend section 77*a*, article I, chapter 18, Compiled Statutes, 1903. This section was originally enacted in 1887, amended in 1889, and as so amended it provided that "at the general election in the year 1889, and every four years thereafter, a register of deeds shall be elected in and for each county having a population of eighteen thousand and three (18,003) inhabitants or more, to be ascertained by the census of 1885, and each state and national census there-

after," etc. It contains at length provisions in regard to the fees of the register of deeds, varying in different counties according to the number of inhabitants of the county. The only change made by the act of 1905 in question was the insertion of 1906 instead of 1889, so that the section should read: "At the general election in the year 1906, and every four years thereafter," etc. By the act of 1887 the office was created, and it was provided that the election should be held at the general election of that year, and every two years thereafter, so that the next election of the register of deeds would take place in the year 1889, which was not changed by the act of 1889. The term, however, by the latter act was extended four years, and, by its provision that a register of deeds should be elected every four years thereafter, the election of the register of deeds would take place in 1905. If, then, this act of 1905 is valid, the effect would be to prevent the holding of an election for register of deeds in 1905, and to provide for the election of that officer in 1906, thereby extending the term of the officers now holding for the period of one year. The county clerk of Gage county refused to file the certificate of nomination of the relator as a candidate for the office of register of deeds, and refused to cause his name to be printed upon the official ballot as such candidate, to be voted for at the election of 1905, and these proceedings were brought to obtain a writ of mandamus to compel him to do so. If the act in question is valid, the county clerk was right in his refusal, as there could be no election of register of deeds in the year 1905.

1. In the argument the constitutionality of the act was attacked upon several grounds. It was insisted that the sole purpose of this legislation was to provide for biennial elections; that this act was a part of the scheme of the legislature mainly set forth in the more comprehensive act above referred to, but supplemented by several acts that manifestly had no purpose, except to assist in the general object to do away with annual elections. From

this premise it was argued that this act was unconstitutional, because the inducement for its enactment has failed with the failure of the more comprehensive act. To this it was objected that the court is never at liberty to look to one act of the legislature for the inducement to another act. If the court could know that the sole inducement to the act was to assist in carrying out the provisions of a general act of the legislature, enacted at the same time, that has been found to be unconstitutional and void, it would, of course, hold this act unconstitutional also. The argument is that the court cannot know this to be the case, but, on the other hand, must presume that the legislature had some sufficient motive in enacting a law which is complete in itself. This seems to us somewhat like a relic of the earlier days, when courts continually presumed things to exist which they knew did not exist. We do not find it necessary to pass upon this curious question, since the statute must be held invalid for another reason.

2. Another objection urged against the constitutionality of the act was that the legislature has no power to extend the terms of the present incumbents of the office of register of deeds by such legislation. The office is not mentioned in the constitution. It is a creature of the statute, and there can, of course, be no doubt that the power that created the office may abolish it, or may change it, including the lengthening of the term of the office itself. There is no doubt of the validity of the act of 1889, the sole and manifest purpose of which was to extend the length of the term from two years to four years; and, likewise, there can be no doubt that the term might be again reduced by the legislature to two years, or that the office might be abolished entirely and its duties imposed upon other officers. *County of Douglas v. Timme*, 32 Neb. 272. Again, there can be no doubt that the legislature, after it has established an office, or in the act of establishing it, may provide for filling the office either by election by the people or, in a proper case, by appoint-

ment by some designated authority. The legislature, however, cannot itself fill the office. It cannot elect or appoint the officer. Const., art. V, sec. 10; *State v. Stanley*, 66 N. Car. 59, 8 Am. Rep. 488; *State v. Holcomb*, 46 Neb. 88. And it seems to us to follow that it cannot by direct legislation for that sole purpose cause an office to be held for the term, or any period of the term, by any particular individual. The supreme court of California in *Christy v. Board of Supervisors*, 39 Cal. 3, held, as stated in the syllabus:

"But when office has been filled by an election, the legislature may extend the term of the incumbent; provided the whole term, when extended, does not exceed the time limited by the constitution."

The court said in the opinion:

"If we had any doubt on this point, we should be very reluctant to arrive at a different conclusion, in view of the serious complications which might arise, growing out of past legislation on this subject. The legislature has so often exercised, unquestioned, the power to prolong the terms of the incumbents of elective officers, that it might result in the most embarrassing perplexities, if all these acts, at this late day, were pronounced to be void. They have repeatedly extended terms of supervisors, tax collectors, assessors and all county officers. (Citing many acts of their legislature.) Nothing but an imperious sense of duty, founded on the plainest principles of constitutional construction, would justify us in holding all these acts to be void after this lapse of time."

To our minds the reason for their holding set forth in this quotation is more satisfactory than the other reasons which the court attempted to give. It does not appear from the opinion that their constitution contains an equivalent of our provision in section 13, article XVI, to the effect that elective officers must be elected "at the general election next preceding the time of the termination of their respective terms of office." We find no suggestion in their opinion as to what force or meaning

should be given to such a constitutional provision. They say:

"The people select the incumbent of the *office,* but the legislature has the power to define the duration of the term."

That is, the people by election shall designate the person who shall hold the office, and the legislature shall then provide for how long a time he shall hold. Again they say:

"It cannot be denied that he was *elected* to the *office,* and that he would not be the incumbent of it, except for his election. The people have exercised their constitutional right in selecting him for the office," etc.

Such language as this does not satisfy our idea of the meaning and force of our constitutional provision. We think the idea of our constitution is that the people shall choose a man to fit the established term, and not that the legislature shall establish a term to fit the man who has been chosen. In the argument it was stated by counsel for the respondent that the inducement to this legislation was not to assist in carrying out the general idea of the more comprehensive biennial law, but the sole object of this legislation was to extend the term of the various registers of deeds for one year; that is, by an act for that sole purpose, the legislature has declared that A, who is now occupying the office of register of deeds and whose term for which the people elected him will expire in January next, shall hold that office for another year. This is nothing else than providing by legislative enactment who shall be register of deeds in the respective counties of the state from January, 1906, to January, 1907. This, we think, the legislature cannot do. On the other hand it is plainly provided by that part of the constitution above quoted that the legislature shall provide for an election so that, before the current term of elective officers expires, the people may select the incumbent for the succeeding term. The view of the California court makes no distinction between the term of office itself and the tenure

of that office during that term by the incumbent; between the official house and the individual who occupies it. The legislature establishes the office, and the people provide the incumbent. So that attempted legislation, which has for its sole purpose to determine who shall be the incumbent of the office for another definite period of time, is infringing upon the rights of the people, and is void.

Counsel for respondent cited *People v. Loeffler,* 175 Ill. 585, and *Crook v. People,* 106 Ill. 237, but these authorities do not support their contention. In the first named case it was said:

"When an office is created by a statute, it is wholly within the control of the legislature creating it. The length of term and mode of appointment may be altered at pleasure, and the office may be abolished and the compensation taken away from the incumbent, unless forbidden by the constitution."

These propositions are not controverted. They do not involve the question of the right of the legislature to select the incumbent of an office. In 1872 the legislature of Illinois enacted a general incorporation law, and provided that cities already incorporated might, upon a vote of the people at an election held for that purpose, become incorporated under this general act. The city of Springfield was incorporated under a special act, and afterwards on the 4th day of April, 1882, held an election, at which it was voted to become incorporated under the general act. The general act of incorporation provided that "the city officers then in office shall thereupon exercise the powers conferred upon like officers in this act until their successors shall be elected and qualified." It was contended that the vote of the people repealed the special charter, and that that repeal abrogated all the offices of the city and determined the tenure of all the officers who held under the repealed act. The supreme court held in *Crook v. People,* 106 Ill. 237, that the vote of the people did abrogate the special charter of the city, but that the general incorporation act continued the officers that were

in office at the time of the vote for the purpose of calling an election to elect officers under the general incorporation act, and that this was not such an extension of the terms of those officers as to be in violation of the constitution. It does not appear that the terms of the officers were extended beyond the time for which they were elected by the people, and moreover the authority given these officers to hold over for a specific purpose was incidental and necessary to the incorporation of the city under the general law. We do not find it necessary to determine in this case whether such special and incidental holding over for a short period would be in violation of our constitution. It was contended by both parties upon the argument that the act that we are now considering was enacted for the sole purpose of extending the tenure of the office another year; one party contending that this was the ultimate purpose of the legislation; the other party contending that this purpose was only incidental to the general scheme to provide for biennial elections.

The conclusion that we have reached in this case is amply sustained in the reasoning of the court of appeals of New York in *People v. Bull,* 46 N. Y. 57, 7 Am. Rep. 302. The legislature of New York created a new judicial district in the city of New York, called the eighth judicial district, and directed the time for the election of a justice of the district court for that district. The time designated was "at the next general election which took place in the same year." It was directed that the justice should be elected the same as the justices of the district court in that city, and that he should hold his office for the term of six years from January 1, 1861. Under that law the defendant was elected to the office. Afterwards the legislature enacted that "the term of office of the justice * * * * of the district court for the eighth judicial district, in the city of New York, is hereby extended and continued to and including the 31st day of December, 1869, so that the term of office of said justice * * * shall expire when the term of office of the present justices * * *

of the other district courts expire by law." The court of appeals held that this act was unconstitutional; that it was beyond the power of the legislature to extend the term of the incumbent. The opinion, which was delivered by Mr. Justice Folger, is an exhaustive and unanswerable discussion of the point involved. In the course of the discussion the eminent jurist said:

"If the legislature can, by extending the term of such an office, continue in it the holder thereof for one year, it may for any number of years; and thus the duration of the term thereof may be perpetuated by legislative power; and the people, after one exercise of the constitutional power of choosing certain of their own officers, be ever after that deprived of it. So the legislature may as well from time to time, at the expiration of a term, whether the elective term, or the legislative extended term approaches, again and again extend it, and continue in office an incumbent distasteful to his legitimate constituency. Thus would the theory of the government be subverted, and its practice be prevented. The government is the expressed will of a majority of the people, limited by constitutional restrictions. The practice is, that such will shall be expressed, at frequently returning periods. * * * It (the constitution) at the same time gives the legislature power to declare the duration of the office. But doing that, it means no more than that, be the time what it may, and altered in duration when it may, the incumbent shall be the creature of the people. And thus it guards against a majority of the legislature, adverse in sentiment to a majority of the people of a locality, placing or continuing over them in official power, one whom they would not select. * * * It will not be claimed, that the legislature could have passed an act, appointing to the office for a term of three years, after the expiration of the defendant's elective term of six years, any person whom it might in the act name. Nor will it be claimed, that it could have passed an act, appointing the defendant to the office by his proper name for

that term of three years. That all will concede to be a violation of the constitution. But is not the violation the same, to continue him in the office by his official name for that time by legislative act? The authority under which he must act for the term is the same in both cases. He would find it not in the voice of the people, but only in the act of the legislature."

The whole opinion is worthy of careful study, and sets forth sufficient reasons for the conclusion which we have reached in this case. It is true the language of their constitution was that all such judicial officers as may be created therein (in cities and villages) by law shall be elected at such time and in such manner as the legislature may direct. This provision does not affect the argument as applied to the case at bar. The reasoning of the New York court, which we approve, is to the effect that continuing an officer in office beyond his term is equivalent to an appointment for the time he is so continued in office. The legislature cannot appoint registers of deeds, and therefore it cannot by an act for that sole purpose continue such officer in office for a definite period beyond the expiration of the term for which he was elected. It is not necessary to discuss the effect of section 13, article XVI of our constitution above referred to.

Again, it was said by the same court in 1896:

"Where the office is to be filled by one authority and the duration of the term is to be determined by another, the declaration of such duration must go before the filling, so that each authority may have its legitimate exercise." *People v. Foley*, 148 N. Y. 677, 43 N. E. 171. It was held in that case that: "The legislature cannot extend the term of a town officer after his election, since that would virtually be an appointment to the office during the period of extension." There were other matters presented upon the argument, but their discussion would be of no permanent value, and we think the foregoing are sufficient reasons for our conclusion in allowing the peremptory writ.

WRIT ALLOWED.

BARNES, J., dissenting.

I am unable to concur in the opinion of my associates. I think no one will dispute the correctness of the statement that "the legislature cannot appoint county officers, nor by an act solely for that purpose extend the terms of such officers." But whether that rule applies to the facts of this case is quite another question. It appears that in the year 1887 the legislature passed an act creating the office of register of deeds, and fixing the term thereof at two years; that at the legislative session of 1889 that act was amended, and the term of office was fixed at four years by the provision that the register of deeds shall be elected "at the general election in the year 1889, and every four years thereafter." The validity of these acts has never been questioned, and the majority opinion concedes that they were a proper exercise of legislative power, because the office in question is not a constitutional one, but is purely a creature of the legislature. And it is fairly stated by the majority that in such cases that body may fix the term of office, the compensation of the incumbent, the time of his election, and may change the duration of the term, or abolish the office altogether, if it be deemed expedient to do so. The legislature at its session of 1905 again amended the act, and changed the time of the election to fill the office, which would have occurred in the present year, to the general election of 1906, by an act which reads in part as follows: "At the general election in the year 1906, and every four years thereafter, a register of deeds shall be elected in and for each county having a population of * * * 18,003 inhabitants or more." Nothing appears in the title to the act, or in its provisions, which would render it invalid or unconstitutional, and on its face it seems to be a valid exercise of legislative power.

At the hearing it was contended by the relator that the act was a part of a legislative plan to provide for biennial instead of annual elections, and, the main act having

failed, the act under fire must also fail. It was found necessary, however, to abandon that proposition, for the rule, that constitutional and unobjectionable provisions in a legislative act may be declared invalid only applies where it is manifest that the unconstitutional features of the act constituted the main inducement for its passage, is so well established that its soundness cannot be questioned. The question of illegal or unconstitutional inducements does not seem to have been extended to separate or independent acts, constitutional in and of themselves.

Counsel for the relator also asserted that the sole purpose of the legislature in passing the act was to fill the office for the year commencing on the first Thursday after the first Tuesday of January, 1906, and ending at a corresponding time in the year 1907, by extending the term of the incumbents, and thus usurp the powers of the qualified voters of the state and deprive them of their constitutional right to elect such officers. As I understood the discussion, the above statement of counsel for the relator was strenuously denied by the attorney general and other able counsel who appeared with him on behalf of the people in support of the validity of the act. It is but fair, however, to say that the attorney who appeared as private counsel for the respondents, for the purpose of argument only, admitted the assertion, and contended that, even if that fact existed, it would not render the act invalid. In support of his contention he cited *Christy v. Board of Supervisors,* 39 Cal. 3, which is disapproved by the majority opinion. This, no doubt, is what led to the statement contained in that opinion that "it was contended by both parties upon the argument that the act we are now considering was enacted for the sole purpose of extending the tenure of the office another year," and to the conclusion announced by my associates. As I recollect it, the law department of the state made no such contention or admission; and I am of opinion that private counsel for the respondent had no right or power to bind either the people or the members of the legislature by a

statement of that kind, and thus invalidate a legislative act which, but for such admission, must have been held to be a valid exercise of legislative power.

The conclusion that a majority of the members of the legislature were influenced by 13 incumbents of the office of register of deeds to pass a law for the sole purpose of keeping them in office for a year is so absurd that I am unable to give it serious consideration The majority, however, base their opinion on that conclusion, and support it by the case of *People v. Bull,* 46 N. Y. 57, 7 Am. Rep. 302, where the dangers of legislative usurpation are discussed at length and with great ability. I am inclined to believe that the rule there announced has no application to the instant case, for several reasons: First. The office there in question was a constitutional one, and the decision could have been properly justified on the grounds stated in *State v. Galusha, ante,* p. 188. Second. The constitution of New York, under which that decision was rendered, differs from the constitution of Nebraska in an important and decisive particular. Our constitution says that the legislature shall provide for the election of such county and township officers as may be necessary, and contains no further restriction. The whole matter, except that the officers are to be elected and not appointed, is left to the discretion of the legislature. The term may be dealt with as the legislature pleases. The New York constitution required that the legislature should provide not only for the election, but also for the time and manner of election, of such officers. The Nebraska constitution goes no further than to require that the officers be elective, while the New York constitution required the legislature also to fix the term. The constitution of California is very like that of this state; hence it was held in *Christy v. Board of Supervisors, supra,* that an act of the legislature extending the term of a legislative office was constitutional. Third. The legislature of the state of New York is to some extent a continuing body. Senators are elected in that state for a term of four years, under an

arrangement by which one-fourth of their number goes out of office each year. So it would only be necessary, in order to secure permanency of objectionable legislation, to elect a few of the members of the assembly pledged to that purpose, and it would be accomplished. In our state, however, the members of the legislature are all elected biennially, and may be held to immediate and strict accountability to their constituents. So usurpation of unlawful power by our legislature can never occur.

Speaking for myself, I see no danger of legislative usurpation, for it does not appear to me that, by the passage of the act in controversy, any such usurpation was either contemplated, attempted, or accomplished. In determining the question involved in this case, we should be mindful of the rule that a legislative intent to violate the constitution is never to be assumed, if the language of the statute can be satisfied by a contrary construction. *New York & O. M. R. Co. v. Van Horn,* 57 N. Y. 473; *French v. Teschemaker,* 24 Cal. 518; *Attorney General v. City of Eau Claire,* 37 Wis. 400; *Brown v. Buzan,* 24 Ind. 194; Endlich, Interpretation of Statutes, sec. 178; *People v. McElroy,* 72 Mich. 446, 2 L. R. A. 609.

In *City of New Orleans v. Robira,* 42 La. Ann. 1,098, 11 L. R. A. 141, it was said: "The acts of the legislature are to be treated with great respect, as they emanate from a coordinate and powerful branch of the government. They must be presumed to be constitutional, unless they can be shown manifestly to have transgressed or violated the organic law."

Judge Cooley in his work on Constitutional Limitations (7th ed., ch. 7, par. IV), page 236, says: "The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions

upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them."

So, in safeguarding the rights of the people against legislative usurpation, we should have a care lest we trespass upon the domain of a coordinate and independent department of state government. Again, all acts and parts of acts bearing on a particular subject should be construed together, harmonized, if possible, and given such a construction, if it can be done, as to render all of them constitutional. The foregoing rules have had our approval in one form or another in *Bradshaw v. City of Omaha,* 1 Neb. 16; *In re Creighton,* 12 Neb. 280; *Hallenbeck v. Hahn,* 2 Neb. 377; *State v. Smith,* 35 Neb. 13; *State v. Poynter,* 59 Neb. 417; *State v. Stewart,* 52 Neb. 243; *Muldoon v. Levi,* 25 Neb. 457; *State v. Farmers & Merchants Irrigation Co.,* 59 Neb. 1; *State v. Stuht,* 52 Neb. 209.

Notwithstanding these rules, it is announced by the majority that the act in question violates the provisions of section 13, article XVI of the constitution, because by its terms the legislature has appointed persons to fill the office of register of deeds for the ensuing year, and deprived the people of their right to elect such officers. In this conclusion I cannot concur. An examination of the register of deeds acts discloses that the legislature has never, in direct language, fixed the term of that office. That matter, however, is incidentally included in the words, "in the year 1889, and every four years thereafter."

No section of the constitution prohibits the legislature from extending the term of office, where the office is created by legislative act. Now, if the section above mentioned is construed in such a way as to prevent the extension of the term of a legislative office, on the ground

that the extension of such term is filling the office by legislative appointment, then sections 101, 103, 104 and 107 of chapter 26, Compiled Statutes, 1903, are unconstitutional, because they define how vacancies in office may be created, provide for filling such vacancies, and declare that "every officer elected or appointed for a fixed term shall hold office until his successor is elected, or appointed and qualified, unless the statute under which he is elected or appointed expressly declares the contrary." If we may be permitted to look beyond the terms of the act in question and ascertain the purpose of the legislature in passing it, then the several acts passed by that body at its last session relating to the subject of elections conclusively show that the purpose was to provide for biennial elections, which was surely a commendable one, and the act in question is at least one step toward its consummation. I think it stands to reason that the legislature, fearing the main act might not be sufficient to change the election of registers of deeds from the odd to the even numbered years, adopted the act which is the subject of this controversy. Now it must be conceded that this act, in connection with section 104 of the chapter above mentioned, operates incidentally to extend the term of the incumbents until their successors shall be elected at the general election of 1906, and thereafter qualified, as provided by law. That this does not render the act invalid seems to be settled by the great weight of authority in this country. The time of holding over of these officers is as much a part of their term of office as that which preceded it. *State v. Moores*, 61 Neb. 9; *Pruitt v. Squires*, 64 Kan. 855, 68 Pac. 643; *State v. Menaugh*, 151 Ind. 260, 43 L. R. A. 408; *State v. Tallman*, 24 Wash. 426, 64 Pac. 759; *Commonwealth v. Hanley*, 9 Pa. St. 513; *Gosman v. State*, 106 Ind. 203, 6 N. E. 349; *State v. Howe*, 25 Ohio St. 588; *State v. Lusk*, 18 Mo. 333; *People v. Lord*, 9 Mich. 226. It was said in *State v. Tallman*, *supra:*

"When, therefore, the legislature used the words, 'whose

term of office shall begin on the second Monday in January next succeeding his election and continue for two years and until his successor is elected and qualified,' it was not meant thereby that his term of office should be two years and no more. The phrase, 'and until his successor is elected and qualified,' means something. It was not used idly. If so, the term was not fixed at two years and no more, but was two years and more; the further time depending upon the contingency not only of an election, but also of the qualification of the person elected, which might be one day, one month, or any number of months."

The effect of the sections of chapter 26, above mentioned, is to provide that, if the election of any officer fail, by reason of the ineligibility of the person elected, by failure to hold an election, the postponement of such election by legislative act, or a failure to elect for any other reason, there shall be no vacancy in the office, and the incumbent shall hold over until the next general election at which his successor can be chosen. Those sections were enacted to provide for contingencies like the one which arises in this case; and it seems to me that it cannot be said that the legislature, by passing an act which incidentally creates such a contingency, has appointed any particular person or persons to fill the office. The office is already filled by the voters. They have filled it by electing the person of their choice, and by operation of law such person continues to hold the office until he can be legally reelected, or another chosen to take his place. This view not only accords with the authorities last above cited, but with many other decisions of the courts of last resort of nearly all of our sister states.

It seems to me that the effect of the majority opinion is to restrict the power of the legislature to deal with offices of its own creation; to overthrow or, to say the least, disregard the provisions of section 104, chapter 26, Compiled Statutes, 1903, to violate the usual canons of constitutional and statutory construction, and substitute the opin-

ion of the court for that of the legislature as to matters of legislative policy. I therefore respectfully dissent from the conclusion of my associates. I am of opinion that the act in question is constitutional, and that the writ should have been denied.

STATE OF NEBRASKA, EX REL. LAWRENCE M. WELSH, RELATOR, V. ARTHUR V. OFFILL, COUNTY CLERK, RESPONDENT.

FILED OCTOBER 19, 1905. No. 14,477.

ORIGINAL application for a writ of mandamus to compel respondent to file certificate of nomination and place name of relator on election ballot. *Writ allowed.*

H. M. Sinclair, for relator.

Norris Brown, Attorney General, W. T. Thompson and *Edwin E. Squires,* for respondent.

Fawcett & Abbott, amici curiæ.

PER CURIAM.

Writ of mandamus allowed. Opinion to be filed later.

BARNES, J., dissents.

The following opinion was filed December 6, 1905:

SEDGWICK, J.

This is an original application for a writ of mandamus against the county clerk of Buffalo county, and the questions presented upon the record are in all respects identical with those presented in *State v. Plasters, ante,* p. 652.

For the reasons given in that case, a peremptory writ of mandamus was allowed.

BARNES, J., dissenting.

I dissent for the reasons stated in my opinion in *State v. Plasters, ante,* p. 652.

STATE OF NEBRASKA, EX REL. PORTER DONNELL, RELATOR, V. ARTHUR V. OFFILL, COUNTY CLERK, RESPONDENT.

FILED OCTOBER 19, 1905. No. 14,478.

ORIGINAL application for a writ of mandamus to compel respondent to file certificate of nomination and place name of relator on election ballot. *Writ allowed.*

H. M. Sinclair, for relator.

Norris Brown, Attorney General, W. T. Thompson and *Edwin E. Squires,* for respondent.

Fawcett & Abbott, amici curiæ.

PER CURIAM.

Writ of mandamus allowed. Opinion to be filed later.

BARNES, J., dissents.

The following opinion was filed December 6, 1905:

SEDGWICK, J.

This is an original application for a mandamus against the county clerk of Buffalo county to compel him to receive and file the nomination of relator to the office of supervisor for the sixth district of said county. The county clerk refused to receive and file the certificate upon the sole ground that there could be no election of supervisor at the ensuing election, because section 1, chapter 54, laws of 1905, provides: "The supervisors selected and ap-

pointed as provided in this act shall hold their respective offices until the next general election occurring upon the even year following their selections or appointment, and until their successors have been duly elected and qualified." This act of the legislature would extend the terms of the county supervisors of the state for another year, and was held to be in conflict with the constitution for the reasons given in *State v. Plasters, ante,* p. 652.

Other objections were made to the constitutionality of the act, but it is not thought that their discussion here would be of permanent value.

The peremptory writ was allowed as prayed.

BARNES, J., dissenting.

I dissent for the reasons given in *State v. Plasters, ante,* p. 652.

ALBERT BLACKER V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1905. No. 14,148.

1. **Criminal Law:** EVIDENCE. One cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof *aliunde* of the essential facts constituting the crime. *Sullivan v. State,* 58 Neb. 796.
2. **Evidence** examined, and found insufficient to support the verdict of guilty and the sentence pronounced thereon.

ERROR to the district court for Keya Paha county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

W. S. Hedrick and *W. C. Brown,* for plaintiff in error.

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

HOLCOMB, C. J.

The defendant (plaintiff in error) was charged and convicted of the crime of uttering a false, fraudulent and forged instrument. The forged instrument alleged to have been uttered by the accused was a warranty deed, purporting to convey title to certain lands situated in Keya Paha county. The verdict of guilty rests almost entirely, if not exclusively, on an alleged written confession of the accused while under arrest and waiting trial for the crime charged. The writing was sworn to by the accused, and was a narration of purported facts as to how the accused and others perpetrated the forgery of the deed, the uttering of which was charged in the information. The court instructed the jury: If you believe from the evidence beyond a reasonable doubt that the crime of uttering a forged deed was committed as charged, "and you further believe from the evidence beyond a reasonable doubt that the defendant made the confession given in evidence in this case, you should treat and consider such confession precisely as you would any other evidence or testimony; and if the jury believe said confession to be true, then you should act on it accordingly. The confession offered in evidence is competent evidence for you to consider in determining the guilt or innocence of the defendant in this case." No other instruction regarding the alleged confession was given, nor were any requested by counsel for the accused. That the accused signed and made oath to the written confession is established beyond peradventure of doubt, and there is nothing in the record to discredit its truthfulness. There was, however, a very serious controversy concerning the manner in which the confession was procured, and whether it was freely and voluntarily made, and there was introduced more or less testimony of a conflicting character on that point. It was the theory of the defense, to support which there is competent evidence in the record, that the affidavit termed a confession was procured to be made for the purpose of securing the extradi-

tion of an alleged accomplice in the forgery of the deed, with the view of having the prosecuting witness compensated for the financial loss he had sustained because of the void deed which he had obtained from the accused, and the dismissal of the prosecution. There is evidence tending to prove that it was represented to the accused that, by making the affidavit, requisition papers could be procured for the alleged accomplice, and he would, before being brought to this state to answer to the crime charged, make good the financial loss sustained by the prosecuting witness, and that, thereupon, the prosecution of the crime charged would be terminated, and the accused thus regain his liberty. Whether the question of the confession being the free and voluntary act of the accused, which was a mooted one, should not have been submitted to the jury, under suitable instructions, as a question of fact, we need not here determine, since it is not raised by the record. What has been said regarding this phase of the case is for the purpose of more clearly presenting the error relied on for a reversal of the judgment of conviction.

It is earnestly contended in briefs of counsel for defendant that there is no evidence of the *corpus delicti* aside from the alleged confession, and that the confession alone is insufficient to support the verdict of guilty found by the jury. It seems to be a well settled rule in almost if not all the states of the Union that an extrajudicial confession will not be received as conclusive plenary evidence, and that there must be also proof of the *corpus delicti*. 1 Elliott, Evidence, sec. 292, and other authorities cited. This court has recently said that "one cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. Such confession may be sufficient to prove the defendant's connection with the criminal act, but there must in all cases be proof *aliunde* of the essential facts constituting the crime." It is also said that, "while a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is competent evidence of that fact, and may,

with slight corroborative circumstances, be sufficient to warrant a conviction." *Sullivan v. State,* 58 Neb. 796. See also *Davis v. State,* 51 Neb. 301; *Priest v. State,* 10 Neb. 393; and *Dodge v. People,* 4 Neb. 220.

It is modestly contended by the state that there is found in the record, in addition to the confession, slight corroborating circumstances of the commission of the crime charged, and sufficient to bring the case within the rule announced in *Sullivan v. State, supra,* and to support the judgment of conviction. A careful perusal of the evidence contained in the bill of exceptions has failed to satisfy us that there is any competent evidence of the essential elements of the crime charged, aside from the written confession. It is true there is some evidence to prove that the deed was inadequate to convey title to the grantee, the prosecuting witness, but this does not prove nor tend to prove that the instrument delivered to him by the defendant was a forgery. We fail to find anything in the testimony given by the prosecuting witness to prove his title failed because the deed of conveyance, which the accused was charged with uttering, was a forgery. He says he lost the land because of a forged title. The record in a civil action, in which the question of title, and the force and effect of the deed alleged to have been forged, and regarding which the accused was charged with uttering, were involved, was introduced without objection as evidence in the case, but subsequent to its introduction, on the objection and motion of counsel for the accused, this item of the evidence was all stricken out for all purposes, except as evidence that the prosecuting witness had been devested of his title to the land. This, of course, left nothing in the way of evidence, from which it might be inferred that the deed was a forged instrument, or that the loss of title was the result of a forged deed, with the uttering of which the defendant was charged in the information on which he was being prosecuted. We can find nowhere evidence independent of the written confession from which the deduction is at all warrantable that the deed he was

charged with feloniously uttering was in fact a forged instrument. There is on this point an utter failure of proof, the confession alone excepted, hence we are driven to the conclusion that the evidence is insufficient to sustain a conviction, and that the judgment complained of must be reversed and the cause remanded for a new trial, which is accordingly ordered.

REVERSED.

STATE OF NEBRASKA, EX REL. W. W. SLABAUGH, COUNTY ATTORNEY, RELATOR, V. DUNCAN M. VINSONHALER, COUNTY JUDGE, RESPONDENT.

FILED OCTOBER 19, 1905. No. 14,446.

1. **Taxation:** INHERITANCES. The tax provided for in the inheritance tax law, so called (laws 1901, ch. 54, as amended, laws 1905, ch. 117), is not a property tax, but upon the right of succession to property by inheritance or will.
2. ———: LEGISLATIVE POWER. The enumeration of subjects of taxation in section 1, article IX of the constitution, is not exclusive. The legislature has power to provide for taxation upon inheritances.
3. **Inheritance Tax Law:** CONSTRUCTION. The act does not require the tax to be levied upon the property constituting the whole estate of the decedent, but upon the share that each heir or devisee takes therein.

ORIGINAL application for a writ of mandamus to compel respondent to appoint appraiser under inheritance tax law. *Writ allowed.*

W. W. Slabaugh and *Charles E. Foster,* for relator.

George E. Pritchett, for respondent.

Crofoot & Scott, amici curiæ.

SEDGWICK, J.

The respondent as county judge of Douglas county refused to appoint an appraiser in the matter of the estate of

Frank Murphy, deceased, pursuant to the inheritance tax law. Comp. St. 1905, ch. 77, art. VIII, sec. 11; Ann. St. 10716. This is an application for a writ of mandamus to compel the appointment of such appraiser. The defense is that the law is unconstitutional.

1. The first question presented is whether the tax provided for in this legislation is a tax on property. Section 1, article IX of the constitution, requires that taxes on property must be levied by valuation, and the tax exacted from each person and corporation must be in proportion to the valuation of the property taxed. The act in question provides for a varying rate of taxation, depending upon the degree of relationship of the heir or devisee, and upon the amount received from the estate by him. If therefore the tax in question is to be regarded as a tax upon property, the legislation cannot be upheld. It appears to be almost uniformly held that, if the tax is laid upon the amount received from the estate by the heir or devisee, it is a tax upon the right of succession to property, that is, upon the right to receive the property from the estate of the decedent, and not upon the estate itself. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594.

2. Indeed, this appears to be conceded by the respondent, and the principal argument is upon the following question involved in the construction of section 1, article IX of the constitution. That section 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, innkeepers, 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." It is

said in the brief of the respondent: "The right of succession to property by will or inheritance is not among the subjects of taxation named in the constitution, and, therefore, the legislature had not the authority to provide for taxing it. The legislature is restricted by this section of the constitution in its power of taxation, and to the objects and things therein named." The federal constitution is a grant of power to the federal government, but the state constitutions are restrictions upon the general power of legislatures. *State v. Nelson,* 34 Neb. 162; *Hanscom v. City of Omaha,* 11 Neb. 37; *Magneau v. City of Fremont,* 30 Neb. 843. It is insisted that the section of the constitution under consideration must be construed to limit the taxing power of the legislature to the subjects named therein. It is urged with great force, and it must be admitted with some reason, that the language of the section itself requires such construction. The command of the constitution is that the legislature shall provide needful revenue, and this command is followed immediately by a provision as to how such revenue shall be provided, to wit: "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." Then follows an enumeration of subjects of taxation upon which the legislature may lay taxes "in such manner as it shall direct by general law." These exceptions are introduced by the words "and it shall have power." These words, it is urged, show the manifest intention of the constitution to deny the power to the legislature of taxing any other subjects than those named in the constitution. The legislature must provide needful revenue. It must do this by valuation, except that it shall have power to tax some specified subjects by another method. To this reasoning it is answered that the legislature must necessarily determine the meaning of doubtful provisions of the constitution defining or limiting its power. That, when a provision of the constitution is susceptible of a construction that will justify the

legislation attacked, the legislature will be presumed to have adopted that construction, and its action will be upheld. It is also answered that the matter has been determined by prior decisions of this court. In *State v. Lancaster County*, 4 Neb. 537, it is said in the third paragraph of the syllabus:

"The maxim, *expressio unius est exclusio alterius*, does not apply in the construction of constitutional provisions regulating the taxing power of the legislature." And in the opinion section 1 of article IX is quoted, and it is said: "It is therefore contended on the part of the relator that by this section the taxing power of the legislature is limited to the objects and classes of business enumerated, and that as the tax required to be paid on the commencement of suits, is not included in any one of the classes thus enumerated, the act imposing such tax is inconsistent with the constitution and void. * * * The theory of construction, advanced on the part of the relator, assumes that this power is limited by implication, upon the principle, *expressio unius est exclusio alterius;* but does this rule apply to the taxing power of the legislature? I think not. And as no positive restriction is imposed on the exercise of this power in respect to other matters, not included in the objects and classes enumerated, I think the rule is that the framers of the constitution relied for protection in this regard upon the wisdom and justice of the representative body and the accountability of its members to the people, rather than the restraining power of the courts of law."

Upon the argument the writer of this opinion was impressed with the view that the point so discussed and so plainly determined in *State v. Lancaster County, supra,* was not in fact necessary to a determination of that case. It seemed that the requiring of a commencement fee to be paid in actions brought in this court was not in the nature of providing public revenues, but rather an attempt to require litigants to pay at least a portion of the expense that they caused the state in particular litigation, and that

therefore it might be supposed that the restrictions of the constitution regulating the manner of providing needful revenues would not apply. If the case were unsupported by subsequent decisions there might still be reason to doubt its controlling power here. In *State v. Ream,* 16 Neb. 681, it was said:

"In *State v. Lancaster County,* 4 Neb. 537, this court held that the enumeration in the constitution of certain subjects for taxation did not preclude the legislature from imposing other taxes where there was no prohibition," thus recognizing the authority of that case upon this proposition. And in *Magneau v. City of Fremont,* 30 Neb, 843, it is said:

"It has been the uniform holding of this court that the constitution is not a grant, but a restriction of legislative power, and that the legislature may legislate upon any subject not inhibited by the constitution."

And in support of this proposition *State v. Lancaster County, supra,* and *State v. Ream, supra,* are both cited, with numerous other decisions of this court. Again, in *State v. Lansing,* 46 Neb. 514, it is said: "Therefore, in such cases as the present, the maxim *'expressio unius est exclusio alterius'* is not applicable, and the legislature may adopt any provision not prohibited by the constitution," citing also *State v. Lancaster County,* and *State v. Ream, supra.*

Also, Mr. Commissioner RYAN in his dissenting opinion in *State v. Moores,* 55 Neb. 480, 523, quoted the foregoing language from the opinion in *Magneau v. City of Fremont, supra,* and cited the same decisions of this court in support thereof. This construction of the section of the constitution in question is not entirely without reason to support it. The legislature has evidently construed this section as it was construed in the cases above referred to. It is a general rule that, if a phrase or section of the constitution will admit of different constructions, that construction given it by the legislature must so far prevail as to uphold the legislation if possible, and, without investi-

gating the matter as an original question, in view of the construction given to this section by the legislature, we feel constrained to follow *State v. Lancaster County, supra,* which has so long been recognized as authority by this court. Upon this view this legislation is not prohibited by the constitution.

3. It was urged upon the argument that the part of the section of the statute under consideration beginning with the words, "in all other cases," in some instances requires the tax to be levied upon the whole estate of the decedent, and so is a tax upon property, and, not being uniform, is therefore unconstitutional. For the purposes of this taxation, estates seem to be classified according to their value, but it does not follow that the tax is placed upon the property constituting the gross estate of the decedent. The tax is placed upon the estate received by each heir, or devisee, and its rate is uniform as to each class. It is held in *Magneau v. City of Fremont, supra,* that this classification is reasonable and within the province of the legislature. If some clause or clauses of this part of the section are void for uncertainty (which we of course do not decide), this would not invalidate the entire act. We conclude that the legislation is valid, and the county court should have appointed an appraiser as requested.

The relator is entitled to a peremptory writ as prayed.

WRIT ALLOWED.

JOHN ALPERSON, APPELLEE, V. MICHAEL WHALEN, APPELLANT.

FILED OCTOBER 19, 1905. No. 14,452.

Statutes: TITLE. Section 11, article III of the constitution, requires the subject of an act of the legislature to be clearly expressed in the title of the act, but this is sufficiently complied with if the subject and purpose of the proposed legislation is manifest from the language of the title. A literal recital in detail of the subject of legislation is not indispensable.

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

Norris Brown, Attorney General, and *W. T. Thompson,* for appellant.

Woolworth & McHugh, contra.

SEDGWICK, J.

The plaintiff Alperson, being held in custody for the violation of the so-called anti-cigarette law enacted by the last legislature, applied to the district court for Douglas county for a writ of habeas corpus, and upon hearing was discharged from custody. He was charged with unlawfully giving away cigarettes and cigarette paper, and insisted that that part of the act which made giving away of cigarettes and cigarette paper unlawful was unconstitutional, because it was a subject not sufficiently expressed in the title of the act. The provision of the constitution which this part of the statute was supposed to have violated is section 11 of article III: "No bill shall contain more than one subject and the same shall be clearly expressed in its title." It is insisted by the plaintiff that the subject of the legislation in this section is not clearly expressed in the title of the act; that the words "give away or willingly allow to be taken" are not found in the title, and therefore cannot properly be included in the act itself. In the copy of the opinion of the learned trial judge, which we find in the brief, it is said that the object of the constitutional limitation is "to prevent the legislature from passing a law under the guise of one name, which might affect some other interests or rights," and it is contended by counsel that the right to give away cigarettes and cigarette paper cannot be abridged in a law, the title to which does not specify an intention to prohibit a gift; that, as the title mentions only manufacture and sale," the legislation must be limited to the

technical and well-defined meaning of these words, and that gift would constitute a different subject and cannot be held to be included in this title. It was said by the supreme court of Maryland in *Parkinson v. State,* 14 Md. 184, 195: "To find out what the law was intended to prevent, we are at liberty to resort to the body of the law." That is, the first thing to ascertain is the subject of the bill, and then ascertain whether that subject is clearly expressed in the title.

What, then, is the subject of this legislation? The first section of the act provides: "That it shall be unlawful on and after the date this act shall go into effect to manufacture, sell, give away or willingly allow to be taken any cigarettes or the material for their composition known as cigarette paper within the state of Nebraska." Laws 1905, ch. 198. The legislature undoubtedly supposed that the use of cigarettes was injurious to the public in general, through its effects upon the health and morals of the people. Unless there is reason for such supposition the legislation would be unconstitutional as beyond the power of the legislature. That the use of these injurious articles might be discouraged, and the injurious effects thereof upon the public removed as far as possible, it was made unlawful to manufacture, sell, or give away the article itself, and a particular material that is used only in the manufacture of that article. The intention is to remove these articles from the avenues of commerce; to banish them from the state as guilty and illegitimate things that ought not to be offered to, or easy of access by, vicious or thoughtless people who are, or may be, injured thereby. This is the manifest subject of legislation as disclosed in the first section of the act above quoted.

Is this purpose of the legislature sufficiently disclosed in the title of the act? The title is: "A bill for an act to prohibit the manufacture and sale of cigarettes and what is known as cigarette paper and to provide a penalty for its violation and to repeal sections 2363, 2364, 2365 and 2366 of Cobbey's Annotated Statutes of Nebraska."

The nature and use of these articles is well understood. If the legislature was justifiable in assuming that the character of these articles is such as to justify the prohibition of their manufacture and sale, the court will also take notice of the nature and use of the prohibited articles. With this in mind, can it be said that the subject of this legislation as derived from the act itself is so disguised in the title that the legislators would not be sufficiently notified by the language used in the title that it was intended to discourage the use of the articles referred to, and to that end, to prevent all traffic therein? We think that it is manifest from the title to this act, and therefore sufficiently expressed therein, that it was the purpose of the proposed legislation to protect the people of the state against results arising from furnishing these articles to the public. In *Affholder v. State,* 51 Neb. 91, it was said:

"Section 11, article III of the constitution, should be so liberally construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title, and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title."

The title of the act in question in that case was "An act to provide cheaper text-books, and for district ownership of the same." The provision of the act itself, which it was claimed was unconstitutional as not sufficiently expressed in the title, was as follows: "The provisions of this act shall include all school supplies."

It was contended that school supplies were not included in text-books, and it must be confessed that a stronger case was made against the act there attacked than against the act under consideration here. It was also said in the opinion:

"We do not think the term 'text-books' should be given a technical meaning, but that it is comprehensive enough to and does include globes, maps, charts, pens, ink, paper,

etc., and all other apparatus and appliances which are proper to be used in the schools in instructing the youth."

If the barter and gift of cigarettes and cigarette paper are not prohibited by the act, it is manifest that the purpose and intent of the legislature is thwarted, and we think that purpose and intent is plainly to be derived from the title of the act itself.

The judgment of the district court is reversed, and the prisoner John Alperson is remanded to the custody of the officer.

REVERSED.

WILLIAM H. MILES V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1905. No. 14,157.

1. **Injunction:** CONTEMPT. A party is not punishable for contempt of court for disregarding a void order of injunction; but, when an injunction is legally granted in a case where the court has jurisdiction of the subject matter and of the parties, it must be respected until it is set aside by the court allowing it, or is reversed in the appellate court by some appropriate mode of direct review.

2. ———: ———. When one knowingly disobeys an injunction which is not void, he is liable to punishment for contempt, though he would have been entitled to a vacation of the order upon a motion to dissolve or upon a trial of the merits of the bill.

3. **Bill of Exceptions.** Unless a bill of exceptions is authenticated in the manner required by law, the supreme court cannot receive and consider it.

4. **Injunction:** CONTEMPT: REVIEW. Where the evidence introduced on the trial of one charged with a constructive contempt of court for the violation of an order of injunction is not preserved and authenticated by a proper bill of exceptions, the only question which can be considered by the reviewing court is whether the pleadings contained in the transcript support the judgment, and, if they are found sufficient, the judgment will be affirmed.

ERROR to the district court for Frontier county: ROBERT C. ORR, JUDGE. *Affirmed.*

E. B. Perry, for plaintiff in error.

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

BARNES, J.

This is a proceeding in error instituted by one William H. Miles to reverse a judgment of the district court for Frontier county by which he was adjudged to be in contempt of that court for the violation of an order of injunction. So far as we can ascertain from the complaint, the facts underlying this controversy are, in substance, as follows: One David C. Ballentine claimed to be the owner and was in possession of a certain tract of land situated in Frontier county adjoining the plaintiff's premises. On the 6th day of December, 1903, Ballentine commenced an action in the district court for Frontier county against the plaintiff, and in that suit obtained a temporary order of injunction, restraining the plaintiff from committing repeated trespasses upon his premises, or, in other words, enjoining a continuing trespass, which it was alleged consisted of driving over the lands of the said Ballentine, cutting down and destroying his fences, and driving cattle and hogs upon the land in controversy therein. While the temporary order of injunction was in force, a complaint in the form of an affidavit was filed, charging the plaintiff with a violation thereof. He was thereupon required to show cause why he should not be adjudged in contempt of court. Issues were made up, and a trial was duly had, which resulted in the judgment complained of. The plaintiff contends that the judgment of the trial court should be reversed because the temporary order of injunction was void. It is true that a void order of injunction will not sustain a judgment for contempt. *Calvert v. State,* 34 Neb. 616; *State v. Graves,* 66 Neb. 17.

It is claimed by counsel that the injunction was void because it transferred the title and the right of possession

of the premises in dispute to Ballentine summarily and without a trial. This contention is beside the mark. The record discloses that the injunction was only a temporary one, by which it was sought to hold matters *in statu quo* pending the litigation between the parties to the suit in which it was allowed. *Calvert v. State, supra,* is the case relied on by counsel for a reversal of the judgment complained of, but it does not sustain his contention. In that case the court said:

"A preliminary injunction is merely to preserve matters *in statu quo* until a hearing. * * * In any case where the court or judge has jurisdiction and grants an injunction during the pendency of a suit, the injunction while in force must be obeyed."

The injunction which was the basis of the proceeding for contempt was, as above stated, merely a temporary order restraining a continuing trespass during the pendency of the action in which it was allowed. That the district court had power to make and enforce such an order cannot be successfully questioned. *Shaffer v. Stull,* 32 Neb. 94; *Peterson v. Hopewell,* 55 Neb. 670; *Pohlman v. Evangelical Lutheran Trinity Church,* 60 Neb. 364; *Sills v. Goodyear,* 80 Mo. App. 128. It was the duty of the plaintiff while the order was in force to obey it. One violating such an order does so at his peril. In *Wilber v. Wooley,* 44 Neb. 739, it was held:

"A party is not punishable for contempt of court for disregarding a void order of injunction; but when an injunction is legally granted in a case where the court has jurisdiction of the subject-mattter and of the parties, it must be respected until set aside by the court allowing it, or it is reversed in the appellate court by some appropriate mode of direct review. Where one knowingly disobeys an injunction which is not void, he is liable to punishment for contempt, though he would have been entitled to a vacation of the order upon a motion to dissolve, or upon a trial upon the merits of the bill."

It is further claimed that the evidence does not support

the judgment. An examination of the record discloses that we are not at liberty to examine that question. What purports to be the bill of exceptions, attached to the transcript herein, has never been settled and allowed by the judge before whom the cause was tried. Neither is it settled, allowed or certified to by the clerk of the district court. In fact, it is not authenticated in any manner known to the law. For this reason, as we have frequently held, we cannot consider it. *Hogan v. O'Niel,* 17 Neb. 641; *Edwards v. Kearney,* 13 Neb. 502; *Quick v. Sachsse,* 31 Neb. 312; *Murphy v. Warren,* 55 Neb. 215.

The only question left for our determination is whether the pleadings are sufficient to sustain the judgment. The sufficiency of the complaint, which is in the nature of an affidavit, has not been challenged in any manner by the plaintiff. In fact, it seems to be conceded on this branch of the case that, if the facts stated therein were true, the plaintiff was rightly adjudged to be in contempt of court. This being the case, nothing remains for us to do but to affirm the judgment of the district court, which is accordingly done.

AFFIRMED.

ALBERT W. CRITES V. STATE OF NEBRASKA.

FILED OCTOBER 19, 1905. No. 14,253.

1. **Contempt: REVIEW.** A judgment in a summary proceeding for contempt *in facie curiæ*, where no complaint is filed, no evidence is taken, and no trial had, may be reviewed on the record made therein without the filing of a motion for a new trial.

2. ———: **PRESUMPTIONS.** Presumptions and intendments will not be indulged in, in order to sustain convictions for contempt of court. *Hawes v. State,* 46 Neb. 149.

3. ———: **RECORD.** The record in such a case must show forth the facts constituting the offense. A mere recital that the defendant is guilty of contemptuous and insolent behavior toward the court, and is in contempt of court, where the record of the proceedings does not warrant such recital, is a mere conclusion, and is insufficient to show that the offense was in fact committed.

ERROR to the district court for Dawes county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

Albert W. Crites, pro se.

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

BARNES, J.

The plaintiff in error, Albert W. Crites, while engaged as counsel for the defendants in the trial of a civil action in the district court for Dawes county, was summarily and without trial adjudged to be guilty of a contempt of court, alleged to have been committed in the presence of the presiding judge, and he was thereupon sentenced to pay a fine of $10 and costs, and to stand committed until said fine and costs were paid. A stay of proceedings was denied him, and his request to be permitted to make a showing and a defense in said proceeding was refused, and he was thereupon committed to, and confined in, the common jail of the county until he obtained an order from this court suspending the execution of his said sentence. By a petition in error he now asks for a reversal of the judgment thus pronounced against him.

The state contends, at the outset of this controversy, that we cannot consider the errors assigned by the plaintiff, because no motion for a new trial was filed in the court below. To support this contention the attorney general cites *Zimmerman v. State*, 46 Neb. 13. An examination of that case discloses that Zimmerman was tried and found guilty of a constructive contempt of court for the violation of an injunction order in a civil case. It appears that a complaint was filed therein; that witnesses were examined on the hearing, and a regular trial was had; that on error to this court it was held that the questions arising on the trial were the only ones that must be included in a motion for a new trial. It was said in the opinion:

"There was no motion for new trial filed in this case, hence we cannot review any of the errors assigned which are alleged to have been committed during the trial."

The contempt in that case was committed outside of the presence of the court, and was investigated as any other complaint, where witnesses are examined and a regular trial had. It was said that in such a case a motion for a new trial must be filed, directing the attention of the district court to the errors claimed to have been committed during the trial, but it is fairly inferable from the whole opinion that no motion for a new trial would be necessary to raise the questions presented by the record in a case where no trial was ever had. It appears in the case at bar that the plaintiff was never tried for the alleged contempt; that no evidence was taken; that he was accorded no defense or explanation, and that judgment was thus summarily pronounced against him; and it would seem absurd to hold that a motion for a new trial must have been filed, when there was no trial in the first instance. Again, we have held that no motion for a new trial is necessary in order to review the decision of the district court upon an application for a liquor license and the case at bar is one quite similar in principle. So we have no hesitancy in holding that the questions presented by the record in a case like this may be reviewed without a motion for a new trial.

We come now to consider the plaintiff's contentions. It appears that during the trial of a civil action in the district court for Dawes county, in which one Horace Brockway was plaintiff and Benjamin F. Pitman and others were defendants, and in which Brockway sought to recover a certain sum of money from defendants therein on account of the alleged wrongful conversion of the proceeds of a check, which it was claimed was left with some of the defendants in escrow, and in which the defendant Pitman, among other things, alleged as his defense that he had sold and conveyed his interest in a certain tract of

land situated in Dawes county for the amount of the check in question, and while the said Pitman was testifying in his own behalf, the plaintiff in error, who was conducting the examination, propounded to said Pitman certain questions tending to establish the defense of some of his clients, and while so examining the witness, the judgment complained of was rendered against him. The following is a copy of the findings on which the sentence was pronounced: "The said Albert W. Crites was examining the defendant Benjamin F. Pitman while the said Pitman was on the witness stand as a witness, and in open court, in the presence of the jury, the court advised the said Albert W. Crites not to examine the witness any further in relation to certain matters as shown by the record; that, after the court had advised the said Albert W. Crites not to examine the witness any further as to this particular matter referred to by the court, the said Albert W. Crites, immediately, in strict violation of the order of the court, again asked certain questions in relation to the same matter. Whereupon, the court advised counsel again not to examine any further as to the matter referred to by the court, and that if he did so he might consider himself in contempt of court; that counsel then advised the court in words, or in substance, that he was going to ask another question anyway; that the attorney did then immediately ask another question, which question was in strict violation of the order of the court; and the court, being fully advised in the premises, finds that said Albert W. Crites is guilty of contemptuous and insolent behavior toward the court and is in contempt of court, and that said contempt and the contemptuous and insolent behavior was committed in the presence of the court and while the court was in open session." This was followed by the judgment and commitment above mentioned. Subsequently, the court refused the accused time in which to apply for a writ of error, and adjudged that he be committed to jail, which was accordingly done, where he remained for a little more than twelve hours, and until an

order of supersedeas was obtained from the chief justice of this court. The plaintiff's petition contains numerous assignments of error, but the substance of his contention is that the judgment of the trial court is not sustained by sufficient evidence, or in fact by any evidence; that the findings do not support the judgment, and it was therefore wrongfully pronounced and should be reversed and set aside.

This was a summary proceeding to punish an alleged contempt committed in the presence of the court. No written charge or complaint was filed, which the accused could examine and attack, and no evidence was taken or submitted to establish the charge, which the accused could combat or explain. In such a case it is absolutely necessary for the preservation of the liberties of the citizen that, in recording the conviction, the court shall state the facts showing the contempt charged. It is not sufficient to state in a general way the conclusions of fact on which the conviction is based. The facts themselves must be stated, from which the reviewing court can see that the ultimate fact of guilt is properly and justly found. The findings of the court fail to meet this requirement. The record contains a bill of exceptions setting forth the proceeding in which the plaintiff was adjudged guilty of contempt. This does not aid the findings or supply such facts as should be contained therein. On the contrary, it would seem that the questions propounded by the plaintiff were competent and proper, and well calculated to establish the defense which he had interposed for his clients; and it does not appear that his demeanor to the court was in any way disrespectful, or that his conduct was contumacious or offensive. No intendments or presumptions can be indulged in to sustain the judgment of the trial court in a contempt proceeding. Such a proceeding is criminal in its nature, and the rules governing criminal proceedings are applicable thereto. *Boyd v. State,* 19 Neb. 128; *Beckett v. State,* 49 Neb. 210; *Zimmerman v. State, supra, Hawes v. State,* 46 Neb. 149. In *Hawthorne v.*

State, 45 Neb. 874, we cited *Batchelder v. Moore,* 42 Cal. 412, and quoted from the opinion therein as follows:

"The power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to a fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law, by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support."

In *Ogden v. State,* 3 Neb. (Unof.) 886, it was expressly held that the record must show forth the *facts* constituting the offense; that a recital that the accused did address insulting and menacing language to the court is a statement of a mere conclusion; that the language itself must be set out, so that the reviewing court may see that it is contemptuous; and that the record of a conviction of contempt *in facie curiæ* is insufficient, unless it thus shows that the offense was committed.

According to the rule announced above, the record in this case is defective, and does not sustain the judgment complained of.

It follows that the judgment of the district court must be, and it is, therefore,

REVERSED.

NELS T. QUIST V. AMERICAN BONDING & TRUST COMPANY ET AL.

FILED OCTOBER 19, 1905. No. 13,947.

1. **Liquor License Bond:** ACTION: PLEADING. A petition against a surety upon a liquor license bond that does not allege the granting or issuance of a license does not state a cause of action.
2. **Evidence** examined, and *held* sufficient to require the submission of the question of conspiracy to the jury.

ERROR to the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Reversed in part.*

H. D. Rhea, for plaintiff in error.

J. B. Strode and *Warrington & Stewart, contra.*

AMES, C.

This is an action to recover damages against retail liquor dealers and the defendant bonding company, as their surety. The petition alleges that in May, 1902, Hutton and Berger were applicants to the board of trustees of the village of Gothenburg for a license to sell liquors for the then ensuing year, and that their application was accompanied by a bond in the form prescribed by the statute, which was executed by them and the surety, and by them delivered to the village authorities. There is no allegation that the bond was accepted by the trustees or that a license was granted or issued, although the petition contains what purports to be a copy of the instrument upon which are indorsements from which, if true, these facts might be inferred. The bonding company filed a separate answer, admitting the execution of the bond and its corporate character and authority to do business in the state, but denying generally every other allegation in the pleading, including, of course, the delivery of the bond and the authenticity of the indorsements. At the beginning of the trial the company objected, separately, that the petition does not state a cause of action against it, and at the conclusion of the trial there was a motion for a peremptory instruction of a verdict in favor of all the defendants, which the court granted, and upon a return of the verdict judgment was entered accordingly. The instrument in question was not offered in evidence, nor was there any proof offered of its delivery to or acceptance by the village authorities or of the granting or issuance of a license. As to the bonding company the instruction and subsequent proceedings were therefore clearly right.

It is not disputed that the defendants Hutton and Berger were engaged during all the then ensuing year in the business of liquor saloon-keepers in the village, and it is alleged in the petition that in April, 1903, while they were so engaged, they entered into a conspiracy with Frank Driscol, George McAully and George Wilkinson unlawfully and wrongfully to assault and beat the plaintiff and that pursuant to said conspiracy, and to the end that the three last named persons might be excited to commit the wrong intended, Hutton and Berger sold and gave them intoxicating liquors, and that while under the influence of said liquors they did commit an assault and battery upon the plaintiff, to recover damages for which this action was brought. It is not disputed that there was a violent and unprovoked assault by the three persons named upon the plaintiff and one George Anderson while the two latter were peacefully walking along the highway. The two were attacked simultaneously, but the plaintiff was struck by Driscol only, while Andrews was assaulted by McAully and Wilkinson. There is evidence that the two latter were seen drinking in the saloon of, and holding whispered conversations with, Hutton and Berger shortly before the commission of the wrongful act, and evidence tending to show that Driscol was intoxicated, and that the motive and object of the conspiracy, if there was one, were to compel the withdrawal of a remonstrance against the granting of a liquor license to Hutton and Berger for the then ensuing year, or to be revenged for the making of such remonstrance. Assuming that there was a conspiracy, Driscol may, if not a party to it, have been its instrument for the perpetration of the wrong complained of, and his principals liable for his conduct. We think these facts are such as required the question of conspiracy between Hutton and Berger and the parties committing the assault to be submitted to the jury, and that the verdict and judgment in their behalf is therefore erroneous.

It is recommended that the judgment as to the Ameri-

can Bonding and Trust Company be affirmed, but as to the defendants Hutton and Berger it 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 as to the American Bonding & Trust Company be affirmed, but as to the defendants Hutton and Berger it be reversed and a new trial granted.

JUDGMENT ACCORDINGLY.

ARTHUR T. GALLAWAY ET AL., APPELLANTS, V. ROCHESTER LOAN AND BANKING COMPANY ET AL., APPELLEES.

FILED OCTOBER 19, 1905. No. 13,940.

Judgment: RECORDING. Delay in entering on the records of the district court a judgment pronounced in open court will not invalidate the judgment in the absence of a fraud perpetrated by such delay.

APPEAL from the district court for Antelope county: JOHN F. BOYD, JUDGE. *Affirmed.*

W. V. Allen, E. D. Kilbourn and *Powers & Hays,* for appellants.

M. F. Harrington, N. D. Jackson and *S. D. Thornton, contra.*

OLDHAM, C.

This is an action by the plaintiffs, who were the former owners of a number of tracts of real estate in Antelope county, to expunge a journal entry confirming the sale of these lands in a foreclosure proceeding in the district court for Antelope county, and for permission to redeem

from the mortgage. The defendants are the purchasers at the mortgage sale and their vendees. There was a trial of the issues to the court and judgment in favor of the defendants. To reverse this judgment, plaintiffs have appealed to this court.

From an unnecessarily voluminous record we have gleaned the following abridged statement of the facts and issues involved in the controversy: On and prior to the first day of August, 1896, the plaintiffs in this cause of action were the owners in fee of the lands in controversy and other lands in Antelope county, all of which were subject to a first mortgage to Henry L. Pratt. The lands in controversy were also subject to a second mortgage to the Rochester Loan and Banking Company. On the date above mentioned, Henry L. Pratt, as plaintiff, brought an action in the district court for Antelope county to foreclose his mortgage on the lands now in controversy and the other lands, and the Rochester Loan and Banking Company and the plaintiffs herein were made parties defendant to that cause of action. The plaintiffs appeared and answered, claiming to be the owners of the lands. The Rochester Loan and Banking Company appeared and filed a cross-petition on its second mortgage. On the 20th of November, 1896, a decree was entered in favor of the plaintiff, Henry L. Pratt, for the sum of $14,400, and ordering a sale of the property. On the 4th day of October, 1897, the property involved in this controversy was purchased at the sheriff's sale under the Pratt decree by the Rochester Loan and Banking Company for the sum of $8,800. The plaintiffs herein objected to the sale, but their objections were overruled and the sale was confirmed, as appears from the records of the court, on the 11th day of November, 1897. An appeal was taken from this order of confirmation to the supreme court and was docketed for hearing, and the order of confirmation of the district court was affirmed in this court on the 5th day of October, 1898, under the following stipulation: "Whereas an order of confirmation was entered in the district court for Ante-

lope county, Nebraska, in the above entitled cause, confirming the sale of the following described real estate, to wit: (Here follows a description of the lands.) And whereas the defendants, William C. Gallaway, Mary R. Gallaway, Arthur T. Gallaway and Emmett E. Gallaway, appealed from said order of confirmation to the supreme court of Nebraska, where such appeal is now pending. And whereas said appellants, William C. Gallaway, Mary R. Gallaway, Arthur T. Gallaway and Emmett E. Gallaway, do not wish to prosecute said appeal. Now, therefore, said appellants hereby consent and request that a final order be entered in this case affirming the judgment and decree of the district court for the said Antelope county, Nebraska, and directing the present sheriff of Antelope county, Nebraska, to execute to the purchaser of the aforesaid real estate deeds for the same and an order of distribution. Arthur T. Gallaway, Emmett E. Gallaway, William C. Gallaway, Mary R. Gallaway, by E. D. Kilbourn, their Att'y."

Under this stipulation the decree was affirmed in this court, and a mandate was returned to the clerk of the district court for Antelope county and entered upon the records of said court. After this mandate was issued, the sheriff executed a deed to the lands in dispute to the Rochester Loan and Banking Company and distributed the purchase price as directed in the decree of confirmation. A portion of these lands was subsequently conveyed by the Rochester Loan and Banking Company to defendant Gilman for the sum of $11,000, who, relying on his record title, erected improvements thereon in the sum of about $30,000, prior to the institution of this suit.

The reason urged by the plaintiffs for expunging the journal entry showing the confirmation of the sale by the district court is that the decree confirming the sale was, in fact, entered by the judge of said court after the 11th day of November, 1897, and outside of Antelope county. The evidence relied upon to sustain this contention is a showing that, when the objections to the confirmation of

the sale filed by the present plaintiffs had been overruled, it was discovered that the defendant Rochester Loan and Banking Company had given the sheriff of Antelope county an uncertified check on a foreign bank to cover its bid, and that as there was some doubt as whether the check would be honored or not, it was agreed by all the parties that the decree should not be formally entered until the sheriff had time to collect his money on the check. It is fair to say this was talked of among the attorneys representing the different parties to the action, and that there was an understanding among them that unless the check proved genuine the sale might be set aside to protect the sheriff. The check, however, proved to be genuine, and the sheriff received the money on the bid. A decree was accordingly prepared by counsel for Pratt, the Rochester Loan and Banking Company, and the defendants Gallaway, who are the present plaintiffs. This decree was sent to the district judge, who had gone to a neighboring county during a recess of the court, and was there signed by him and returned to be formally entered of record at the adjourned sitting of the Antelope county district court on December 2, 1897. The decree was entered of the date November 11, 1897, and it gave the defendants, who are the present plaintiffs, 40 days from the final adjournment of the court to prepare and settle a bill of exceptions, and 20 days to file a supersedeas bond. As before stated, the present plaintiffs availed themselves of the leave given in this decree, filed a supersedeas bond within 20 days of the final adjournment of the court, and perfected an appeal from the order of confirmation, which was subsequently affirmed under the stipulation before set out. In the supersedeas bond executed by them in this appeal they recited that a decree of foreclosure of the premises had been entered in the district court on the 11th day of November, 1897. It appeared from the positive testimony of Judge Robertson, who represented Mr. Pratt, and of Judge Jackson and Mr. S. D. Thornton, who represented the Rochester Loan and Banking Company, all of

whom were present when the decree was entered, that the trial judge announced in open court his unequivocal decree confirming the sale when the objections to the confirmation were overruled. The trial court in the instant case found such to be the fact, and we think that such finding is sustained by a clear preponderance of the evidence.

It is well settled in this jurisdiction that mere delay in extending the journal entry of a judgment on the records of the court in which it is entered does not affect the validity of the judgment, when no fraud is perpetrated upon the parties to the judgment or their privies by reason of such delay. *Slater v. Skirving,* 45 Neb. 594. In the case at bar there was no unreasonable delay in entering the judgment of record. It was done before the final adjournment of the term, and the present plaintiffs had all their rights protected in such judgment, so that they might have directly attacked it for any irregularity in their appeal to this court. Instead of doing so they stipulated here to have the judgment of the district court affirmed, and to direct the issuance of the sheriff's deed. This stipulation was entered into with plaintiff Pratt in the foreclosure proceedings in part consideration for his permitting the Gallaways to redeem certain other lands covered by his mortgage. Having aided in procuring a confirmation of the sale on which the present defendants' rights depend, they cannot, either in equity or in conscience, as against those claiming under such judgment, now be heard to say that the judgment is void.

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

LETTON and AMES, CC., concur.

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

AFFIRMED.

HARGREAVES BROTHERS V. WALTER W. HACKNEY, TRUSTEE.

FILED OCTOBER 19, 1905. No. 14,257.

1. **Evidence** examined, and *held* sufficient to sustain the judgment.
2. **Instructions** examined, and *held* not prejudicial.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Tibbets & Anderson, for plaintiff in error.

John S. Bishop and *Mockett & Polk, contra.*

OLDHAM, C.

This was an action by the trustee in bankruptcy of Julius M. Erlenborn to recover from the defendants in the court below the amount of an alleged preference received by them as creditors of the bankrupt. There was a trial of the issues to a jury in the court below, a verdict for the plaintiff, and judgment on the verdict. To reverse this judgment defendants bring error to this court.

This case, with the companion case of *Hackney v. Raymond Brothers Clarke Company,* involving the same issues, has been three times before this court for consideration. The facts involved in the controversy have been fully stated and discussed in each of the former opinions, which will render a further statement unnecessary. The instant case was first considered in an unofficial opinion by HASTINGS, C., reported as *Hackney v. Hargreaves Bros.,* 3 Neb. (Unof.) 676. In that opinion a judgment in favor of the defendants in the court below was reversed for an error of the trial court in its instructions to the jury on the question of preference. It was there held, in substance, that, under the facts and circumstances surrounding the transfer of the account of Erlenborn to Ketter ing, the assumption of such account by Kettering as part of the purchase price of Erlenborn's stock of goods, with

the knowledge of the defendants that it was so intended, amounted to a preference in violation of the national bankruptcy law, if the defendants knew or had reason to believe that such transaction would result in a preference to them over other creditors of Erlenborn of the same class. The companion case of *Hackney v. Raymond Bros. Clarke Co.* was later considered by this court in an opinion delivered by POUND, C., and reported in 68 Neb. 624. In this case a judgment in favor of Raymond Brothers in the court below was recommended for affirmance, it being held in that opinion, in substance, that whether or not the sale of the account of Erlenborn to Kettering was, under the evidence, a sale of an account against a bankrupt, made in the ordinary course of business by the creditor, was a question of fact to be determined by the jury, and it was also held that it was not error for the trial court to exclude the schedule of liabilities filed by Erlenborn in the bankruptcy proceedings. Motions for rehearing were filed in each of the above causes. The two motions were considered together, and an exhaustive opinion, which went into every material fact in the controversy, was delivered by HOLCOMB, C. J., and is reported in 68 Neb. 633. In this latter opinion, the opinion of HASTINGS, C., *supra*, was adhered to, and the opinion of POUND, C., *supra*, so far as in conflict therewith, was vacated and set aside, it being held that the transfer of the account in the manner detailed by the testimony was not a sale of the account of the debtor in the ordinary course of trade, and it was further held, specifically, that it was error for the trial court to exclude from the evidence the schedule filed in the bankruptcy proceedings.

The first question called to our attention is that the evidence is not sufficient to sustain the judgment. An examination of the testimony shows facts and circumstances to have existed sufficient to have placed an ordinarily prudent man on inquiry as to the financial condition of Erlenborn at the time the preference was accepted.

The next objection called to our attention is as to the

alleged error of the trial court in giving the concluding sentence of paragraph 8 of the instructions on its own motion. The portion of the instructions objected to must be read in connection with the entire instruction, as well as the preceding instruction to which it relates. These instructions are as follows:

"(7) If you shall determine from the evidence that Erlenborn January 15, 1900, was insolvent, and consequently that a preference was obtained by the defendants, then, before the plaintiff can recover herein, it will be necessary for him to prove by a preponderance of the evidence that the defendants at the time of the making of said transfer to Kettering and the payment by him of defendants' claim to the amount of $675 had reasonable cause to believe a preference was thereby intended.

"(8) Therefore, before finding against the defendants, it is necessary for you to conclude from the evidence that they, or A. E. Hargreaves acting for them, had reasonable cause to believe that a preference was intended. On this point you are instructed that a creditor is not charged with knowledge of his debtor's financial condition from the mere nonpayment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; nor is it essential that the creditor should have actual knowledge of or belief in his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent. He has reasonable cause so to believe if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, for he is charged with knowledge of the facts which such inquiry should reasonably be expected to disclose; or if he has knowledge of facts and circumstances which would cause a reasonably prudent man so to believe. While constructive notice is sufficient ground for such belief, yet the circumstances upon which such notice is predicated must be of a character to induce belief as distinguished from mere suspicion. *Transactions not in the usual course of trade*

or of the accustomed dealings between the parties are notice of probable wrong, and the creditor is thereby put on inquiry, and is chargeable with all such inquiry would have produced."

It is the italicised portion of the instruction that is objected to, and it is urged that this portion of the instruction assumes that the transfer of the account was not made in the ordinary course of business. This conclusion is fully justified and, unless the evidence is so clear and convincing on this point that no other finding could be supported, the objection is well taken. On this point, however, it was held in the opinion by HOLCOMB, C. J., *supra*, that "the trial court erred in submitting to the jury the question of whether the transactions between Kettering and Erlenborn and the defendants were or were not *bona fide* sales of accounts, or whether they were entered into with the view of securing a preference in violation of the bankruptcy law." In view of this holding the court was justified in declaring as a matter of law that the transaction was "not in the usual course of trade, or of the accustomed dealings between the parties." We are therefore of opinion that, under the peculiar conditions surrounding this transaction, the instructions, as a whole, were rather favorable than otherwise to defendants' theory of the case.

We are asked to review the holding in our last opinion as to the admission of the schedule filed in the bankruptcy proceedings. This question was fully discussed in the former opinion between these same parties, and we see no reason to reexamine it.

As these are the only questions properly called to our attention we recommend that the judgment of the district court be affirmed.

LETTON and AMES, CC., concur.

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

AFFIRMED.

PETER KOSLOWSKI ET AL. V. DAVID M. NEWMAN, ADMINISTRATOR.

FILED OCTOBER 19, 1905. No. 13,912.

Administrator: POSSESSION OF REAL ESTATE. An administrator is not entitled to the possession of property of which the decedent whose estate he represents died possessed, as against a defendant who shows that he is the equitable owner thereof, in the absence of proof that there are creditors of the estate whose equitable claims to the property take precedence over that of the defendant.

ERROR to the district court for Platte county: CONRAD HOLLENBECK, JUDGE. *Reversed.*

A. M. Post and *Whitmoyer & Goudring,* for plaintiffs in error.

McAllister & Cornelius and *J. J. Sullivan, contra.*

DUFFIE, C.

David M. Newman, as administrator of the estate of Frank Mercek, deceased, brought this action against Peter Koslowski and Mary, his wife, to recover from them money and the value of certain chattel property of which the said Mercek died seized, and which was thereafter converted by the plaintiffs in error. The plaintiffs in error filed a joint answer, in which they allege title to the money and property in controversy by virtue of an agreement with the deceased, a copy of which is as follows: "This agreement entered into this 28th day of September, A. D. 1901, between Peter Koslowski, of Duncan, Nebraska, party of the first part, and Frank Mercek, of Duncan, Nebraska, party of the second part, witnesseth that said party of the first part hereby agrees to care for, support and maintain during his life the said party of the second part, providing him with wholesome and necessary food, and to also provide him with a suitable bed and bedding, and, should his resources not be sufficient, the said party of

the first part shall provide him with suitable and necessary clothing; the intention of this agreement being to provide said party of the second part a home during the remainder of his lifetime. The said party of the second part hereby agrees, in consideration of the provisions above enumerated, that at the time of his death all of his property, both real and personal, and of which he dies seized, shall descend to and belong to said Peter Koslowski, the said party of the first part hereto, free and exempt from any claim from any of the heirs of said party of the second part; and for this purpose this agreement shall act as a last will and testament of the said party of the second part. This agreement shall be binding upon the heirs, executors and administrators of the parties to this agreement. Witness the hands of the parties hereto on the day first above written. Peter Koslowski, Frank Mercek, his (X) mark, Mary Koslowski. Witness, G. W. Phillips."

It is also alleged in the answer that, pursuant to said agreement, Peter Koslowski continuously from the date thereof until the death of Mercek on February 7, 1904, provided a home for, and in all respects maintained and supported, the said Mercek, and fully kept and performed all the conditions of said agreement on his part to be kept and performed, and that said Mercek was at the date of his death possessed of money to the amount of $317.52, and no more, and of personal property of the value of $9.60, and no more; that upon the death of said Mercek plaintiff in error, Peter Koslowski, took possession of said money and property, and claims to own and hold the same under and by virtue of the agreement aforesaid. It is further alleged that Peter Koslowski, from the money so received by him, paid the necessary funeral expenses of said Mercek and for certain church services requested by said deceased, in all $93. The answer concludes with a prayer that the title of the said Peter Koslowski in and to said money and property be quieted and confirmed, and for general relief. A reply was filed,

admitting the execution of the agreement above set forth and performance thereof by the said Peter Koslowski, but charging that said agreement was procured by plaintiffs in error by means of fraud and undue influence over said Mercek, and that he was, at the date thereof, mentally enfeebled by senile dementia, and wholly lacking in the capacity to contract. At the conclusion of the evidence the court instructed the jury that the contract with Peter Koslowski, given in evidence by the defendants below and under which they claim title to all the personal property of the deceased, was not available as a defense as against the claim of the administrator, and that they should therefore return a verdict for the plaintiff for the value of the money and property that the defendants had reduced to their possession and converted to their own use. The jury returned a verdict in favor of the administrator in the sum of $851, and a motion for a new trial being filed, the court overruled the same upon the plaintiff remitting the sum of $523.48 from the verdict, and entered judgment against defendants below for $327.52.

We have examined the evidence given on the trial with some care and it establishes to our satisfaction the following: The wife of Frank Mercek died in 1900, at Denton, Nebraska, where the parties then lived. After the death of his wife, and in October, 1900, Frank Mercek went to live with his son, John Mercek, in Polk county, Nebraska, and continued to live with him until June, 1901, when he went to Duncan and commenced boarding with Koslowski. He was, apparently, a strict church member, and one reason given for his going to Duncan to live was that he might be near a church, where he could regularly attend services, his son's farm being 17 miles distant from the church of which he was a member. We are also inclined to believe that he was not satisfied with his treatment, and the two causes combined induced him to remove to Duncan and make his home with Koslowski. He continued in Koslowski's family as a boarder until his bill amounted to $72, which he paid, and then requested Koslowski to enter into

the agreement which we have copied above. The evidence tends to show that when he came to Duncan he had $847 in money, and there is also evidence from which it can be fairly inferred that he afterwards sent money to friends in Germany in fulfilment of a request made by his deceased wife. There is not sufficient evidence to support the claim that he was afflicted with any mental disease or disorder, or that he was not capable of transacting business and making the contract with Koslowski with a full understanding of its terms and conditions. The evidence is undisputed that, at the time of his death, being then about 75 years of age, the only money found in his trunk was $317.52, and he was possessed of a few articles of wearing apparel, a bed and some bedding, and other property, all of but little value; and the trial court very properly refused to enter judgment on the verdict until a remittitur was entered by the plaintiff, if any judgment at all was warranted by the pleadings and evidence.

The district court evidently took the view, urged by counsel for defendant in error, that the administrator was entitled to the possession of all personal property of which Mercek died seized, regardless of any contract existing between the deceased and Koslowski; and this is the principal question to be determined in the case. That Frank Mercek had the legal right to dispose of his property as he saw fit cannot be disputed. If, because of dissatisfaction with his treatment in the home of his son, or because he could not, while living there, attend church to his satisfaction, he desired to change his residence, that was a privilege which no one could deny him. After living with Koslowski for some time, if he found a home there to his satisfaction, he had a right to enter into the contract which he did, and that contract is legal and binding. The rule is well established that one may, for a sufficient consideration, bind himself to make a particular disposition of his property, and such contract, upon performance by the other party, is irrevocable and enforceable upon the death of the promisor. *Kofky v. Rosicky,*

41 Neb. 328; *Teske v. Dittberner,* 65 Neb. 167. We understand that counsel for defendants in error do not controvert this proposition, but they insist that the administrator of Mercek's estate is entitled to the money and property of which he died seized, and that Koslowski should file his claim with the administrator and have it allowed by the probate court. That the administrator is generally entitled to the possession of all personal property of the intestate cannot be doubted; but whether in cases of this character he can, merely by virtue of his appointment and without showing that there are creditors of the estate having rights in the property, demand it from one in possession, claiming title under a contract with the decedent, such as above set out, is the question in dispute. In *Emery v. Darling,* 50 Ohio St. 160, 33 N. E. 715, the syllabus is as follows:

"One sister covenanted in writing with another that, if the latter would reside with her as long as she desired, she would 'give and bequeath' to her all the property, real and personal, of which she should died seized. The sister to whom the promise was made accepted it, and fully performed the contract on her part. * * * *Held,* That at the death of the sister making the promise the other became the equitable owner of the property of which her sister died seized; and, in specific performance of the contract, is entitled to a conveyance of the legal title from the heirs of her deceased sister."

We think that the rule above announced is correct and should be followed. If, as appears from the evidence in this case, Koslowski fully kept and performed his contract with the deceased, he has fully earned the property. It may be said that, because delivery was not made by the decedent in his lifetime, Koslowski was not invested with the legal title; but that he was the equitable owner seems beyond dispute. He had paid for it in the very terms required by his contract. He had fully performed upon his part. Nothing but a delivery was necessary to invest him with the legal title. It would be a useless and a senseless

proceeding to require him to pass this property over to the administrator with one hand, and award him the right, which the law will not deny, to take it back with the other. It may be, although that is a question which is not presented and which we do not determine, that creditors of the estate of Mercek, who extended credit, relying on this property for payment, if any exist, have a right to be paid out of this money, but there is no showing in this record that any such creditors exist. It is conclusively shown that the expense of the burial had been paid by Koslowski, and we cannot presume that there is other indebtedness to be provided for, and, as between the administrator and Koslowski, we are satisfied that the latter has the better right.

In *Howes v. Whipple,* 41 Ga. 322, A desired to purchase from B a lot of mules on credit, and B refused to sell, and thereupon A proposed to trade to B certain cotton then on A's plantation, which B declined, as he knew nothing of the cotton trade, but offered to let A have the mules if he would deliver the cotton at the warehouse of C, at Macon, to be sold for B's benefit, in payment for the mules, and both the parties went to the warehouseman and stated the contract, and he undertook, as agent of both parties, to receive and sell the cotton, and pay to B the price agreed on for the mules out of the proceeds, and the mules were thereupon delivered to A, who, on going home, commenced hauling cotton to the depot, instructing the agent to send it to C under the contract. After the cotton was delivered at the depot, but before shipment, A suddenly died. It was held that under these facts B had acquired such an interest in the cotton to the extent of the price of the mules that it was not assets of A's estate for distribution, and a court of equity, in a bill filed for direction, would direct so much of the proceeds of the cotton as equaled the price of the mules to be paid to B, and this even as against persons who claimed that A was indebted to them as a trustee, and, consequently, upon a debt of the highest dignity under the statute of distributions. In the opinion it is said:

. . . . . .

"Can anyone question that a court of equity would have restrained Mr. Brown from disposing of this cotton otherwise than as he had agreeed? Had he attempted to divert it from Hardeman & Sparks, would not equity have compelled him to send it to them, as he had contracted to do? It does not follow that because a sale is not complete, so as to change the possession or give a clear title, the purchaser has no *interest* in the thing. In the case of real estate a court of equity will compel a specific performance to prevent fraud. In cases of personal property, the remedy by suit for damages stands in lieu of this, but the principle is the same, and if it would be a fraud upon the purchaser, and he have no other remedy, the mere fact that the property is personal property does not defeat the party of his remedy. Equity will decree the specific performance of contracts for leases, or the good-will of a trade, and, generally, if there be no adequate remedy at law, equity will grant relief to prevent fraud and injustice."

Asbury v. Hicklin, 181 Mo. 658, 81 S. W. 390, was a case where the deceased left only a personal estate, and, in an action for specific performance of the contract to devise a child's share to the plaintiff, the court held that a court of equity will specifically enforce an oral contract to devise property to another in consideration of services actually rendered, provided the proof of such contract is so cogent, clear and forcible as to leave no reasonable doubt as to its terms and character.

McKinnon v. McKinnon, 56 Fed. 409, was a case where an uncle and his nephew made a partnership agreement, by which it was agreed, "in the event of the death of the senior member of the firm, all his property, personal and otherwise, which he held in partnership at the time of his death, should go to the junior partner." Judge Thayer, in delivering the opinion, said:

"The partnership articles involved in the present controversy were neither intended as a deed nor a will. They constitute an executory agreement, which determines the rights of the parties *inter se,* and provides what disposition

shall be made of the partnership property on the happening of a certain event. In the state of Missouri, where these articles were signed, and where both parties at the time resided and carried on business, it is as well settled as it is in any state of this Union, that an agreement by a person, upon a valuable consideration, to give to another the whole or a part of his property at the promisor's death, will be specifically enforced in equity, both as to real and personal property, if the consideration is duly rendered by the promisee."

It will be seen, therefore, that courts of equity enforce contracts of the character of the one under consideration, whether the property involved is real estate or personalty, and, this being so, Koslowski has an interest in the property of which he took possession as owner thereof, subject, it may be, to some special debts of Mercek, which might be made a charge against this fund.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

ALBERT and JACKSON, 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 not inconsistent with this opinion.

REVERSED.

MODERN WOODMEN OF AMERICA v. IDA A. PLUMMER.

FILED OCTOBER 19, 1905. No. 13,930.

Review: DISMISSAL. Where the transcript filed in this court does not contain the judgment or final order of the district court sought to be reviewed, the petition in error will be dismissed.

ERROR to the district court for Deuel county: HANSON M. GRIMES, JUDGE. *Dismissed.*

B. D. Smith and *Talbot & Allen,* for plaintiff in error.

G. G. McAllister and *Wilcox & Halligan, contra.*

DUFFIE, C.

The transcript filed in this court consists of the petition, answer, reply, instructions, verdict and motion for a new trial. It does not show that the motion for a new trial was ever passed upon, or that a final judgment has been entered in the case. It is only a judgment or final order rendered by the district court that can be reviewed by the supreme court, and, unless the transcript brought to this court contains such judgment or final order, the proceedings will be dismissed. *Baker v. Kloster,* 41 Neb. 890.

It is recommended that the petition in error be dismissed.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the above proceedings are

DISMISSED.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY v. ALVA TODD.

FILED OCTOBER 19, 1905. No. 13,943.

1. **Market reports** in journals, such as the commercial world relies upon, are competent evidence of the state of the market.
2. **Carriers:** DELAY IN TRANSPORTING FREIGHT: DAMAGES. Where a railroad company negligently refuses to receive and transport freight intended for immediate sale upon the market, such as live stock, it is liable for the expense of keeping the stock, caused by such delay, and for the difference between the price of the stock when it should have arrived at the market and the price when it did actually arrive.

3. **Damages: EVIDENCE.** The class and condition of live stock are material matters in determining their market price, and, in the absence of evidence as to these matters and of what the market price of live stock of the class in question was, damages cannot be awarded from a claimed decline in the market price of stock of the general description of that which the carrier negligently refused to accept and transport.

ERROR to the district court for Dawson county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

H. M. Sinclair, J. W. Deweese and *F. E. Bishop,* for plaintiff in error.

Warrington & Stewart, contra.

DUFFIE, C.

February 25, 1903, Alva Todd, the defendant in error, hereafter called the plaintiff, applied to the agent of the railway company for two cars in which to transport sheep and hogs from Farnam, Nebraska, to South Omaha, the cars to be furnished and stock to be shipped on February 28, 1903. The railway company placed the cars on the side track at Farnam on February 27, but on account of a storm the plaintiff did not drive his stock to the station until Saturday afternoon, the 28th, and too late to be shipped that day, there being but one freight train, which usually left the station for the east about 7:15 A. M. At the time of ordering the cars the agent informed the plaintiff that his sheep could not be shipped until they were inspected by a government inspector, on account of an order in force prohibiting the railway company from transporting sheep without a certificate from the inspector that they were free from disease. The agent, at Todd's request, wired to Grand Island for an inspector, but failed to secure one. The order requiring inspection was issued February 9, 1903, but on the 26th of February, 1903, the following modification of the order was made, of which the agent had no notice: "On account of requests of representatives of the South Omaha packing industry, and with

the consent of Governor Mickey, I wish to modify the quarantine notice on sheep, viz., permitting all fat sheep to be marketed up to July 1, 1903, without certificates of inspection. After July 1 you will please comply with the notice issued to you from this office February 9, 1903. Respectfully, W. A. Thomas."

It does not clearly appear from the record whether the plaintiff requested the agent to ship his sheep on Sunday. Monday there was no train, and on Monday evening plaintiff noticed in a newspaper that the quarantine order had been modified, and called this to the attention of the agent of the railway company. Thereupon the agent telegraphed to the general freight agent of the company, and about 11 o'clock Tuesday morning received a dispatch directing him to receive the sheep without inspection. The sheep were loaded Wednesday morning about nine o'clock, the train being late, and arrived in South Omaha at 9:30 o'clock Thursday morning, March 5, and were delivered by the railway company to the Union Stock-Yards Company at 10:45 that same morning, and by that company were sent to the chutes for unloading at 11:10 A. M. The time of the arrival of the stock at South Omaha appears from a stipulation of the parties filed in the case. It further appears from the evidence of W. A. Thomas, state veterinarian, that the quarantine order issued by the state authorities on February 9 was modified, as appears from the order above quoted, on the afternoon of February 26; that notice of such modification was mailed to the railway authorities of the state on the evening of that day, but too late to be carried in the mails before the morning of February 27. The plaintiff in his petition alleges that the company refused to receive his stock until March 4, to his damage in care and expense for feeding same and loss from decline in the market price, and also that there was delay in moving the train, and that his stock was confined in defendant's care without feed and water for an unusual length of time, and as a consequence thereof the said sheep shrank in weight and became rough and gaunt, and

their market value on that account was depreciated in the sum of $58.20.

The court properly instructed the jury that the railway company was bound to observe and enforce a rule or regulation issued by the proper state authorities requiring an inspection of sheep before receiving the same for shipment, until such time as it had received proper notice and authority from the government officials, acting under such inspection law, of its suspension, and until it had reasonable time to notify its agents that such rule or regulation was no longer in force. And, further, that the jury must be satisfied from the evidence that the defendant did not transport the stock in question within a reasonable time, and because of such fact the plaintiff had sustained damages. There is an entire absence in the instructions of advice to the jury of what they should consider in determining whether the company failed to receive and ship the stock within a reasonable time after the order of February 26 was issued, but as there was no request for a charge by the company on this question it amounts to a failure to instruct upon that particular question, and not a misdirection, and consequently not reversible error. The verdict was for $140 in favor of the plaintiff, and, as the expense claimed by the plaintiff for keeping his stock at Farnam from February 28 until March 4 was but $22.60, it is evident that this verdict includes an amount either for the alleged damage to the stock on account of being confined in the cars for an unusual length of time or on account of a decline in the market price of such stock between March 2 and March 6, when they were sold. This requires us to determine whether, under the evidence, the railway company was negligent in not receiving and shipping the stock at an earlier date than it did. The order of the state authorities allowing railway companies to receive and ship fat sheep without an inspection was mailed at Lincoln, Nebraska, on the evening of February 26, and the presumption obtains that it would reach the general offices of the company at Omaha by due course of

mail, which would be on the 27th. There is no evidence showing that the railway company is the owner of any telegraph line, and all that could be expected of it in the use of reasonable diligence would be to notify their agents of this order by due course of mail, and this, we think, in the absence of evidence to the contrary, could have been done as early as March 1 or 2, which would have allowed shipment to be made not later than March 3. There was an unexplained delay in the shipment of from one to two days, and the expense of keeping the stock at Farnam for that time was a proper element of damages.

The plaintiff introduced in evidence copies of the Daily Drovers Journal-Stockman of March 2, 5 and 6, 1903, showing the state of the market and the sales of sheep at the stock-yards in South Omaha on these dates. Objection was made to this evidence upon the ground that it was incompetent, irrelevant and immaterial. We do not think the objection well taken. In *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489, it is said: Market reports in newspapers, such as the commercial world relies upon, are competent as evidence of state of markets. "Such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries, or individual sales or inquiries."

So, too, do we think that the plaintiff is entitled to recover on account of the depreciation in the market price of his stock between the date when it should have been delivered and the date of its delivery. In *Peet v. Chicago & N. W. R. Co.*, 20 Wis. 624, it is said: "The rule of damages as given to the jury by the circuit court was, that the plaintiff was entitled to recover the difference between the price of the flour when it should have arrived in New York, and the price at the time when it did actually arrive, if it was sold at the latter depreciated price. * * * We think, on principle as well as authority, the ruling of the circuit court as to the measure of damages was right."

While this is the proper rule of damages, we are yet of

the opinion that there is no proper evidence in the record before us to show that the defendant sustained any damage on account of a depreciation in the market price of his sheep. It is true that the Daily Drovers Journal-Stockman introduced in evidence shows that sheep were sold on March 5 at a higher price than that received by the plaintiff, but whether they were the same character of sheep as those reported sold nowhere appears, and it is evident that the character and class of the sheep offered on the market is a material factor in determining the price at which they will sell. Neither do we think that the plaintiff was entitled to any damage on account of his sheep being confined in the company's cars for an unusual length of time. All the evidence is to the effect that the schedule time of the train upon which the sheep were transported is about 24 hours, and the train carrying the sheep left Farnam at 10:45 A. M. and arrived in South Omaha at 9:30 the next morning, making the run in less than schedule time. There was some delay in the train arriving at Farnam on account of what the agent calls having to "double in," that is, the engine had to haul in part of the train and then go back for the remainder, but the plaintiff's stock was confined in the car for less time than if the train had arrived promptly and ran through on schedule time.

For the reason that the record is barren of evidence to support the amount of damages allowed, we recommend a reversal of the judgment and that the cause be remanded.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

REVERSED.

CITY OF OMAHA V. PETER KOCHEM.

FILED OCTOBER 19, 1905. No. 13,951.

1. **Cities: SIDEWALKS.** A city, charged with the duty of keeping its streets and sidewalks in safe condition for use, is not required to search for defects therein, where there is no reason to suppose defects may be found.
2. ———: ———: **NOTICE OF DEFECTS.** A city is not charged with implied notice of a latent defect in a sidewalk, producing an injury to a person using the walk, by the existence of a defect therein of a different character and which did not contribute to the injury in any manner.
3. ———: ———: ———. The city of Omaha must use ordinary care and diligence to keep its streets and sidewalks in reasonably safe condition for use by the public, but it will not be charged with implied notice of a latent defect in a sidewalk, not apparent on ordinary inspection, until such time or the happening of such event as would challenge the attention of a man of ordinary diligence, charged with a like duty, to such defect.

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

C. C. Wright, W. H. Herdman and *A. G. Ellick,* for plaintiff in error.

John C. Cowin and *Isador Ziegler, contra.*

DUFFIE, C.

Peter Kochem brought this action to recover from the city of Omaha damages sustained from a fall occasioned by a defect in the sidewalk on Cuming street in said city. In his brief his claim is set forth in the following language: "Defendant in error on January 2, 1903, between the hours of 4 and 5 o'clock in the afternoon, while walking to his home on the north side of Cuming street in the city of Omaha, stepped upon the cover of a scuttle hole that was partially removed from said hole owing to the want of fasteners which would have held said cover firmly in its place, thereby kicking the same entirely off, and being

violently precipitated into the excavation directly beneath. By reason of said fall he sustained severe bruises to his head and leg, several ribs being fractured and his chest wall caved in, and was unable to perform any manual labor for nearly 4 months." Judgment went in favor of Kochem, and the city has prosecuted error to this court.

The errors principally relied on are that the evidence is insufficient to sustain the verdict, in that the city had no actual notice of the defective condition of the walk, and that, in consequence of the defect not being visible on ordinary inspection, the city cannot be charged with implied notice of the defect; and, second, a claimed faulty instruction given by the court.

It is not claimed that the scuttle hole in the sidewalk and the cover over the same were faulty in their original construction. It is conceded, however, that the iron bolts by which the cover was fastened over the hole and which extended below into the area way beneath, where they were made fast, were broken two or three weeks previous to the accident, and that, in consequence, the cover had become displaced on several occasions prior to Kochem's injury. On each of these occasions the cover was at once replaced by those who saw it, and there is no evidence whatever that any officer of the city had any actual knowledge of the defect or that the cover had become displaced. It might further be stated that the cement walk surrounding the scuttle hole had become worn prior to the breaking of the bolts, and that there was some evidence to the effect that the cover would slip on account of such wearing away. This fact seems to be immaterial, as the evidence is conclusive that the accident was caused by the breaking of the fasteners underneath the cover of the scuttle hole, which defect could not be seen from the sidewalk. In order to see the broken rods the cover would have to be lifted, and the wearing away of the cement around the scuttle hole did not throw the cover above the sidewalk, or show any imperfection or defect which would be visible to one passing along the walk.

The third instruction of the court is in the following language: "Negligence is the gist of this action, and the burden of proving the negligence on the part of the defendant city, as alleged in plaintiff's petition, is upon the plaintiff, and, before he would be entitled to recover in this action, he must prove the negligence so alleged in his petition on the part of said defendant by a fair preponderance of the evidence, and in this case, if you find from the evidence that the said scuttle hole in controversy was constructed in such manner as was considered, exercising ordinary reason and prudence, ordinarily safe to persons passing along and over the same, using ordinary care and diligence, or that said scuttle hole became out of repair and unsafe and defective, and that said defendant city through its authorities had no knowledge of the same, and that such defective condition had not existed a sufficient length of time, or said defective condition existed in such manner that by the exercise of ordinary care and diligence the said defendant city could not have known it, then and in that event said defendant city would not be liable, and your verdict should be accordingly." The foregoing instruction was approved by this court, *City of Lincoln v. Pirner,* 59 Neb. 634, and relating thereto the court used the following language:

"By the instruction quoted the jury were informed, in unmistakable terms, that, if the defective condition of the coal-hole was of such a character that the city authorities could not have discovered it by the exercise of ordinary care, the city would not be liable. In other words, the right of the plaintiff to a verdict in her favor was, by the fourth instruction, made to depend upon the accident having resulted from a defect in the sidewalk which was so evident and open to view that actual knowledge of it must, in the usual course of events, have reached the agents and servants of the city, if they had faithfully performed the duty imposed upon them by law in seeing that the public streets were safe for those having occasion to use them. The jury, following the instructions of the court, could not have found for the plaintiff without

first finding that the defect in the sidewalk was a visible defect—one which ought to have been discovered and remedied by the city authorities before the accident happened. The conclusion of the jury upon this point is a just one. It is an eminently fair deduction from all the evidence in the case."

This puts the court upon record as holding that, where the defect is latent, not visible to ordinary inspection, implied notice of the defect will not be presumed and will not be charged against the city, until something occurs from which notice may be presumed or implied. In the same case at page 638 it is said:

"The action being grounded on negligence, the test of liability is whether the municipal authorities did everything which, under the circumstances, ordinary care and prudence required them to do; and the rule is that an omission of duty is not to be inferred from a failure to search for defects in a sidewalk where there is no reason to suppose defects may be found."

This holding is followed in *Nothdurft v. City of Lincoln*, 66 Neb. 430, and in that case it was further held that "it is not sufficient to show notice of a particular defect which is different in kind from, and in no way related to, the one that produced the injury, and did not contribute thereto in any manner."

The rule that latent defects, not visible on ordinary inspection, will not charge the city with implied notice is held in *Cook v. City of Anamosa*, 66 Ia. 427. And *Duncan v. City of Philadelphia*, 173 Pa. St. 550, 34 Atl. 235, and *Cooper v. City of Milwaukee*, 97 Wis. 458, 72 N. W. 1130, seem inclined to the same view. A head-note in the Iowa case is in the following language: "A city is not charged with notice of a defect in a sidewalk which is not apparent to the ordinary observer, and whose existence is not known to the inhabitants of the city generally." This rule is broader than we care to establish, and broader, we think, than that recognized in *Anderson v. City of Albion*, 64 Neb. 280. In a city the size of Omaha it would be

going to great lengths to say that the city should not be charged with notice of a defect in its streets until it became so notorious as to be known throughout the city, but we are of the opinion that it should be known to more than those who occupy the premises adjacent to the street upon which the defect exists, or be so open and visible that ordinary inspection and ordinary care would bring it to the knowledge of those in charge of the streets. There is no evidence in the record before us that anyone, except those occupying the premises in the immediate vicinity of the sidewalk where the accident occurred, had any knowledge that the cover to this scuttle hole had ever become displaced, unless it be the evidence of one witness, who testified that on one occasion about a week previous to the accident he saw the hole uncovered, and a traveler along the sidewalk immediately replaced the cover. The occupant of the premises testified that he saw the cover off on but two or three occasions, and a fair deduction from the evidence is that during the two or three weeks previous to the accident, and while the fastenings were broken, the cover was not off to exceed a half a dozen times, and on each occasion was immediately replaced. The instructions as a whole fairly presented the law of the case, but, in our opinion, the verdict was clearly in conflict with the third instruction above quoted and is not supported by the evidence.

We recommend that the judgment be reversed and the cause remanded.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the cause remanded.

REVERSED.

JOHN V. AINSWORTH, RECEIVER, APPELLANT, V. JOSEPH ROUBAL ET AL., APPELLEES.

FILED OCTOBER 19, 1905. No. 14,200.

1. **Evidence** examined, and *held* to show the conveyance attacked fraudulent except as to one mortgage.
2. **Creditors' Suit:** LIMITATION OF ACTIONS. A party cannot maintain an action in the nature of a creditors' suit to reach property of his debtor fraudulently conveyed until the claim has been reduced to judgment, and until judgment is obtained by the creditor the statute of limitations will not, under ordinary circumstances, commence to run against such a suit. *Gillespie v. Cooper*, 36 Neb. 775, so far as it holds a contrary doctrine, disapproved.
3. ———: ATTACHMENT. The creditor, if he chooses, may, before reducing his claim to judgment, commence an action aided by attachment and seize the estate fraudulently conveyed by his debtor, and after judgment in the attachment suit he may enforce his lien by an action in the nature of a creditors' bill. This course may be pursued, whether the debtor is a resident of the state or a nonresident. *Keene v. Sallenbach*, 15 Neb. 200; *Kennard, Daniels & Co. v. Hollenbeck*, 17 Neb. 362; *Kimbro v. Clark*, 17 Neb. 403.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

F. I. Foss, R. D. Brown, Courtright & Sidner, C. H. Sloan and *J. D. Pope*, for appellant.

Frank Dolezal, contra.

DUFFIE, C.

The plaintiff and appellant, who is receiver of the State Bank of Milligan, Fillmore county, Nebraska, brought this action against the defendants and appellees to subject certain lands in Dodge county, Nebraska, to the payment of a judgment obtained by him against Joseph Roubal, the record title of which stands in the name of Josephine Roubal, wife of said Joseph. For a clear understanding

of the case it is necessary to set out somewhat in detail a history of the litigation between the parties.

In November, 1897, the plaintiff recovered judgment against Joseph Roubal in the sum of $4,700 in the district court for Fillmore county upon the bond of one Fiala, on which Roubal was surety. November 24, 1897, Joseph Roubal and wife executed a deed to James Vech, a brother-in-law, conveying to him the land in controversy in this action. November 27, 1897, the plaintiff filed a transcript of his judgment obtained in Fillmore county in the office of the clerk of the district court for Dodge county. December 9, 1897, James Vech and wife deeded the property to Louis J. Kudrna. December 10, 1897, the plaintiff caused execution to be issued on his judgment and delivered to the sheriff of Dodge county, and on the following day the sheriff levied on the real estate in controversy, and caused the same to be advertised for sale as the property of Joseph Roubal, who had during all the time remained in possession of the premises. January 21, 1898, and previous to a sale being made under the execution, Kudrna obtained an injunction from the district court for Dodge county, restraining the sheriff from proceeding to a sale under his execution. The plaintiff applied to the court to be made a party to this action, and filed an answer and cross-bill in that case, bringing in other defendants. His cross-petition was in the nature of a creditors' bill, seeking to subject the land to the payment of his judgment. April 21, 1900, a decree was entered in said action, setting aside the different transfers, and declaring the real estate to be the property of Joseph Roubal, and ordering it sold, subject to his homestead interest. The defendants in that action filed a supersedeas and took an appeal to this court. In the meantime the law action in which plaintiff's judgment had been obtained in Fillmore county was appealed to this court by the defendant Roubal, and on November 20, 1901, an opinion was filed, reversing said judgment and remanding the case for another trial. See *Fiala v. Ainsworth*, 63 Neb. 1. March 21, 1902, a second trial of

the law action was had in Fillmore county, in which the plaintiff herein obtained judgment against the defendant Joseph Roubal for the sum of $7,364.45. On the same day Joseph Roubal and his wife executed three mortgages upon the land in controversy; one to George Bauman for the sum of $661, one to Mary Vech for the sum of $1,060, and one to Frank Dolezal for the sum of $2,000. March 28, 1902, the plaintiff filed a transcript of his new judgment obtained in Fillmore county with the clerk of the district court for Dodge county. April 5, 1902, Louis J. Kudrna conveyed the land in controversy to Josephine Roubal, wife of Joseph Roubal. September 18, 1902, the decree in the injunction and creditors' bill case tried in Dodge county was reversed by this court and the case dismissed, for the reason that the judgment upon which it was based had been reversed on November 20, 1901. *Kudrna v. Ainsworth,* 65 Neb. 711. The present action was commenced in the month of March, 1903, the amended petition upon which the case was tried being filed on May 7, 1904. On the trial a decree was entered dismissing the plaintiff's petition upon the ground, as we understand, that his action was barred by the statute of limitations.

We have carefully examined the evidence contained in the record, and have arrived at the conclusion that there can be no doubt that the conveyance made by Joseph Roubal to James Vech, and the several deeds thereafter made, were for the purpose of avoiding the indebtedness due from Joseph Roubal, the plaintiff, and finally vesting title to the property in Josephine Roubal, his wife. It is unnecessary to discuss this evidence, as even a casual reading will satisfy the mind of any disinterested party that the conveyances, aside from the mortgages mentioned which will be considered later, were colorable only, and without any good faith consideration paid. This brings us to the consideration of the statute of limitations relied on by the defendants and sustained by the district court. That court evidently relied on, and felt bound by, the holding in *Gillespie v. Cooper,* 36 Neb. 775; and, if that

case is to be followed and recognized as the correct rule to be applied in actions of this character, then there is no question that the decree appealed from will have to be affirmed. The deed from Roubal to Vech was made in 1897, while this action was not commenced until 1903, six years after the making and recording of this fraudulent deed. The defendants insist that the plaintiff might have attached the land in controversy, notwithstanding the fact that he had reduced his claim to judgment prior to the fraudulent conveyance, and cite *Strickler v. Hargis*, 34 Neb. 471, in support of this contention. If we concede this to be the rule, then the holding in *Gillespie v. Cooper*, *supra*, if adhered to, is fatal to the plaintiff's claim. In that case it was held that an action in the nature of a creditors' bill must be commenced within four years from the discovery of the fraud. We quote from the opinion at page 790:

"Were the appellees limited to a *creditors' bill* in order to obtain relief from this fraudulent conveyance? We think not. Appellees could have attached the property on the ground that it was fraudulently conveyed to Richards for the purpose of delaying Mrs. Cooper's creditors. Code, sec. 198, subd. 8; *Keene v. Sallenbach*, 15 Neb. 200; *Brown v. Brown*, 91 Ky. 639, 11 S. W. 4; *Rogers v. Brown*, 61 Mo. 187. For this court to hold that appellees' cause of action did not accrue—the fraud discovered—until appellees were in a position to file a creditors' bill would be to judicially amend this statute and leave it to the discretion of creditors to fix the time of the accrual of their cause of action by hastening or delaying the recovery of judgment. A case might arise where, by reason of the debtor being a nonresident, a personal judgment could not be obtained. In such case would appellee have no cause of action for relief on the ground of fraud until the debtor became a resident and a personal judgment was entered against him? It is an old maxim that for every wrong the law affords a remedy, but if one effectual remedy is afforded by the law the maxim is complied with."

Upon mature consideration we are unable to agree with the conclusion reached by the learned commissioner from whose opinion we have taken the above quotation, or the reasoning by which the conclusion is arrived at, and yet we have hesitated to interfere with the law established by that case, upon the principle that it is better that a rule once announced should be permanent and certain, rather than that it should in all cases establish the technically correct rule. The principle involved is, however, of so much importance to the profession and to the people of the state, and the construction given the statute in *Gillespie v. Cooper, supra,* so radically different from our views of its true meaning, that we think it better to get back to what we believe to be the correct doctrine at the earliest date possible. It has always been the rule in this state that a suit of this nature could not be maintained until the plaintiff had reduced his claim to judgment. When he has obtained his judgment at law, he can then appeal to the equity court to assist him in removing an obstruction to the collection of that judgment by clearing up what bidders might regard as a doubtful title. From this it will be seen that the right does not accrue to the creditor to maintain a creditors' bill until after judgment; and our statute of limitation does not by its terms commence to run against any suitor in our courts until his cause of action has accrued. Section 5 of the code is as follows: "Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued."

It is true that an extraordinary remedy is offered for the relief of creditors where the debtor is seeking to defraud them. An attachment may be had in such a case, whether the creditor's claim be due or not, but we might here remark that the general rule appears to be that the extraordinary remedy afforded the creditor by an attachment does nothing more than give him a lien upon the property attached, and does not entitle him to a judgment until his debt has matured. In this state the

statute provides that the plaintiff shall not have judgment until his claim is due. Code, sec. 242. By this method he may obtain a lien upon his debtor's property giving him priority over other creditors who had not been so vigilant, but his right to a judgment, in case his claim has not matured, is not at all advanced by this proceeding.

Again, it is undisputed law that a creditor who has two remedies offered him may elect which remedy he will pursue, and it is no objection that one remedy is barred by the statute, provided the remedy which he elects is not barred. *Lamb v. Clark,* 5 Pick. (Mass.) 193. In *Shipp v. Davis,* 78 Ga. 201, it is said:

"Where the creditor had an election between two rights of action for the same debt, he may, after one of them is barred, maintain a suit on the one not barred."

Let us see what would be the practicable result of the rule announced in *Gillespie v. Cooper, supra.* A, having a cause of action against B upon a note, might, upon learning that B had fraudulently transferred his property, commence an action in attachment, whether the note had matured or was not yet due. C, having a cause of action against B for a tort committed, could not obtain an attachment, his demand not being liquidated. As against A, therefore, the statute of limitation would run from the discovery of the fraud. As against C, the cause of action would commence to run only from the time of reducing his claim to judgment, or, if it should be held that it did commence to run, we would have the anomaly of the statute running against a claim upon which a right of action had not accrued to the plaintiff. The principle for which we are contending is well expressed by the supreme court of South Carolina in *Suber v. Chandler,* 18 S. Car. 526, in the following language:

"This principle, unless authority beyond question the other way can be found, ought to control in a case like this. It is claimed that these principles cannot apply in the face of the positive decision in this state that the

statute commences at the discovery of the fraud. This doctrine is not denied, but it must be taken in connection with that other principle, also held in this state, that to give currency to the statute there must be a plaintiff who can sue and a defendant who can be sued. *Bugg v. Summer,* 1 McMul. *333. The discovery of the fraud by a party who cannot sue on account of it amounts to no discovery. These are cases where an action can be commenced the moment the fraud is discovered, and to such cases this doctrine is properly applicable, but in those cases where this discovery gives no right of action at the time, the reason of its application entirely fails."

We apprehend, also, that the reasoning in *Gillespie v. Cooper, supra,* is unsound in its statement that fraud is the cause of action for which an attachment may be issued. In our view, the fraud of the debtor is not the cause of action. The cause of action is the debt due from the defendant to the plaintiff. That the defendant has fraudulently conveyed his property does not give the plaintiff a cause of action of which he is not already possessed. It merely gives him the right to sue on an unmatured claim, if his debt has not matured, and to have the assistance of a writ of attachment because of the defendant's fraudulent act. The cause of action is still the note or contract, the debt upon which the defendant is liable. The defendant's fraudulent acts merely give the plaintiff a remedy for securing his demand. As before remarked, it is true that the plaintiff, because of the fraud of the defendant, may have the assistance of a writ of attachment to secure his claim before judgment, but this right is given him as a security only, and not as a new cause of action, nor can it be used by one not having a cause of action in aid of which it may be invoked. After judgment at law, the creditor may pursue the following remedies: If he has not attached, he may file his creditors' bill against the fraudulent vendee of his debtor's estate. If he has attached the estate fraudulently conveyed, he may, if he elects so to do, sell the attached property and,

after sale and deed obtained, bring his action to quiet title against the fraudulent grantee; or he may, if he prefers, before the sale, call upon a court of equity to cancel the fraudulent deed, remove the obstruction, and declare the fraudulent conveyance void as to him. In the latter case the equity court is merely lending its assistance to the legal tribunal to enforce its judgment. The equitable action in such case is merely ancillary to the legal action, and in aid thereof. The fraudulent vendor is not a necessary party to any of these equitable proceedings, unless he has attempted to reserve some right or interest to himself in the estate conveyed; but the fraudulent grantee is an indispensable party, as it is the deed under which he claims that is attacked for fraud; and it is in one or the other of these actions that the plaintiff's cause of action is grounded upon the fraud of his debtor in conveying the estate sought to be reached, and of the vendee in accepting the conveyance. Not until the conveyance is attacked by a bill in equity is the plaintiff's cause of action based upon fraud; then for the first time is fraud his cause of action, and then for the first time can the statute of limitations of four years, in which an action for fraud is barred, be pleaded as a defense to such cause of action.

There are other reasons which appeal to the legal mind for refusing our assent to the doctrine of *Gillespie v. Cooper, supra.* As before stated, the creditor who has two remedies may pursue whichever remedy he may elect, and he is certainly entitled to pursue the ordinary and usual remedy afforded him by the laws of the state, and is not called upon to adopt the extraordinary and hazardous remedy of attaching his debtor's property, unless he believes it for his best interest so to do in order to gain a preference over other creditors. So, also, is he entitled, if he so desires, to pursue a remedy that gives him the right to try the question of fraud on issue duly made by the pleadings, and to cross-examine the witnesses of his adversary; in other words, to have the benefit of a formal trial to the court on the issue made, which is denied him

on a motion to dissolve his attachment, if the defendant elects to pursue that course. His failure to pursue this extraordinary remedy will not, in our opinion, start the running of the statute of limitations against a remedy which had not then matured. The authorities are practically agreed that the statute of limitations does not commence to run against a creditors' bill until the creditor has reduced his claim to judgment and exhausted his legal remedies. *Rose v. Dunklee,* 12 Colo. App. 403, 56 Pac. 342; *Mickel v. Walraven,* 92 Ia. 423, 60 N. W. 633; *Gates v. Andrews,* 37 N. Y. 657; *Weaver v. Haviland,* 142 N. Y. 534; *Reynolds v. Lansford,* 16 Tex. 286; *Wilson v. Buchanan,* 7 Grat. (Va.) 334; Bump, Fraudulent Conveyances (3d ed.), 547; *Brown v. Campbell,* 100 Cal. 635, 38 Am. St. Rep. 314; *Harrell v. Kea,* 37 S. Car. 369, 16 S. E. 42. Being convinced that the doctrine announced in *Gillespie v. Cooper, supra,* as follows: "The statute begins to run against a creditor from the discovery of the fraudulent act on the part of his debtor, whether the creditor's claim has been reduced to judgment or not, as he is not limited to a creditors' bill in order to obtain relief on the ground of fraud, but may attach the property fraudulently conveyed"—was announced without sufficient consideration, the same is overruled.

The defendants also relied upon the case of *State v. Osborn,* 143 Ind. 671, in which the following was held: "That judgment against a debtor was not rendered until after the expiration of the six years within which a conveyance by the debtor, fraudulent as to his creditors, could be attacked, due to the fact that the debtor persistently fought the action, does not entitle the creditor to sue to set aside such conveyance after the expiration of such time." (42 N. E. 921.) We do not think that this head-note fairly reflects the reasoning of the court. A careful reading of the opinion discloses that judgment was obtained against the defendant long prior to the expiration of the six years limited by statute for commencing an action upon the ground of fraud. The de-

fendant appealed the case to the supreme court, but did not supersede the judgment, and the creditors' suit could have been commenced immediately upon obtaining judgment, instead of waiting two or three years, as was done, for the opinion of the supreme court, and during which time the statute barred the action. In that case the plaintiff had every opportunity to prosecute his action before the statute intervened, whereas, in the present case, more than ordinary diligence has been shown by the plaintiff in pressing his demand and seeking the assistance of the court to enforce it. We do not wish to be understood as holding that a party having a matured claim may postpone the running of the statute of limitation at his pleasure by neglecting to bring suit within a reasonable time after discovering the fraud of his debtor. Equity requires a creditor to be active and diligent. In *Earl of Deloraine v. Browne,* 3 Brown, Ch. (Eng.) *633, *640, it is said that nothing will cause a court of equity to act "but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing." And we quite agree with the supreme court of Iowa, expressed in *Mickel v. Walraven, supra,* that "when, by reason of the laches and delay of the complainant, it has become doubtful whether the other parties can produce the evidence which is necessary to a fair presentation of the case on their part, or when it appears that they have been misled to their disadvantage by such conduct, a court of equity will deal with the remedy as barred. In such cases the court acts in obedience to the spirit of the statutes of limitations, and adopts the reasons and principles on which they are founded, rather than their literal requirements."

Coming now to the mortgage liens upon the land, it is shown that the mortgage executed to Dolezal was for services rendered in the various suits growing out of this transaction and expenses incurred therein. We incline to the belief that the amount of his mortgage is not excessive for the services performed, and that he is entitled to a

first lien upon the property. The evidence relating to the consideration for the mortgages of Mrs. Vech and George Bauman is very unsatisfactory. Mrs. Vech, who is a sister-in-law of Joseph Roubal, was for a long time a member of his family. It is claimed that she loaned him $500 some 20 years or more previous to the making of this mortgage. No note or other evidence of indebtedness was given at the time, nor intervening the loan and the making of the mortgage. No memorandum appears to have been kept of the state of the account between them, and, while it may be true that the money was furnished by Mrs. Vech, none of the circumstances disclosed tend to show that it was regarded as a loan. Bauman is a nephew of Joseph Roubal, and was about 18 years of age at the time it was claimed he furnished money to Mrs. Roubal to purchase certain property offered at sheriff's sale. There is no pretense that he had money, except what was earned by working out on a farm. No note was given or memorandum made of the amount claimed to have been furnished by him at the time. The circumstances do not impress us with the belief that the consideration was in fact advanced out of his own means. As between the parties these mortgages are good, but we think that they ought to be postponed to the claims of the plaintiff.

We recommend, therefore, that the decree of the district court be reversed, and that a decree be entered subjecting the land in dispute, after setting aside the homestead interest of Joseph Roubal and wife, to the payment of the plaintiff's judment, after first satisfying the mortgage of the defendant Dolezal, and that the cause be remanded to the district court for that purpose.

ALBERT 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 to the district court, with directions

to enter a decree subjecting the land in dispute, after setting aside the homestead interest of Joseph Roubal and wife, to the payment of the plaintiff's judgment, after first satisfying the mortgage of the defendant Dolezal.

REVERSED.

CHARLES E. YATES ET AL. V. JONES NATIONAL BANK.*
CHARLES E. YATES ET AL. V. UTICA BANK.†
CHARLES E. YATES ET AL. V. THOMAS BAILEY.†
CHARLES E. YATES ET AL. V. BANK OF STAPLEHURST.†

FILED OCTOBER 19, 1905. NOS. 13,030, 13,031, 13,032, 13,033.

1. **Banks**: MISCONDUCT OF OFFICERS: ACTION FOR DAMAGES. Damages resulting to a national bank from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable only in an action brought by the bank or for the benefit of all the stockholders and creditors thereof.

2. ———: OFFICERS: LIABILITY: ACTION. The officers of a national bank are personally liable for false reports made and published by them in pursuance of section 5,211, Revised Statutes, United States, to the party injured thereby, and the right of the injured party to maintain the action does not rest on the federal statute but the common law.

3. **False Reports**: ACTION: DEFENSE. It is no defense to an action of that character that such reports were made and published by the officers without knowledge of their falsity. Following *Gerner v. Mosher*, 58 Neb. 135.

4. **Res Judicata.** A cause of action, once finally determined between the parties on the merits, cannot afterwards, so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal.

5. ———: DEMURRER. The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of the case; but a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of *res judicata.*

* Reversed, 206 U. S. 158. † Reversed, 206 U. S. 181.

6. **Dismissal.** The voluntary dismissal of an action before final submission does not operate as an estoppel, and is without prejudice to a future action.

7. ———: COSTS: SECOND ACTION. Under our practice the common law rule, making the payment of costs in the action dismissed a prerequisite to the prosecution of another, is one which the trial court in the exercise of a sound discretion may or may not apply.

8. **Evidence** examined, and *held* sufficient to sustain the findings of the jury.

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

J. W. Deweese and *Halleck F. Rose,* for plaintiffs in error.

R. S. Norval and *J. J. Thomas, contra.*

ALBERT, C.

In 1893 the Jones National Bank and the Bank of Staplehurst each brought an action against Charles W. Mosher, Homer E. Walsh, David E. Thompson, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rollo O. Phillips; and Thomas Bailey and the Utica Bank each brought an action against all of the said defendants except David E. Thompson. The actions were brought in the district court for Lancaster county, and the several petitions, so far as the present inquiry is concerned, as substantially the same, and the allegations are, in effect, as follows: That from the 9th day of December, 1886, to the 21st day of January, 1893, the Capital National Bank of Lincoln was a corporation duly organized and existing under and by virtue of the banking laws of the United States; that the defendants were the directors and officers thereof, and, as such, had exclusive control and managment of its affairs; that during the whole of said period the bank was insolvent, as the defendants well knew, or by the exercise of due dili-

gence would have known, and that on or about the 23d day of January, 1893, it passed into the hands of a receiver, who at the commencement of the action was in possession of all of its assets; that from the 9th day of December, 1886, to the date such bank passed into the hands of the receiver, the defendants, in pursuance of the banking laws of the United States and on the demand of the comptroller of the currency, from time to time made statements, and caused and permitted statements to be made, to the comptroller of the currency, purporting to show the financial condition of such bank at the time such statements were respectively made, and caused such statements to be published in certain newspapers of general circulation in this state; that the defendants, although chargeable with knowledge of the true condition of said bank and that it was not in a prosperous condition, but insolvent, when such reports were respectively made, for the purpose of deceiving the plaintiff and others and thereby inducing them to deposit their money in said bank, made out and caused said statements to be made in such a way as to show that the bank was in a prosperous condition, and that it was safe and solvent; that such statements were brought to the notice of the plaintiff and that, relying thereon and believing them to be true, the plaintiff, induced thereby, made certain deposits in the said bank before it passed into the hands of the receiver; that, if each of the defendants did not have actual knowledge of the false and fraudulent character of such statements, and of the actual condition of the bank when such statements were made, his lack of knowledge was the result of his gross negligence in respect to his duties as an officer of the bank. Then follow allegations to the effect that the defendants, as officers of such bank, had loaned sums of money and had allowed and paid dividends to its stockholders while the bank was insolvent, contrary to, and in violation of, the banking laws of the United States. The concluding allegations are as follows: "And, by reason of the several violations

of the banking law, as above set forth, by these several defendants, they have become, and are, liable to this plaintiff for the damages he has sustained by reason of their said acts in the sum of $11,500, together with interest thereon from the 11th day of October to the 28th day of December, 1892, at the rate of seven per cent. per annum." In each case the defendants demurred on four grounds: (1) Want of jurisdiction of the subject matter. (2) Plaintiff's want of legal capacity to sue. (3) Defect of parties plaintiff. (4) Insufficiency of the facts stated to constitute a cause of action. The defendants also filed petitions, asking the removal of the causes to the federal court, for the reason that the actions involved a construction of the national banking act. The causes were removed, and thereupon the plaintiffs filed motions in the federal court, asking that the causes be remanded, for the reason that they involved no federal question. The motion was overruled.

In the action brought by the plaintiff Bailey, the federal court sustained the demurrer to his petition and dismissed the case. Bailey prosecuted error to the circuit court of appeals, where the rulings of the lower court on the motion to remand and the demurrer to the petition were sustained, and the judgment of dismissal was affirmed. *Bailey v. Mosher*, 63 Fed. 488. Whereupon the other plaintiffs dismissed their actions.

Thereafter, the plaintiffs each brought an action against the parties they had respectively made defendants before in the district court for Seward county. The petitions in the later cases, as they stood at the time of the trial, are substantially the same as those in the former, save that it is not alleged in the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned, purporting to show the financial condition of said bank, were made in pursuance of the banking laws of the United States or on the demand of or to the comptroller of the currency. The concluding of the latter petitions is as

follows: "Plaintiff states that, by reason of the facts as above set forth and the false and fraudulent statements, advertisements and representations of the defendants, the plaintiff has been damaged in the sum of twenty thousand dollars ($20,000)." On the application of the defendants the case of *Bailey v. Mosher* was removed to the United States circuit court, on the theory that it was brought under the United States banking act for misfeasance or mismanagement of the defendants as officers of a national bank. On motion of the plaintiff the circuit court remanded the cause to the state court, holding that no federal question was involved. *Bailey v. Mosher,* 74 Fed. 15. When the cause again reached the state court, the several petitions were amended by interlineation, whereby they were brought to their present form. Whereupon, on application of the defendants, the cases were removed to the United States circuit court, on the theory that the amendment had injected a federal question. The circuit court overruled a motion to remand, sustained a demurrer to the petition and dismissed the cause. *Bailey v. Mosher,* 95 Fed. 223. On appeal, the question was presented to the circuit court of apeals, the judgment of the circuit court was reversed and the causes remanded to the state court, for the reason that they involved no federal question. *Jones v. Mosher,* 107 Fed. 561.

The subsequent pleadings are somewhat voluminous, and it will suffice to say that the questions hereinafter discussed are sufficiently presented. The defendant Stuart made default and judgment was taken against him. The defendants Hamer and Phillips died after the action was commenced; as to the former the action was revived against his estate; as to the latter no proceedings for revivor were had. The cases were all tried at the same time and submitted on the same evidence. At the close of the evidence the court directed a verdict in each case in favor of the defendant Walsh. As to the other defendants, in the several cases to which they were respectively parties, the jury found for the plaintiff and

judgment was given accordingly, from which the defendants respectively prosecute error to this court.

One of the principal contentions of the defendants, reduced to its simplest form, is as follows: (1) Damages resulting to a national bank from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable of such officers only in an action brought by the bank, or for the benefit of all the stockholders and creditors. (2) The damages alleged in the petition resulted to a national bank from the misfeasance and mismanagement of its officers. (3) Therefore, such damages are assets of the bank, and are recoverable only in an action brought by the bank, or for the benefit of all the stockholders and creditors. The major premise is so nearly a self-evident proposition that it requires no elaboration. It is recognized in *Bailey v. Mosher, supra,* and in the cases there cited. But we are not disposed to accept the minor premise. It is true the petitions show misfeasance and mismanagement on the part of the defendants as officers of the bank, and that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegations may be contained in the petition, they also contain sufficient to constitute a common law action for deceit. That the party upon whom the deceit or imposition was practiced by the officers of a national bank may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of action does not rest on the federal statutes, but the common law, is no longer an open question. *Stuart v. Bank of Staplehurst,* 57 Neb. 569; *Gerner v. Mosher,* 58 Neb. 135; *Gerner v. Yates,* 61 Neb. 100; *Prescott v. Haughey,* 65 Fed. 653; *Gerner v. Thompson,* 74 Fed. 125; *King v. Pomeroy,* 121 Fed. 287; *Briggs v. Spaulding,* 141 U. S. 132.

But it is contended that the petitions are substantially the same as that in *Bailey v. Mosher,* 63 Fed. 488, and that the circuit court of appeals held that such petition committed the plaintiff to the theory that his action was for misfeasance and mismanagement, resulting in damages to the bank, recoverable only in an action by the receiver for the benefit of all the stockholders and creditors. The difference between the petition in that case and those in the cases at bar has already been pointed out, and the importance which the circuit court of appeals attached to some of the allegations of the petition in that case, which are omitted from those now before us, is shown by the following taken from the body of the opinion:

"We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants as its officers and directors. We cannot adopt the view of the plaintiff in error that those clauses of the petition which state, or tend to state, a cause of action for deceit at common law, should be segregated from the other clauses of the petition, and held to constitute the statement of the cause of action. The court cannot reject the allegations of the petition which do state a cause of action under the banking act, for the purpose of converting mere matter of inducement or surplusage, contained elsewhere in the petition, into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action. The plaintiff was not bound to state the legal effect of the facts set out in his petition, but, having done so, he cannot complain if his adversary and the court accept and act upon his own theory. Especially is this so when the petition is ambiguous, and will support that theory as well or better than any other.

"In the sense of the word, as used in code pleading, there is but one paragraph in this petition. The term

'paragraph,' as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of 'count' at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. It is a requirement of some codes that, if the petition contains 'more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered' (code, Ark. sec. 5,027); and all of them require that each cause of action shall be separately stated and numbered. The Nebraska code provides that, 'where the petition contains more than one cause of action, each shall be separately stated and numbered.' Consol. St. Neb. 1891, sec. 4,633 (93). And the supreme court of that state, construing this section, have said: 'A plaintiff cannot jumble his causes of action together.' *Schuyler Nat. Bank v. Bollong,* 24 Neb. 821. If, in drafting the petition, the pleader supposed he was stating more than one cause of action, he would undoubtedly have separately stated and numbered them, as required by the Nebraska code. No one can point out in this petition where the statement of one cause of action ends and another begins. The plaintiff cannot reform or amend his petition in this court. If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the 'violations of the banking law' therein set out. Section 5,239 of the Revised Statutes of the United States provides that: 'If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. * * * And in cases of such violation, every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all

damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.' It is obvious that the plaintiff, in the inception of this case, had in view the enforcement of the defendants' liability under the last clause of this section."

From the foregoing it is clear that the court proceeded upon the ground that the plaintiff, by those allegations of his petition which are omitted from those in the cases at bar, had committed himself to the theory that his cause of action was one arising under the federal banking law for misfeasance and mismanagement, resulting in damages to the bank. Those very allegations, it held, precluded it from "spelling out" a cause of action for deceit. If those allegations are to be held of such importance when included in a petition, it seems to us that their omission and the studied omission of direct reference to the federal banking law from the petitions in the cases at bar are equally significant. Besides, it was expressly held in *Jones v. Mosher,* 107 Fed. 561, that the petition involved no federal question; consequently, it presented no case arising under the federal banking law. It and the other petitions before us do state a cause of action for deceit. We know of no rule of pleading that would justify this court in assuming that the plaintiff intended to plead a cause of action which he could not maintain, so long as he has pleaded facts sufficient to constitute one which he could maintain. It may be said, in passing, that in this state no such meaning is attached to the term "paragraph" as that given it by the court of appeals in that case.

It is further insisted that the judgment rendered in that case supports the plea of *res judicata* interposed against the plaintiff Bailey in his present action. It is elementary that a cause of action, once finally determined between the parties on the merits, cannot afterwards, and so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal. And this rule is not limited to judgments

which are the result of a trial of an issue of fact, but applies as well to judgments on demurrer, where such judgments go to the merits of the case. *Gould v. Evansville & C. R. Co.,* 91 U. S. 526; *Bissell v. Spring Valley Township,* 124 U. S. 225; *City of Los Angeles v. Mellus,* 59 Cal. 444; *Gregory v. Woodworth,* 107 Ia. 151; *Rodman v. Michigan C. R. Co.,* 59 Mich. 397. But a judgment on a demurrer, which is based on a technical defect of pleading, a lack of jurisdiction, misjoinder of parties, or the like, does not involve the merits of the controversy, and is not available as *res judicata. House v. Mullen,* 22 Wall. (U. S.) 42; *Sivers v. Sivers,* 97 Cal. 518; *Roberts v. Hamilton,* 56 Ia. 683. When a plea of *res judicata* is interposed, the controlling question is whether the judgment offered to support it is based on the merits of the controversy. If it is, it is conclusive and forecloses further investigation. Applying that test to the present case, we do not think the judgment of the court of appeals in *Bailey v. Mosher, supra,* supports the plea of *res judicata.* It does not dispose of the action for deceit on its merits, but on the technical ground that, by the averment of mere conclusions of law, the plaintiff had committed himself to the theory that the action was of a different character, and precluded an examination of the merits of his action for deceit.

As to the other plaintiffs, it is insisted that they are concluded by the judgments of dismissal rendered in the respective cases by the federal court. It will be remembered that in all of those cases, save that brought by Bailey, the dismissal was on the motion of the plaintiffs, and before the trial of any issue of law or fact. A dismissal, under such circumstances, does not operate as an estoppel, and is no bar to another action. Section 430 of the code seems to embody the prevailing doctrine in regard to a voluntary dismissal, and provides, among other things, that an action may be dismissed by the plaintiff, before a final submission of the cause to the jury, without prejudice to a future action. See *Beals v. Western Union*

Telegraph Co., 53 Neb. 601; *Bank of Maywood v. Estate of McAllister*, 56 Neb. 188; *Harrison v. Hartford Fire Ins. Co.*, 112 Ia. 77. That the costs had not been paid in the cases voluntarily dismissed does not estop the plaintiffs to prosecute these actions. So far as our practice is concerned, the most that can be said of the common law rule, making the payment of costs in the former action a prerequisite to the prosecution of another, is that it is one which the trial court, in the exercise of a sound discretion, may or may not apply. *Union P. R. Co. v. Mertes*, 35 Neb. 204. The record shows no abuse of discretion in this instance.

It is next contended by the defendants that these cases were prosecuted on the theory that they were actions for misfeasance and mismanagement. The record does not sustain that contention. It is true there is a large amount of evidence in the record tending to establish misfeasance and mismanagement of the affairs of the bank by the defendants. But this evidence was not introduced for the purpose of proving such facts, but was, in most instances, inseparably connected with evidence tending to establish an action for deceit. That the court tried the cases as actions for deceit is clearly shown, we think, by an instruction following the statement of the issues, in which the jury were instructed that the burden of proof was on the plaintiffs to establish the allegations contained in their several petitions, closing with these words: "In other words, the burden is upon the plaintiffs severally to show that the defendants severally published, or caused to be published, or participated in the publication of, the statements of the condition of the Capital National Bank; * * * that the plaintiffs, each for himself, relied upon the truth of said statements; * * * that such statements were untrue."

It is earnestly contended by the defendants that the verdicts are not sustained by sufficient evidence. The evidence makes up three large volumes, and it is impossible to discuss it, save in the most general way, with-

out extending this opinion to undue length. It was incumbent on the plaintiffs to establish by a preponderance of the evidence: (1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements, and believed them to be true, and were thereby misled to their injury.

As to the first proposition, the evidence shows that none of the statements were actually made by all the defendants, but that each defendant participated in making some of them. It is urged on behalf of the defendant Thompson that he participated in making but one of them. That is a mistake. The evidence is conclusive that he signed and participated in making at least four of them; the first being that made and published December 28, 1886; the last that made and published July 9, 1891. The mistake arises, perhaps, from the construction which the defendants seem to place on the petitions. The petitions set out two of the statements at length, but it is also alleged that at divers other times and dates, between the 28th of December, 1886, and the 21st day of January, 1893, the defendants made and published other false and misleading reports purporting to show the condition of the bank, which were relied upon by the plaintiffs. The defendants appear to take the position that plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion.

As to the proposition that the statements were false, the evidence involves a maze of figures and computations covering a large portion of the bill of exceptions. The defendants contend, among other things, that the only discrepancies shown by this evidence are discrepancies be-

tween the balance book of the bank and the statements, and that such discrepancies are due to the fact that the comptroller of the currency, in pursuance of his authority under the federal banking law, required a different classification of the items in such statements than that under which they were classified on the books of the bank; that the relation between the totals was not thereby disturbed; consequently, such discrepancies are immaterial. The contention is not borne out by the record. The evidence not only tends to show discrepancies between the statements and the books of the bank, but also between such statements and the actual condition of the bank when the statements were respectively made, and that such discrepancies materially disturbed the relation between the totals of the assets and liabilities of the bank, and made its condition appear better than what it actually was. In short, there is ample evidence to sustain a finding that the bank was insolvent before and during the period covered by the transactions of the plaintiffs with it; that, had the statements been made in accordance with the facts, they would have shown, notwithstanding the classification required by the comptroller of the currency, the true condition of the bank, or at least sufficient to put prospective customers upon inquiry; but, instead, they exaggerated the assets, depreciated the liabilities, and were so framed as to conceal the actual condition of the bank and convey the impression that it was not only solvent, but prosperous. In the face of these facts, no manipulation of figures or refinement of argument can make it appear that the discrepancies are immaterial, or that there is a lack of proof that the statements were false. We do not wish to be understood to say that all of the defendants knew that such statements were false. We are satisfied that such is not the case. But, as was said in *Gerner v. Mosher,* 58 Neb. 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them, without knowledge of their falsity, is no defense.

As to the proposition that the plaintiffs relied upon such statements and believed them to be true, and were thereby misled to their injury, we consider it sufficiently established by the evidence. The plaintiff Bailey testified that he had had some money to invest, and read the published statements of the different banks including those of the Capital National, in order to keep himself informed of their condition.

The following is a portion of his testimony on this point: "Q. How did you come to go to the Capital National Bank? A. I went on purpose to see what they would pay on the money. And I thought it was just as good as the First National. Q. What information did you have as to the condition of the Capital National Bank? A. As soon as I went in they handed me a card, and the directors and stockholders of the bank were on that card. And I took the papers several years previous. Q. What papers? A. The Semiweekly Journal, I believe, and the Call. Q. What did you see? A. I saw the bank was in good circumstances, as I supposed, the way the amount of assets read in the published statements. Q. Well, what did you read in those papers—published statements? A. Yes, in the published statements in the paper. Q. Of what bank? A. The Capital National Bank of Lincoln, Nebraska. Q. State when it was, with reference to the time. A. I suppose ever since the bank started, for I read the papers every day, and took particular notice. I had some money to loan out, and I took a little notice where I thought was the best place to put it. Q. And what reliance did you make, if any, upon these statements? A. Well, that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank. Q. State what information, if any, you had, other than what was disclosed in the statements that were published. A. That was all the information I had. Q. You may state where you got your information as to the condition of this bank. A. I got it from the published statements. Q. And from any other source? A. No, sir, I had no other source

to get it from. Q. State what effect those published statements had upon your transacting business at the Capital National Bank, if any. A. Why, that is all the effect I had to go by was the published statement, supposing it was to be true and correct. Q. Did you believe it to be true? A. I believed it to be true or I wouldn't have put my money there, I would have kept it where it was. Q. Now, you may state if you knew at any time, or had any means of knowing, that the Capital National Bank * * * was not financially in the condition as represented in the condition as represented by its statements. A. I had no means of knowing. Q. Well, did you have any knowledge? A. I had no knowledge. Q. State what belief, if any, you put in those statements prior to the time you deposited your money in the bank. A. I believed the statements to be true, or I never would have put my money in the bank. That is sure."

Cross-examination—"Q. And there was no bank in Lincoln, or in the state that you knew of, that stood higher in the general estimation than it? A. Not in my own mind according to their statement. I don't think there was any in Lincoln, anyway."

His evidence, fairly construed, sufficiently shows that he relied upon the false statements, believed them to be true, and, consequently, that the bank was safe; that, acting in that belief and influenced by it, he transferred his business to such bank. It is true, his evidence shows that he was influenced somewhat by the higher rate of interest this bank was paying. But it is well settled that, where a false statement is relied upon and is a material inducement, it is immaterial that other causes contributed to influence the conduct of the injured party. *Runge v. Brown*, 23 Neb. 817; *Foley v. Holtry*, 43 Neb. 133; *Olcott v. Bolton*, 50 Neb. 779; *Sioux Nat. Bank. v. Norfolk State Bank*, 56 Fed. 139. The evidence adduced on behalf of the other plaintiffs on this point is stronger than that adduced by Bailey, and is sufficient, we think, in each case to sustain a finding that the plaintiffs relied upon the statements, be-

lieved them to be true, and were misled thereby to their injury.

We have gone over the evidence in this case with some care, fully alive to the liability of the jurors to draw wrong inferences in cases of this character, owing to the lack of time and facilities to consider and weigh the mass of evidence introduced, and are thoroughly satisfied that every fact essential to a recovery in these cases is sufficiently sustained by the evidence. We have also gone over the several errors assigned, and have examined them in the light of exhaustive briefs and luminous oral arguments of the learned gentlemen representing the respective parties, but have found no reversible error.

It is therefore recommended that the several judgments be affirmed.

By the Court: For the reasons stated in the foregoing opinion, the said judgments and each of them are

AFFIRMED.

CITY OF PLATTSMOUTH V. HUGH MURPHY.

FILED OCTOBER 19, 1905. No. 13,832.

1. Unconstitutional Statute: AMENDMENT. An act of the legislature amendatory of, or supplemental to, an unconstitutional law is unconstitutional and void, and chapter 14, laws 1887, being amendatory of, and supplemental to, chapter 14, laws 1885, which has been held unconstitutional and void, is also invalid.

2. Cities: CONTRACTS: RATIFICATION. A contract entered into by a city in violation of a mandatory provision of its charter is void, and can be ratified only by an observance of the conditions essential to a valid agreement in the first instance.

3. The maxim, *Ignorantia juris neminem excusat*, applied.

ERROR to the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed.*

H. D. Travis and *J. L. Root,* for plaintiff in error.

Matthew Gering, contra.

ALBERT, C.

This action was brought to recover the balance due on an alleged written contract between the city of Plattsmouth and one Fanning for the paving of certain streets of that city. The work was performed and accepted by the city, and, by the terms of the contract, the amount due the contractor therefor was $7,628.38. Of this amount the city paid $7,097.06, but afterwards refused to pay the balance. Fanning assigned his claim for the balance to the plaintiff. There was a verdict for the plaintiff, and from a judgment rendered thereon the city brings the case here on error.

Among other defenses, it is urged that the contract is void, because it was made in violation of certain mandatory provisions of the charter under which the city was acting at the time the contract was made. Among other violations relied upon to defeat the action is that no estimate of the cost of the improvement had ever been made and submitted to the city council by the city engineer, as required by law, before the contract was made. The evidence shows a history of the contract and of the preliminary steps leading up to its execution. We have gone over this evidence with care, and it is clear and convincing that no estimate of the cost of the improvement in question was ever made and submitted to the council by the city engineer before the contract was made.

This brings us at once to the question whether the making of such estimates and their submission to the city council were prerequisites to a valid exercise of the power of the city to make the contract, and to determine that question it is necessary to consider the provisions of the charter under which the city was acting at the time, so far as such provisions relate to the matter in hand. The

contract was made in 1892, and at that time the city had more than 5,000, but less than 10,000 inhabitants—a fact which stands admitted of record. In 1879 an act was passed and approved, entitled "An act to provide for the organization, government, and powers of cities and villages," which provided that all cities and villages containing more than 1,500 and less than 15,000 inhabitants should be governed thereby. Laws 1879, p. 193. In 1883 there was passed and approved "An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants." Laws 1883, ch. 16. As the defendant city then, as now, had less than 10,000 inhabitants, it was not affected by this act. In 1885 the legislature undertook to amend the title to the act of 1883 in such a way as to include cities of the second class having over 5,000 inhabitants. The title to the act is "An act to amend the title and sections 1, 2, 3 and 4, of an act entitled 'An act to provide for the organization, government, and powers of cities of the second class having more than ten thousand inhabitants.'" Laws 1885, ch. 14. This act was held void in *Webster v. City of Hastings,* 59 Neb. 563. Consequently, the powers and duties of the defendant city are to be determined without regard to this act. In 1887 an act was passed entitled "An act to amend sections 27 and 58, and to add subdivisions XVIII and LIX to section 52, of article II, of chapter 14, of the Compiled Statutes relating to 'cities of the second class,' having over five thousand (5,000) inhabitants, and to repeal said original sections 27 and 58 and all acts and parts of acts in conflict with this act." Laws 1887, ch. 14. This act clearly refers to the act of 1885, because there was no other act relating to cities having over 5,000 inhabitants. As we have seen, the act of 1885 was held unconstitutional and void, and it necessarily follows that all acts amendatory or supplemental thereto must fall with it. With the defendant city excluded from the act of 1883, because of having less than 10,000 inhabitants, and the acts of 1885

and 1887 unconstitutional and void, the act of 1879 is the act to which we must look to determine whether the lack of estimates of the cost of the improvement in question is fatal to the contract. Section 20 of the act of 1879, *supra,* so far as material at present, is as follows: "Before the city council shall make any contract for building bridges or sidewalks, or for any work on the streets, or for any other work or improvement, an estimate of the cost thereof shall be made by the city engineer and submitted to the council, and no contract shall be entered into for any work or improvement for a price exceeding such estimate; and in advertising for bids for any such work the council shall cause the amount of such estimate to be published therewith." Construing substantially the same provision, in *Fulton v. City of Lincoln,* 9 Neb. 358, this court held that the power of the city council to bind the city by contract would depend, among other things, upon an estimate having been first made and submitted by the city engineer. The provision requiring such estimate is clearly mandatory, and it is well settled that a contract of a city made in violation of a mandatory provision of its charter is *ultra vires* and void. *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla,* 40 Neb. 775; *City of Kearney v. Downing,* 59 Neb. 549; *Ottawa v. Carey,* 108 U. S. 110; *Lewis v. Shreveport,* 108 U. S. 282; *Smith v. Newburgh,* 77 N. Y. 130.

It is claimed that the city afterwards ratified the contract. In *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, supra,* in disposing of a like claim, Mr. Justice POST said:

"If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires,* and can be ratified only upon the conditions essential to a valid agreement in the first instance," citing a long list of cases in support of his position. The mandatory provisions of the charter were not complied with in this case in the first instance, nor does the record disclose anything remotely approaching a subsequent

compliance therewith, which would bring the case within the rule with respect to the ratification of an invalid contract, as just stated. In the same case the learned judge used the following language, which has our unqualified approval: "It is the recognized doctrine that whoever contracts with a municipality must, at his peril, take notice of the powers conferred by its charter and whether the proposed indebtedness is in excess of the limitations imposed thereby. *Hodges v. City of Buffalo,* 2 Denio (N. Y.), 110; *Lowell Five Cents Savings Bank v. Inhabitants of Winchester,* 8 Allen (Mass.), 109; *People v. May,* 9 Colo. 80; *Law v. People,* 87 Ill. 385; *French v. City of Burlington,* 42 Ia. 614. As said in the case last named, 'any other rule leaves the taxpayer at the mercy of the officers of the city and contractor, and would render the constitutional provision nugatory. Such a result cannot be contemplated or allowed to prevail.' And if a recovery is sanctioned upon a contract like this, on the ground that it has been subsequently ratified, surely legislative restriction upon corporate powers is in vain. It would then be within the power of willing or corrupt officers to accomplish by indirection that which is prohibited in the most explicit terms of the statute or charter. There may be cases in which considerations of equity and good faith will impose upon a municipal corporation the duty of returning property, or its equivalent, where an action would not lie upon contract, express or implied. That question is, however, not presented by the record of this case and is not decided."

It is claimed by the plaintiff that the parties to the contract proceeded on the theory that the acts of 1885 and 1887, *supra,* were valid, and, if we understand the argument on this point, that plaintiff's rights should be measured by those acts. In the first place, it is by no means clear that he would be in any better plight if those acts, or either of them, were to be taken as the measure of his rights. But it would be unprofitable to go into that question. *Ignorantia juris neminem excusat* is a maxim sanc-

tioned by centuries of experience. That it makes a hardship in individual instances is a matter of common knowledge; but is of little importance, when compared with the evils which would result from measuring the rights of a litigant, not by the law as it is, but by the law as he understands it to be.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

DANIEL G. RUBY V. JESSE E. PIERCE ET AL.

FILED OCTOBER 19, 1905. No. 13,931.

Judgment: PROCESS: SERVICE. An officer's return to a summons, showing service by leaving at the "last" usual place of residence of the defendant, does not show a compliance with the statute authorizing service by leaving a copy at the usual residence of the defendant, and a judgment based thereon is void for want of jurisdiction.

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

L. W. Colby, for plaintiff in error.

Hazlett & Jack, contra.

ALBERT, C.

This action was for the recovery of damages for breach of warranty in the sale of an animal for breeding purposes. A summons duly issued, and the officer's return

thereto is as follows: "April 10, 1903, Summons returned, indorsed: Received this writ on the 31st day of March, A. D. 1903, and on the 9th day of April, A. D. 1903, after diligent search, and being unable to find the within named D. G. Ruby in Gage county, I left a true and certified copy of the within summons at his last usual place of residence of the said D. G. Ruby. All done in Gage county, Nebraska. Witness my hand this 10th day of April, A. D. 1903. Fees, 85c. W. A. Waddington, Sheriff, By V. E. McGirr, Deputy."

The defendant made no appearance, and judgment by default was taken by the plaintiffs. Afterwards, at the same term, the defendant entered a special appearance, objecting to the jurisdiction of the court. These objections were overruled, and the defendant brings the record here for review on error.

It will be observed that the return to the summons does not show actual service on the defendant, but that service was made, or attempted, by leaving a copy of the writ at his "last" usual place of residence. In our opinion, the service is not merely irregular, but absolutely void. The statute permits service by leaving a copy of the summons "at the usual place of residence" of the defendant. Code, sec. 69. His usual place of residence is his place of abode at the time of service. *Blodgett v. Utley,* 4 Neb. 25; *Seymour v. Street,* 5 Neb. 88. "The words 'residence' and 'usual place of residence,' as employed in statutes, are generally synonymous with the term 'domicile,' hence the residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant. The domicile of a defendant is that place where he has his fixed and permanent home, and to which, when absent, he has the intention of returning." *Wood v. Roeder,* 45 Neb. 311. It is clear that such home must be his present home, as distinguished from a past or prospective home. In the return of the sheriff the phrase "usual place of residence" is qualified by the word "last." It will be presumed that in making this qualification the officer acted advisedly. The

return as thus qualified conveys the thought, not that a copy of the writ was left at the present residence of the defendant, but at some place at which the defendant had formerly resided or made his home. *Madison County Bank v. Suman*, 79 Mo. 527. It seems to us that the qualifying word as used in the return serves no purpose, save to distinguish between a past and present place of abode.

It is urged that all presumptions are in favor of the action of the trial court, and that its proceedings should be liberally construed according to our code. The office of the liberal spirit which pervades the code is to insure a speedy hearing on the merits, and to that end to ignore purely technical omissions not affecting the substantial rights of the parties. But the right of a party to his day in court and to an opportunity to be heard are substantial rights, and where, as in this case, instead of actual personal service, the plaintiff relies on a substitute therefor of doubtful sufficiency to apprise the defendant of the pendency of the suit, it is not an application of any technical rule to hold that such substituted service, to be valid, must be made in the manner prescribed by statute. Such service, at best, is calculated to work hardship and injustice. The statute authorizing it can be justified only on the ground of necessity, and should not be extended beyond the plain import of its terms, nor to cases where the language of the return is doubtful or ambiguous.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

NICHOLAS V. HALTER ET AL. V. STATE OF NEBRASKA.*

FILED OCTOBER 19, 1905. No. 13,955.

1. **Legislative Power:** USE OF FLAG. The power to prohibit the use of the national flag does not belong exclusively to the federal congress, but may be exercised by the several states.
2. **Constitutional Law.** Chapter 139, laws 1903, entitled "An act to prevent and punish the desecration of the flag of the United States" is not obnoxious to the fourteenth amendment to the constitution of the United States, nor to the provisions of the state constitution against depriving any person of his property without due process of law, and against special or class legislation.
3. **Police Power.** Notwithstanding the fourteenth amendment to the federal constitution, the state in the exercise of the police power may enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws operate to restrict the liberty of citizens of the United States.
4. **Courts:** CONSTITUTIONAL QUESTIONS. But whether legislation thus operating is in fact calculated to promote such ends is a legitimate subject of inquiry by the court, when the constitutionality of the act is assailed.
5. **Statutes:** VALIDITY. An act which is calculated to foster sentiments of patriotism is not vulnerable to the objection that it is not calculated to promote the welfare of society.

ERROR to the district court for Douglas county: EDMUND M. BARTLETT, JUDGE. *Affirmed.*

Cooper & Dunn and *S. R. Rush,* for plaintiffs in error.

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

ALBERT, C.

The defendant was convicted of a violation of the statute entitled "An act to prevent and punish the desecration of the flag of the United States." Laws 1903, ch. 139.

It is conclusively established that the defendants were

* Affirmed, 205 U. S. 34.

engaged in selling intoxicating liquors at retail, and sold and offered for sale beer contained in bottles, to which was attached a label on which there was printed a representation of the flag of the United States, and that such label was so used to advertise the beer and distinguish it from other products of a like nature. It is admitted that the beer was sold to the defendants by a brewing company in the bottles thus labeled, and that the representation of the flag thereon is a part of the registered trade mark of the brewing company. It is now claimed that the statute under which the defendants were convicted is unconstitutional, and consequently that the judgment of conviction must be reversed. The statute is as follows:

Section 1. "Any person who in any manner, for exhibition or display, shall place, or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color, or ensign, of the United States of America, or shall expose or cause to be exposed to public view any such flag, standard, color, or ensign, upon which shall be printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing, or any advertisement of any nature, or who shall expose to public view, manufacture, sell, expose for sale, give away, or have in possession for sale, or to give away or for use for any purpose, any article, or substance, being an article of merchandise, or a receptacle of merchandise upon which shall have been printed, painted, attached, or otherwise placed, a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark, or distinguish, the article, or substance on which so placed, or who shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt, either by words or act, upon any such flag, standard, color, or ensign, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one hundred dollars, or by imprison-

ment for not more than thirty days, or both, in the discretion of the court."

Section 2. "The words flag, color, ensign, as used in this act shall include any flag, standard, ensign, or any picture or representation, or either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color or ensign, of the United States of America, or a picture, or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, color, standard, or ensign, of the United States of America."

Section 3. "This act shall not apply to any act permitted by the statutes of the United States of America or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed, said flag, disconnected from any advertisement."

The defendants take the position that the act contravenes section 1 of the fourteenth amendment to the federal constitution, which prohibits the states from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or which shall deprive any person of life, liberty or property without due process of law, and the provisions of the state constitution against special or class legislation. This position is supported by two cases. *Ruhstrat v. People,* 185 Ill. 133, 49 L. R. A. 181, and *People v. Van De Carr,* 178 N. Y. 428, 70 N. E. 965. In each of these cases a statute substantially like the one under consideration was held unconstitutional. The Illinois case rests on three propositions, which for convenience we shall consider out of the order in which they are there discussed.

As to the first, namely, that the act is unconstitutional, "as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted to him by the federal constitution," little need be said. The right to advertise whiskey, beer, tobacco and other articles of merchandise by the use of the national flag is certainly not the subject of an express constitutional grant, and it can be said to be impliedly granted only in the sense that, like an infinite number of other acts, it is not prohibited. If the fact that an act or course of action is not prohibited by the federal constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our criminal code is largely waste paper. A moment's reflection would seem sufficient to show that the proposition is utterly unsound. Nor can we agree with counsel that the federal government has the exclusive power to regulate the use of the national flag. It is not infrequent that the same act is an offense against both the state and federal goverments. Counterfeiting furnishes an apt illustration. The power "to provide for the punishment of counterfeiting the securities and current coin of the United States" is expressly given to congress, but the offense is also punishable under the laws of the several states, the validity of which was upheld in *Fox v. State*, 5 How. (U. S.) 410.

The second proposition to be noticed is that "the act is also unduly discriminating and partial in its character." This proposition is based on the exceptions to the general provisions of the act. The exceptions enumerated in the Illinois act are fewer than in our own, but we do not think it can fairly be said that in either case they render the act unduly discriminating or partial. Neither act is aimed against any individual or class of individuals, but against certain acts. If it were competent for the legislature to deal with the subject, it was clearly competent for it to define the crime of desecration, and to specify

the acts constituting the offense. Every use of the flag not included in such definition or specification would be impliedly excepted from the operation of the act, and it would seem wholly immaterial that the legislature saw fit to make some acts the subject of an express exception, instead of narrowing the definition of the crime, or the specification of the acts constituting it, in such a way as to exclude the acts included in such exception. Besides, there is nothing in the state or federal constitution which forbids the classification of subjects for legislation, so long as the classification is not arbitrary. *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, and cases cited. There this court held that the statute providing for the taxing of an attorney's fee against a defeated insurance company was valid legislation. See also *Rosenbloom v. State*, 64 Neb. 342; *State v. Montgomery*, 92 Me. 433, 43 Atl. 13; *Ex parte Thornton*, 12 Fed. 538; *Davis v. State*, 51 Neb. 301. In this instance, the classification does not appear to be an arbitrary, but a most natural one. It is a matter of common knowledge that the use of the flag for advertising purposes offends the sensibilities of a large portion of our people. The statute is directed against the use of the flag for that purpose, but excepts from its provisions certain uses to which the most sensitive could not object. Without such exception, either express or implied, the statute would be oppressive, if not absurd.

We come now to the remaining proposition on which the Illinois case rests, namely, that the statute is an infringement upon the personal liberty guaranteed by the state and federal constitutions. The court in that case recognizes the right of the state, in the exercise of its police power, to enact such laws as are calculated to promote the health, comfort, safety and welfare of society, although such laws may operate as an infringement upon the personal liberty of the citizen, but holds that such laws must be in fact calculated to promote those objects, or some of them; otherwise, they are an arbitrary restraint on the citizen and unconstitutional. Such is the gen-

erally accepted doctrine. *Lochner v. New York,* 198 U. S. 45, 25 Sup. Ct. Rep. 539, contains a discussion of the police power of the states, and an examination of many cases bearing on the subject. After a somewhat lengthy discussion of the doctrine just referred to, the court in *Ruhstrat v. People, supra,* held that the statute was not calculated to promote any of the objects just enumerated, and was therefore unconstitutional and void. Again, we find ourselves unable to agree with a court to whose opinions, ordinarily, we attach great weight. Patriotism has ever been regarded as the highest civic virtue, and whatever tends to foster that virtue certainly makes for the common good. That familiarity breeds contempt has the force of a maxim. That contempt or disrespect for an emblem begets a like state of mind toward that for which it stands is a psychological law which underlies the canons against profanation which abound in every system of religious instruction. Such inhibitions against the irreverent use of sacred things are not mere arbitrary fulminations, but are grounded on sound practical considerations and the conviction that such use of the sacred emblems of religion is inimical to the cause of religion itself. The legislation under consideration may be justified on the same principle. The flag is the emblem of national authority. To the citizen it is an object of patriotic adoration, emblematic of all for which his country stands—her institutions, her achievements, her long roster of heroic dead, the story of her past, the promise of her future; and it is not fitting that it should become associated in his mind with anything less exalted, nor that it should be put to any mean or ignoble use.

Moreover, that the citizen resents any improper use of the flag of his country, and that his resentment is frequently carried to the extent of a breach of the peace, are matters of common knowledge. The state has the undoubted right to legislate in the interest of the public peace. As was said in *Updegraph v. Commonwealth,* 11 Serg. & Rawl. (Pa.) 406:

"An offense against the public peace may consist either of an actual breach of the peace, or doing that which tends to provoke and excite others to do it. Within the latter description fall all acts and all attempts to produce disorder, by written, printed, or oral communications, for the purpose of generally weakening those religious and moral restraints, without the aid of which mere legislative provisions would prove ineffectual."

The doctrine announced in that case seems peculiarly applicable to the case in hand, and to justify the act in question as a valid exercise of the police power of the state. In *People v. Van De Carr, supra,* the act was not held wholly void, but only in so far as it applies to articles manufactured and in existence when the act went into effect. To that extent it was held unconstitutional as in contravention of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law. If the statute is vulnerable to that objection, it would seem that a large number of our penal statutes, commonly regarded as valid, must fall by the same rule. When our act against taking fish with a seine went into effect, there were doubtless many seines manufactured and in existence. The same may be said of swivel guns, when the act making it unlawful to kill certain wild water-fowl with such guns became a law. But to our knowledge it has never been seriously claimed that either of such acts is unconstitutional and void to the extent that it applies to "articles manufactured and in existence when the act went into effect." By sweeping prohibitory legislation, those engaged in the manufacture and sale of intoxicating liquors were put out of business in the state of Kansas, and property whose chief value consisted in its use in connection with the manufacture and sale of such liquors was rendered practically valueless. The validity of this legislation was assailed on the ground that it operated to deprive those engaged in the traffic in intoxicating liquors of their property without due process of law. *Mugler v. Kansas,* 123 U. S. 623. Considering that feature of the case, the court said: . . . . . .

"Lawful state legislation, in the exercise of the police powers of the state, to prohibit the manufacture and sale within the state of spirituous, malt, vinous, fermented, or other intoxicating liquors, to be used as a beverage, may be enforced against persons who, at the time, happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments."

Nor does the fact that the flag was a part of the trade-mark of the brewing company place the defendants in any more favorable position. To the extent that the trade-mark is property, it comes within what has already been said. A patent or trade-mark puts no restraint upon the state in the exercise of its police power beyond the restraint imposed with respect to property generally. *Patterson v. Kentucky*, 97 U. S. 507.

We have gone over the act in the light of excellent briefs on either side and have reached the conclusion that it is not only a valid piece of legislation, but one well calculated to promote the common weal.

It is therefore recommended 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.

OMAHA STREET RAILWAY COMPANY V. JOHN BOESEN.

FILED OCTOBER 19, 1905. No. 14,250.

1. **Street Railways:** ACTION FOR DAMAGES: BURDEN OF PROOF. In an action against a street railway company for damages for injuries sustained by one of its passengers, the burden of proof on the question of negligence does not shift to the defendant upon proof that the injuries resulted from a derailment of the car.

2. **Negligence**: PRESUMPTION: EVIDENCE. In such case a presumption of negligence arises from the fact of derailment, but when that presumption is met by evidence which makes it equally probable that the accident was not due to negligence on the part of the defendant, in the absence of other evidence tending to establish the affirmative of the issue, the defendant is entitled to a verdict.

3. **Carriers Not Insurers.** A street railway company is not an insurer of its passengers. It is not bound to do everything that can be done to insure their safety. It fulfills its obligations in that regard when it exercises the utmost skill, diligence and foresight consistent with the practical conduct of the business in which it is engaged.

4. **Witnesses**: IMPEACHMENT. On a subsequent trial, the evidence of a deceased witness taken at a second trial cannot be impeached by showing that some of his statements on the witness-stand at the first trial are inconsistent therewith, where upon the second trial his attention was not directed to such statements, and he was given no opportunity to explain the alleged discrepancies.

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

John L. Webster and *W. J. Connell,* for plaintiff in error.

T. W. Blackburn and *R. S. Horton, contra.*

ALBERT, C.

This is an action wherein the plaintiff seeks to recover for personal injuries alleged to have been sustained by reason of the negligence of the defendant. It is alleged in the petition that, while the plaintiff was a passenger on one of the cars operated by the defendant on its street railway, such car, by reason of certain negligent acts and omissions of the defendant, was derailed, and, in consequence, the plaintiff was thrown violently therefrom, and thereby sustained serious and permanent bodily injuries. These allegations are put in issue by the answer, which also charges the plaintiff with contributory negligence. The reply con-

sists of a general denial. A trial of the issues resulted in a verdict and judgment for plaintiff. The defendant brings error.

The court instructed the jury that, if they found that the car was derailed, and that, in consequence, the plaintiff was thrown from the car and injured, it devolved upon the defendant to show by a preponderance of the evidence that the injuries were not due in any degree to a failure on the part of the defendant to exercise the utmost care, diligence and foresight for the safety of its passengers. It would seem that the theory of the court that the burden of proof on the question of negligence shifted to the defendant upon a showing that the plaintiff was injured in consequence of a derailment of the car is erroneous. Section 3, article I, chapter 72, Compiled Statutes 1903 (Ann. St. 10039), which charges railroad companies with liability for all damages inflicted upon the person of their passengers while being transported over their roads, except when the injury arises from the criminal negligence of the person injured, has no application to street railways. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672. The latter class of carriers are liable only when such injuries are traceable to some negligent act or omission on their part. Negligence is the gist of the action, and the plaintiff holds the affirmative, which he must establish by a preponderance of the evidence. Proof of the accident is not direct proof of negligence. The accident is a mere collateral fact, but one so commonly associated with a lack of due care that, when proved, it raises a strong probability, amounting to presumption of negligence. But when the proof of such accident is met by proof of other facts and circumsances making it equally probable that it was the result of causes wholly beyond the control of the defendant, and which no human skill and foresight could have guarded against or prevented, one probability offsets the other, and the affirmative of the issue, in the absence of other evidence tending to establish it, stands, just as it stood at the beginning of the controversy, not proved.

As was said by Commissioner AMES, in *Rapp v. Sarpy County*, 71 Neb. 382:

"The burden of sustaining the affirmative of an issue involved in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue, and remains there until the end."

The charge of the court is also open to the further criticism that it imposed upon the defendant too high a degree of care. A street railway company is not bound "to excercise the utmost care, diligence, and foresight, * * * for the safety of its passengers." In no case should such carriers be held to a higher degree of care than is consistent with the practical conduct of its business. While the precise point was not under consideration at the time, this court recognized the justice of the qualification just suggested in *Lincoln Street R. Co. v. McClellan, supra.* In *Johnson v. Seattle Electric Co.*, 35 Wash. 382, the court said:

"While the jury are told that a common carrier is not an insurer of the lives and limbs of its passengers, yet they are told that it is liable if it has not done everything that could have been done to insure their safety. The rule is not so onerous as this. There are many things that a carrier could do which would conduce to the safety of its passengers, but which it is not required to do, simply because the practical prosecution of the business will not permit of it. The carrier could, for example, by simply increasing its force of attendants, reduce to a minimum the happening of accidents like the one complained of here, but this, simple as the remedy may seem, might so increase the cost of operation as to compel the abandonment of the business. Hence the carrier cannot be held bound to do everything that can be done to insure the safety of its passengers, but only to the highest degree of care consistent with the practical conduct of its business. The measure of duty, as laid down by the trial court, was more than the law requires of the carrier, and for that reason erroneous."

To the same effect are the following: *West Chicago Street R. Co. v. Winters*, 107 Ill. App. 221; *Chicago Union Traction Co. v. Mommsen*, 107 Ill. App. 353; *Palmer v. Warren Street R. Co.*, 206 Pa. St. 574; *Fitch v. Mason City & Clear Lake Traction Co.*, 124 Ia. 665; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291.

The defendant asked the court to instruct the jury to the effect that, although they found that the car was derailed, yet if they found that at the time and place of the accident the car and track were in good order and condition, and without defect or imperfection, the presumption arising from the derailment of the car would be thereby overcome. It was not error to refuse this instruction, because it ignores the inference of negligence, in the operation of the car, which the jury might legitimately draw from the fact of derailment.

This case has been tried in the district court six times. A witness who had testified at the first and second trial died before the last trial. The testimony of the witness taken at the second trial was received on behalf of the plaintiff at the last trial of the case. For the purpose of impeachment, the defendant offered certain portions of the evidence of the same witness given at the first trial. The offer was rejected, and its rejection is now assigned as error. It does not appear that any attempt was made at the second trial to lay a foundation for the impeachment of the witness by calling his attention to the alleged inconsistent statements, or otherwise. The evidence offered was not, under the circumstances, admissible for the purpose of impeachment. 3 Jones, Evidence, sec. 851; *Ayers v. Watson*, 132 U. S. 394.

There is some question whether the defendant is in a position to complain of that portion of the charge in regard to the degree of care required of a carrier of passengers, but, as the judgment must be reversed for the error in the charge with respect to the degree of proof necessary to rebut the presumption of negligence arising from the derailment of the car and consequent injury to the plaintiff, we have not gone into that question.

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

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

HOLCOMB, C. J., not sitting.

STATE OF NEBRASKA, EX REL. HARVEY J. GROVE, V. JOSEPH McGUIRE ET AL.

FILED OCTOBER 19, 1905. No. 14,255.

1. **Mandamus:** ALLOWANCE. A writ of mandamus will be denied, unless it appear that there is some substantial right which is in jeopardy for want of a plain, adequate remedy in the ordinary course of law.
2. **Liquor License:** TRANSCRIPT OF EVIDENCE. One applying for a writ of mandamus to compel a license board to reduce to writing the testimony taken on the hearing of an application for license to sell intoxicating liquors must show, not only that he has a right to have the evidence reviewed in the district court, but that he intends to have it thus reviewed.
3. ———: APPEAL. Such evidence is not essential to give the district court jurisdiction of an appeal from an order granting a license; the filing of a certified transcript of the proceedings containing such order being sufficient for that purpose.
4. ———: ———: TRANSCRIPT OF EVIDENCE. Where the district court has acquired jurisdiction of such appeal by the filing of a certified transcript of the proceedings, and the license board fails to transmit the evidence taken before it at the hearing, the district court may enter a rule requiring the board to supply the omission.

ERROR to the district court for Douglas county: ALEXANDER C. TROUP, JUDGE. *Affirmed.*

L. J. Piatti and *John E. Reagan,* for plaintiff in error.

Charles A. Goss, contra.

ALBERT, C.

Three applications were made to the board of trustees of the village of Benson to sell malt, spirituous and vinous liquors. A remontrance, signed by a number of residents of that village, was filed in each case. A hearing was had on each application, in which the testimony was taken down in shorthand, but was not otherwise reduced to writing. This hearing appears to have closed on the 24th day of December, 1904, and a few days thereafter the village board overruled the remonstrances and granted a license to each applicant, whereupon the remonstrators gave notice of appeal. Three days thereafter the remonstrators gave further notice of appeal, and made demand on the clerk of the board that the evidence taken on the several hearings should be reduced to writing. The clerk refused to comply. On the 7th day of January, 1905, at a meeting of the village board, the remonstrators gave notice of appeal, and made demand on said body to reduce the testimony in each of said cases to writing and place the same on file "in their office," so that the remonstrators might have the same for the purpose of perfecting an appeal in each case. The board refused to comply with the demand, whereupon Harvey J. Grove, one of the remonstrators, filed his petition in the district court, which, as amended, shows a prayer for a writ of mandamus to compel the village board to reduce the testimony above mentioned to writing and deliver the same to the relator. The district court denied the writ, and the relator brings the case here on error.

In our opinion, the writ was properly denied. That mandamus is the last resort of a litigant and that the writ will issue only where there is no remedy in the ordinary course of law are elementary rules of practice. As a

corollary to these propositions, it would follow that the writ ought to be denied, unless it be shown that there is some substantial right which is in jeopardy for want of a remedy. The relator at this point fails, we think. The provisions of section 4, chapter 50, Compiled Statutes 1903 (Ann. St. 7153), requiring the testimony taken on the hearing of a remonstrance against an application for license to sell intoxicating liquors to be reduced to writing and filed in the office of application, have been held by this court to be only for the benefit of those entitled to have the evidence reviewed in the district court. *Moores v. State,* 58 Neb. 608. In other words, one applying for a writ of mandamus to compel a license board to reduce such testimony to writing is required to show, not only a mere omission of official duty, but that he has some right which will suffer by such omission. In this case it is quite clear that the relator was entitled to a review of the evidence in the district court. But he has neither pleaded nor shown in evidence that he has appealed or intends to appeal. It is true, he and the other remonstrators gave ample notice of appeal, and that fact is both averred and proved. But it falls far short of a direct averment and proof that they, or any of them, actually intended to appeal. Although the orders granting the licenses were made more than nine months ago, no appeal has been taken. The failure of the board to reduce the evidence to writing did not prevent the taking of an appeal. It is true, the evidence reduced to writing is a part of the record on appeal, but only a part of it. *Powell v. Egan,* 42 Neb. 482. It is not jurisdictional. To give the district court jurisdiction of the appeal, all that was necessary was to file a certified transcript of the proceedings containing the final order. Then, upon a showing that the record was not complete, that is, that it did not contain the evidence taken on the hearing, the district court could have entered a proper rule requiring the board to supply the omission. *Worley v. Shong,* 35 Neb. 312. It seems quite clear to us that the relator must fail, not

only because he has failed to show that he requires the evidence for the protection of any legal right, but also because, if he had intended to appeal, he had a plain, speedy and adequate remedy in the ordinary course of law.

It is recommended 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.

JAMES M. WECKERLY, APPELLEE, V. CADET TAYLOR ET AL., APPELLANTS.

FILED OCTOBER 19, 1905. No. 13,941.

Witnesses: COMPETENCY. In an action against a married woman, where the proceeding is adversary, her husband is not a competent witness against her, and a judgment against her in such proceeding, unsupported by competent evidence other than that of the husband, where the evidence of the husband was received over the objection of the wife, will be reversed.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed.*

G. W. Shields and *Greene, Breckenridge & Kinsler,* for appellants.

A. C. Wakeley, contra.

JACKSON, C.

On February 20, 1904, James M. Weckerly, appellee herein, filed a petition in the district court for Douglas county against Cadet Taylor, Emma L. Taylor and the Employers Liability Assurance Corporation, appellants herein. Omitting the formal parts of the petition, it was alleged, in substance, that on March 30, 1901, the plaintiff

recovered a judgment against the defendant, Cadet Taylor, upon which there was then due $1,808.79; that execution had been issued and returned unsatisfied as to the amount stated; that the judgment debtors were insolvent and unable to pay their debts; that on the 15th day of May, 1903, the defendant, Cadet Taylor, purchased and received from the defendant, the Employers Liability Assurance Corporation, a certain combination policy of accident insurance in the principal sum of $10,000; that on July 7, 1903, while the policy was in force, Taylor sustained an accident, and thereby became entitled to receive from said company a money indemnity of $50 a week, weekly, so long as he should be incapacitated or disabled from carrying on his customary avocation; that from the time of the accident he had been, and then was, prevented from transacting his regular business by reason of such accident, and was entitled to receive the sum of $50 weekly from the time of the accident, and would be entitled to receive the same during the continuance of his disability; that Taylor had fully complied with and performed all the conditions, stipulations and requirements of the policy, but that the insurance company had not yet paid him any of the indemnity, and was then owing the same; that the company had the said indemnity in its possession, but that Taylor, in order to hinder, delay and defraud his creditors, and especially the plaintiff, had, without consideration, pretended to assign and transfer his rights under the policy and the moneys due him thereunder to his wife, Emma L. Taylor, and had executed what purported to be such a conveyance; that said pretended assignment was void, and that said money in fact belonged to the said Cadet Taylor. The prayer of the petition was that the said assignment might be decreed to be without consideration, and for the purpose of hindering, delaying and defrauding the plaintiff in the collection of his said judgment; that it might be decreed that the insurance company held said moneys in trust for the said Taylor, and that such moneys should, by the order of the court, be paid over and de-

livered to the plaintiff to be applied toward the payment of the judgment. The defendants, Cadet Taylor and Emma L. Taylor, answered, denying such allegations of the petition as were not specifically admitted. It was alleged that, if Cadet Taylor had any interest in the policy of insurance, he had assigned the same to the said Emma L. Taylor. It was further alleged that the policy of insurance was, by agreement between the defendants, entirely for the benefit of the defendant, Emma L. Taylor, and that she paid the premium therefor out of her own money, and that no part of said transaction tended to hinder, delay or defraud any creditor of the said Cadet Taylor, and that it was not intended for any such purpose. It was further alleged that the said Cadet Taylor had no interest in the proceeds of the policy or in any amount of money that is due, or may become due, upon the policy. The Employers Liability Assurance Corporation answered separately, denying such allegations in the petition as were not specifically admitted. By its answer it was admitted that Taylor was insured under a policy of accident insurance; that Taylor had made no claim under said policy against the company in writing, or otherwise, as required by the terms of the policy, and that it had never been informed of the extent of his claim, if he had such claim. It neither admitted nor denied that it was indebted to Taylor, and submitted that it was not obliged to litigate the issues of liability, if any arise, between it and Taylor in that suit. There was a trial to the court, resulting in a finding for the plaintiff and against the Employers Liability Assurance Corporation for the sum of $1,250. The defendants have brought the case to this court for review.

At the trial the defendant, Cadet Taylor, was called and sworn as a witness in behalf of the plaintiff, and, over the objection of the defendant, Emma L. Taylor, that he was not a competent witness as against her, because of the relationship of husband and wife, was permitted to testify as to the judgment having been obtained against him in favor of the appellee; as to the character of the business

which he conducted; that he was the Cadet Taylor named in the policy of insurance; that he sustained an injury in a railroad accident, and the particulars of the accident; as to his being incapacitated on account of the injury, and the length of time during which he was so incapacitated; in fact, to all of the facts and circumstances shown at the trial tending to establish a liability in his favor and against the insurance company. And over the same objections he was permitted to testify as to the circumstances of the assignment of his interest in the policy to his wife, and the fact that no consideration was paid therefor. Without his testimony the record, as it stands, would not sustain the judgment rendered in the trial court. The appellee seeks to justify the admission of the husband's testimony on the assumption that, in an action by the wife against the company on the policy, the testimony solicited would be favorable to her interests, and that he was not, therefore, an incompetent witness in this action. We think, however, the true test is whether the proceeding in its character is an adversary one, and, if the interest of the party litigant who seeks to produce the husband's testimony is antagonistic to that of the wife, the husband should be held to be an incompetent witness in behalf of the antagonist. In this case the husband and wife are codefendants. The wife seeks no affirmative relief. Her position is purely defensive, and to hold that the husband, over the objection of the wife, should be permitted to testify against her in such a proceeding would do violence to both the letter and the spirit of the statute. Having reached that conclusion, it follows that the judgment cannot be sustained.

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

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

STATE OF NEBRASKA, EX REL. CLARK W. ADAIR, RELATOR, V. JOHN C. DREXEL, COUNTY CLERK, RESPONDENT.

FILED NOVEMBER 11, 1905. No. 14,397.

1. **Statutes:** REPEAL. A repealing clause in an act of the legislature, to the effect that certain specified sections of an existing statute are repealed "so far as the same conflict with" the act last passed, and repealing "all acts and parts of acts in conflict herewith," only repeals such parts of existing statutes as are so repugnant to the act last passed that both cannot stand. Prior statutes are repealed *pro tanto* and to the extent only that they conflict with the act last passed.
2. **The title of the act** (laws 1905, ch. 66), providing for the selection of certain candidates for public office and certain delegates at a primary election, and regulating such primary, does not embrace nor comprehend legislation concerning the registration of voters for general elections, and which is, in substance and effect, amendatory of existing registration laws.
3. **The title to the said act is not broad enough to permit legislation** concerning the form and makeup of the official ballots provided for by law to be used at a general election.
4. **Elections:** PRIMARIES: CONSTITUTIONAL LAW. The provisions found in said primary act, limiting the right of parties to participate in a primary election and to have the names of candidates for nomination to appear on the primary ballots to those casting at least one per cent. of the total vote cast at the last election, is a reasonable classification of parties and does not conflict with the constitution guaranteeing freedom in the exercise of the elective franchise.
5. ———: ———: ———. The provisions of the act under consideration, making the right of an elector to participate in a primary election to depend upon his party affiliation, is a legitimate exercise of legislative power, in no way conflicting with the fundamental law guaranteeing freedom in the exercise of the elective franchise.
6. **Candidates:** FILING FEES: CONSTITUTIONAL LAW. It is not competent for the legislature to provide in a primary election law that, before a person eligible to office can be voted for at a primary and have his name appear on a primary ballot, he shall pay a fee for filing nomination papers, computed at one per cent. of the emoluments authorized by law for the office to which such candidate aspires during the term for which he would serve, if elected.

6a. ———: ———: ———. Such provisions are an unwarranted hindrance and impediment to the exercise of the elective franchise, and in conflict with section 22, article I of the constitution.

6b. Statutes: VALIDITY. "Where a statute contains provisions which are unconstitutional, if the valid and invalid are not so connected as to be incapable of separation, and the valid portion is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid." *State v. Moore*, 48 Neb. 870.

6c. ———: ———. The provisions of the act under consideration found to be invalid are *held* not to affect the remainder of the act.

ORIGINAL application for a writ of mandamus to compel respondent to file certificate of nominations and place names of candidates on election ballot. *Writ denied.*

George A. Magney, for relator.

W. W. Slabaugh and *F. W. Fitch, contra.*

HOLCOMB, C. J.

The relator alleges, in substance, that the socialist party of Douglas county, a county having a population of more than 125,000, held a nominating convention on the 1st day of August, 1905, composed of the members of that party, and nominated candidates for county offices to be voted for at the general election to be held in November following; that a certificate was duly prepared by the officers of such convention of the nominations so made in the manner required by section 129, chapter 26, Compiled Statutes, 1903 (Ann. St. 5768); that a request was made of the respondent, the county clerk of said county, to receive and file said certificate of nominations, which he refused to do, giving as a reason for such refusal that such certificate of nominations was illegal and void, because not in conformity with the primary election act passed by the legislature of 1905, known as "Senate File No. 47," providing

for the nomination of candidates for county offices by primary election in counties having a population of more than 125,000 inhabitants. The said act of the legislature is alleged to be void for several reasons, because in conflict with the paramount law. A peremptory writ of mandamus is prayed, compelling the respondent to receive and file said certificate of nominations and place the names of the candidates therein certified to upon the official ballots to be voted at the general election to be held in November, 1905. An alternative writ was issued, to which the respondent interposes a general demurrer.

The act, the validity of which is challenged, is entitled "An act to provide for primary elections in counties having a population of more than 125,000 inhabitants, and to regulate the same; to provide for the nomination of certain candidates for certain offices at such primary elections; to provide for the election of delegates to state, congressional and judicial conventions; to provide for the election of members of the state, congressional and county committees of the several political parties at such primary election; to provide penalties for the violation of the provisions of this act, and to repeal sections 117, 118, 119, 120, 121, 122, 123, 124, 125, 125*a*, 125*b*, 125*c*, 125*d*, 125*e*, 125*f*, 125*g*, 125*h*, 125*i*, 125*j*, 125*k*, 125*l*, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, of chapter 26 of the Compiled Statutes of Nebraska for 1903, so far as the same conflicts with the provisions of this and all acts and parts of acts in conflict herewith." Laws 1905, ch. 66.

1. In determining whether the primary election law is valid, which is attacked by the relator, it seems necessary to first ascertain its general scope and effect, and how, if at all, it affects or has repealed the general laws theretofore in force providing for and regulating the nomination of candidates for public office by party conventions, and printing the names of such nominees on the official ballots to be voted at the general elections at which such offices are filled, such provisions being found in chapter 26, Compiled Statutes, 1903 (Ann. St. 5600-5868), under the title

"Elections." The act under consideration, it will be observed, applies only to counties of more than 125,000 inhabitants. It purports only to repeal sections 117, 118 (Ann. St. 5714, 5715), and the other sections therein mentioned of said chapter 26 "so far as the same conflicts with the provisions" of the act last passed and "all acts and parts of acts in conflict therewith." The general provisions of the election law relative to the nomination of candidates and the placing of their names on the official ballots in all counties of the state of a less population than 125,000, and in the state at large, it was intended by the legislature, should in nowise be disturbed nor interfered with. Although several sections of the general election law are specifically named as being repealed so far as in conflict with the provisions of the act in question, the legal effect of such a repealing clause is, we apprehend, to repeal only such portions of the general election law as are found to be in confiict with the primary act, and then only to the extent they may be found to be in conflict; that is, the old law may yet remain effective in its application to all counties and conditions not coming within the scope and purview of the primary act, and inapplicable *pro tanto* because of such repeal to counties having the population required before the primary act becomes operative. Although in a measure the repealing clause has the form of an express repeal, yet in legal effect it expresses nothing more than a legislative intention of repealing all prior acts and parts of acts in conflict with the provisions found in the body of the act in which the repealing clause is found. It is obvious that the legislature, in using the language it did, undertook only to provide a complete primary election law for counties having the required population, and otherwise to leave the old order of things as then existing, and to repeal only provisions of law then existing which were repugnant to and inconsistent with the new act. Both the old and the new laws were intended to operate in the spheres to which they were applicable, and to be and remain in force and effect

iveness wherever applicable. It is only when the provisions of the older law can serve no purpose after the enactment of the new, and are so repugnant to the latter that both cannot stand, that the former must give way in its entirety. Reduced to its last analysis, the repealing clause found in the act we are considering can have no more force and effect than would a repealing clause purporting only to repeal acts and parts of acts in conflict with the one last passed; and this latter form of repeal adds nothing to the rule that the act last passed repeals by implication former acts found to be in irreconcilable conflict therewith. In either case there is a repeal to the extent of any repugnancy, but no further. The insertion, therefore, of such a general repealing clause as we here find adds nothing to the repealing effect of the act. 1 Sutherland, Statutory Construction (2d ed.), sec. 256; *State v. Yardley,* 95 Tenn. 546, 34 L. R. A. 656. We are therefore of the opinion that the act in controversy repeals only such portions of the general election law as are found to be in conflict with its provisions, and then only to the extent of such conflict, and that otherwise all the provisions of the former act remain in full force and effect. It is, of course, to be understood that, in so construing the effect of the repealing clause of the primary act being considered, we are not to lose sight of the other rule, so closely related thereto, to the effect that repeals by implication are not favored, and will be held so only when the conflict is so apparent and pronounced that both provisions cannot stand at the same time.

2. Section 3 of the act under consideration provides that the primary election shall be held on Tuesday, seven weeks preceding the general election in November, and it is also therein provided that "said day shall be the first day for the registration of voters in all cities and such counties where registration is required." In section 19 of the same act there is found, also, the following provisions relating to the subject of the registration of voters: "In cities wherein registration is by law required, no voter shall re-

ceive a primary ballot or be entitled to vote until he shall have first been duly registered as a voter, then and there in the manner provided by law. Provided, that in cities where registration is by law required, no elector shall be permitted to vote the ballot of any party except that which he was registered at the last general registration as affiliating with, unless he be a first voter or shall have moved into the precinct since the last preceding day of registration. For the purpose of providing a system of registration of party affiliation, it shall be the duty of the mayor and city council of each city wherein registration is required, to provide in the registration books used for the purpose of registering persons who are qualified to vote at the next general election, space for the registration of all persons who may desire to participate in any primary election. Such space shall be provided in said registraton books, immediately following the last perpendicular ruled column in such books and shall be headed as follows: 'Party Affiliation.' It shall be the duty of the supervisors of such regular state registration to ask each person who applies to be registered the question, 'What political party do you desire to affiliate with ?' And the name of the political party given with such party so applying to be registered shall be recorded in the column provided in such registration books for that purpose. In case any party applying does not desire to state his party affiliation, he shall not be required to do so, nor shall his failure so to do act as a bar to his registration for the purpose of voting at any election other than a primary election, but shall debar him from voting at any primary election." It is evident that the registration contemplated in the last above quoted provision was more especially for the benefit of the voter who offered to vote at the primary election, and who was then and there required to first register in the manner provided by law. We are advised by counsel that during the pendency of the bill in the legislature, resulting in the enactment in question, other bills were pending having for their object the amendment of the general registration law so that

the first registration day should be coincident with primary election day as fixed in the present act. This possibly explains the incongruity in the language used, and why the time fixed as primary election day is declared to be the first day of registration under the general law, and, also, why, as in section 19, provisions are made for the registration of voters presenting themselves to vote at the primary election before such votes are received, as well as the provisions found therein for recording the name of the political party with which such voter affiliates. Whatever may be the true explanation of these provisions being found in the primary election law under consideration, or what may have been the real purpose of the legislature in incorporating them in the act, as passed, we think it is manifest that they cannot be upheld as a constitutional exercise of legislative authority. These provisions relate to a registration law applicable to general elections rather than to a primary election. They are, manifestly, amendatory to the general registration laws. As a registration law the new act is altogether incomplete and imperfect. The provisions regarding the registration of voters, found in the legislation we are considering, are not embraced within, nor comprehended by, the title to the act, and their incorporation therein is therefore in contravention of the fundamental law, which declares: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Const., art. III, sec. 11. The title of the act relates exclusively to the subject of primary elections for the nomination of certain candidates and delegates, and to the repeal of existing laws in conflict therewith. The provisions under consideration refer especially to the subject of the registration of voters and is in its effect amendatory of existing statutes. These provisions are foreign to the subject matter embraced in the title of the act. They must therefore, under the rule now well established in this

jurisdiction, as announced in the following cases, be held to be inoperative and void. *Smails v. White,* 4 Neb. 353; *White v. City of Lincoln,* 5 Neb. 505; *Burlington & M. R. R. Co. v. Saunders County,* 9 Neb. 507; *Trumble v. Trumble,* 37 Neb. 340. The law as a whole is not necessarily affected by reason of these void provisions. The act yet remains a complete and a symmetrical whole. Its provisions are capable of enforcement so as to carry into operation the legislative intent, and it can hardly be said that the invalid provisions we have just considered were an inducement for the passage of the remainder. With the general registration law unaffected, as we are constrained to hold it is, the primary act in question serves its full purpose under the provisions found therein for the nomination of candidates and delegates which, by the act, it is sought to regulate and control.

The conclusion reached in respect of the matter last discussed disposes of the objection that only those who have registered at the last general election, except first voters and those moving into the precinct since such election, are permitted to vote at a primary election as therein provided for. It does not appear to have been the legislative intent to exclude from voting at such primary election those not having registered at the last general election, nor do we think it competent for the legislature to do so. Such election must be free to all who are otherwise qualified to participate therein. Where there is a failure to register, when good and sufficient reasons exist, this fact would not justify the disfranchisement of a voter at such primary. *State v. Corner,* 22 Neb. 265. The provisions for registration before voting, as we have seen, contemplated a registration on the same day as the primary election, and, those provisions having been eliminated, no obstacle in the way of registration or the absence thereof can prevent a voter otherwise qualified from casting a ballot at such primary election.

3. Section 32 of the act under consideration declares: "In no case shall the candidates of any political party be

entitled to be designated upon the official election ballot as the candidate of more than one political party, and shall be designated upon the official ballot as the nominee of the party in whose nomination statement his name appears, or in whose certificate of nomination his name appears as the political party with which he affiliates." It is argued that this section undertakes to regulate the manner in which a candidate's name shall appear on the official ballot to be cast at the general election, is amendatory to the general election law with reference to the form and makeup of the official ballot, and is foreign to the subject embraced in the title of the act relating, as it does, to primary elections. Counsel for respondent tacitly concedes the point, but parries by contending that the section refers only to the names of those aspiring to a nomination, and their manner of appearing on the ballots to be voted at the primary, and that it has no relation nor application to the official ballots to be voted at the general election. This latter view does not impress us as being correct. "Official election ballot" and "official ballot," as therein used, obviously refer to the general election ballot, and not to primary ballots. In the definition of terms in the fore part of the act it is said the word "election" shall be construed as a general or city election, as distinguished from a primary election, and that the word "primary" is to be construed as the primary election provided for by this act. In section 29 the same words, "official election ballots," are unquestionably used with reference to the official ballots prepared for the general elections. The section under consideration speaks of "candidates of any political party" and "the nominee of the party," manifestly, we think, in the sense of a person who has been selected by a party as its candidate for a public office, and not with reference to one who is desirous of becoming a candidate and whose name is submitted to the choice of the voters at a primary election. The party's candidate and its nominee cannot be determined until after a choice has been made at a primary. The section

must, we are constrained to say, be held to apply to the appearance of names on the official ballots to be cast at a general election, and not to ballots voted at a primary.

Even though the construction contended for by respondent be permissible, very serious questions would arise as to the power of the legislature to prevent the selection at a primary of the same person as a candidate for a public office by more than one of the political parties, if the voters thereof so chose to do. Of this, however, nothing more need here be said. The act relates to the holding of primary elections. The section under consideration has to do with the form and makeup of the official ballot to be voted at a general election, and is therefore, and for the reasons heretofore fully discussed, not embraced in the subject matter of legislation as comprehended by the title to the act, and is invalid and of no force or effect. It is manifestly amendatory to the law regulating the form of the official ballots, and is also special legislation, in that it would apply only to the official ballots to be voted by the electorate in counties only having a population in excess of 125,000. Its declared invalidity in no way affects the remainder of the act, nor does it appear to be an inducement to its passage.

4. It is contended that the act is void for the reason that its provisions are limited to political parties casting one per cent. or more of the votes cast at the last preceding election. In this connection it is to be borne in mind that, under the general election law as it now stands, and which has stood unchallenged since its adoption, a political party, in order to be entitled to a place for its candidates on the official ballot, must have cast a certain per cent. of the total votes cast at the last preceding election. It is true, provisions are therein found for the nomination of candidates by new political parties and by petition, regardless of the numerical strength of the party supporting such candidates. These provisions are yet preserved, and afford a simple method by which candidates of a party of insufficient numerical strength to participate in a primary may

obtain representation on the official ballot, and whose candidate can be voted for as freely as those nominated at such primary. The primary law has left these provisions intact and unaffected, and through them we think none are, contrary to the fundamental law, prevented from freely and without impediment or hindrance exercising their right of franchise as guaranteed by the constitution.

It is quite true, we think, that when the legislature undertakes by laws of this character to regulate and control the internal affairs of political parties, and to determine the manner and method of making party nominations for public offices, it must do so without discrimination and with equal consideration and benefit to all. But it is equally necessary to recognize the existence of political parties and to classify them by some convenient standard. The law would hardly serve its purpose without some limitations and restrictions as to a party's numerical strength. To say that any number of voters, however small, may associate themselves together as the embodiment of some political principle or policy of government, and be entitled to representation on the primary ballot, is to pave the way to endless confusion, and to destroy in a large measure the objects sought to be attained by such a law. The limitation as to numbers must be fixed at some point, and the requirement of a numerical strength of at least one per cent. of the total votes does not seem unreasonable, nor an unwarranted restriction on the right of the membership of a political organization to be represented on the primary election ballots. In Ohio the same question arose with reference to the right of party nominees to appear on the official ballot to be voted at the general election. The supreme court of that state hold to the view that "the only question is whether the requirement of section 6, that a certified nomination shall be by a political party which at the last election 'polled at least one per cent. of the entire vote cast in the state,' is valid. Certainly, the right of a qualified elector to vote at all elections is secured by section 1, article V of the constitu-

tion, but that the exercise of the right is subject to such regulations, looking to a fair election, as do not unreasonably or unnecessarily impair it, is a proposition too familiar to call for discussion or citation of authorities. Some restriction upon the right to have nominations printed upon the blanket ballot is necessary to render it practicable. In view of the small ratio of voters required to make a certified nomination, and in view of the right to have nominations made by papers or petition signed for that purpose, and of the right conferred by the act upon every voter to supply the names of all persons for whom he may desire to vote, we cannot say that the exercise of the right is unreasonably impeded." *State v. Poston,* 58 Ohio St. 620, 42 L. R. A. 237.

Indeed, a greater percentage than is here required is held to be a proper and valid exercise of legislative power to classify political parties for such purposes. *State v. Jensen,* 86 Minn. 19, 89 N. W. 1126. The requirement as to numerical strength in the case cited was ten per cent. of the total vote. The court, in speaking on this point, observes:

"We are of the opinion that the legislature may classify political parties with reference to differences in party conditions and numerical strength, and prescribe how each class shall select its candidates, but it cannot do so arbitrarily, and confer upon one class important privileges and partisan advantages and deny them to another class, and hamper it with unfair and unnecessary burdens and restrictions in the selection of its candidates. While it seems to some of us that the percentage of the vote selected as the basis of the classification in this act is larger than necessary, yet it was a question for the legislature, and we are not justified in holding that the classification was arbitrary."

In a later case the same court again expresses itself as follows: "The law is also constructed upon the theory that if, at any time, any political party previously in existence shall have become so enervated that it has no liv-

ing and vital principles to present to the people, and there are no men having sufficient interest to stand as sponsors for and advocate its principles, then there no longer remains a necessity for its recognition as a party for the purpose of selecting nominees at such election." *State v. Johnson,* 87 Minn. 221, 91 N. W. 840. See also *Ladd v. Holmes,* 40 Ore. 167, 66 Pac. 714.

We are of the opinion that the limitation complained of is a reasonable regulation regarding party nominations at primary elections, and that it does not infringe on the constitutional safeguards invoked as an insuperable obstacle to its validity.

5. By section 19 of the act the right of an elector to vote at a primary is made to depend upon his political affiliation with the party for whose candidates he desires to cast a ballot. It is therein provided that no person shall "be entitled to vote at such primary election until he shall have first stated to the judges of said primary election what political party he affiliates with, and whose candidates he supported at the last election, and whose candidates he intends to support at the next election." Provisions are also made for challenging any person offering to vote at such primary election, and for his making oath to the truth of the statements above required as to party affiliation and his support of candidates of the party with whom he is offering to vote. It is difficult to perceive any valid objection to provisions of this character, when applied to a primary election law. These laws replace party nominating conventions. The regulation of the membership of the party and of the right to participate in the nomination of its candidates, in this respect, is taken from the party and placed in the control of the legislature. The integrity of the party and the success of its principles and policies can be best maintained by the participation in its affairs of those only who are at heart in sympathy with the objects and ends to be attained by the organization, and loyal to its tenets. An indiscriminate right to vote at a primary would tend, in

many instances, to thwart the purposes of the organization and destroy the party. A hindrance to one, not a member of a party, from participating in the selection of the party's delegates and candidates can in no proper sense be said to interfere with the free exercise of the elective franchise as guaranteed by the constitution. All that is required is that the party offering to vote at the primary, in order to be entitled to vote with either of the parties engaged in nominating candidates thereat, shall have affiliated with such party, supported its candidates generally at the last election, and intend to do so at the next. Open declaration of allegiance to party is absolutely essential to the proper working of any primary law. "By his mere offer to vote for delegates to a convention of any party, the elector does, in effect, declare his intention to support the nominees of such convention, and the oath is provided for as a guaranty of the truth of the declaration already made by such offer to vote." *Rebstock v. Superior Court*, 146 Cal. 308, 316, 80 Pac. 65.

6. The more serious objection to the law, as we view the act as a whole, is the requirement of section 5 with reference to the fees to be paid by those who become candidates for nomination for office at the primaries therein provided for. It is declared that the fees to be paid for filing nomination papers "shall be computed at one per cent. of the emoluments authorized by law for the office to which such candidate aspires, during the term for which he would serve, if elected." It is to be observed that the amount thus required to be paid before one can have his name submitted to the voters at such primary is fixed arbitrarily, and wholly regardless of the value of the services performed in filing the nomination papers. A person aspiring to be nominated for clerk of the district court would be required to pay, perhaps, $200. A candidate for the nomination of county clerk, probably, $40, other candidates for county offices different sums, ranging between the two extremes. Is it competent for the legislature to impose burdens of this character on

those desiring to become candidates for public offices, the nominations for which come within the provisions of the primary law? Can a test of ability to pay fees of the magnitude mentioned be made as to one's right to be voted for at a primary election? It is, at first glance, apparent that these enormous fees prevent many from becoming candidates for party recognition, who otherwise would be willing to yield to a public demand that they become candidates for nomination for a public office. It is said the fees required to be paid in the manner stated are for the purpose of defraying the expenses of the primary. It is not so stated in the act. It is expressly provided the expenses of the primary are to be paid out of the public treasury. It is not, therefore, required of us to pass upon the question of the power of the legislature to require those submitting their names to be voted for at a primary to pay the expenses thereof. It appears from the act itself that there is no relation between the charges made for filing nomination papers, as therein provided, and the expenses incident to a primary election, nor to the value of the services rendered in filing such papers. The charges are arbitrary and unreasonable. They make the pecuniary ability of a person to pay the same a test as to his qualification to become a candidate for a party nomination. The law is as objectionable as if the test were based on a property qualification, or the amount the elector had contributed to the public revenues. The primary election contemplated in the act may not in and of itself be an election within the meaning of the constitutional provisions which guarantee that "all elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Const., art. I, sec. 22. It is, however, a means to an end. It is a part of the election machinery by which is determined who shall be permitted to have their names appear on the official election ballot as candidates for public office. To say that the voters are free to exercise the elective franchise at a general election for

nominees, in the choice of which unwarranted restrictions and hindrances are interposed, would be a hollow mockery. The right to freely choose candidates for public offices is as valuable as the right to vote for them after they are chosen. Both these rights are safeguarded by the constitutional guaranty of freedom in the exercise of the elective franchise. Say the supreme court of Pennsylvania:

"The importance of the relation of the primary to the general election must be apparent. * * * Primary elections and nominating conventions have now become a part of our great political system, and are welded and riveted into it so firmly as to be difficult of separation. * * * It is as much an election law when it strikes at the fraud at the primary election as when it arrests the fraudulent ballot just as it is ready to be dropped into the box at the general election." *Leonard v. Commonwealth,* 112 Pa. St. 607.

Nominations for public office are to be considered in a dual aspect. There is involved, first, the right of every eligible person to be voted for by any elector who desires to do so, and, second, the right of each elector to exercise choice among all who are eligible. "The two rights may be protected by the same legislation, but it is important to remember that there is involved, not merely the right of an individual to be a candidate, but the right of every other person to select him for the office; practically the feasibility of independent political movements depends upon the second right. Now these rights, like the right of suffrage, depend, for their effectual exercise, upon an appointment of time, place, and manner; and the legislature has undoubted power to make regulations for protecting these rights and insuring their enjoyment." Wigmore, Ballot Reform: Its Constitutionality, 23 Am. Law Rev. 719, 730.

We should not, of course, confuse provisions amounting only to regulation, even though an inconvenience results, with such as, in a substantial way, interfere with the free

exercise of the elective franchise. The provisions under consideration, we are satisfied, go beyond those of regulation, and operate as a substantial impairment of the right of the electorate to freely choose its candidates for public office, and therefore infringe on the constitutional guaranty above quoted. In Michigan a primary law required that a person should be denied a place on the primary ballot as a candidate for nomination unless he should in advance declare on oath the fact that he was a candidate for the office. The supreme court held such provisions to be violative of the constitutional provisions prescribing the oath required of public officers and that no other oath, declaration or test should be required. In the discussion of the principles involved the court very pertinently argue:

"The provision of this law which requires that, before the name of any candidate shall be placed upon the ballot at the primary election, such candidate shall on oath declare his purpose to become such, excludes the right of the electorate of the party to vote for the nomination of any man who is not sufficiently anxious to fill public station to make such a declaration. The man who may be willing to consent to serve his state or his community in answer to the call of duty when chosen by his fellow citizens to do so is excluded, and the electorate has no opportunity to cast their votes for him. * * * The authority of the legislature to enact laws for the purpose of securing purity in elections does not include the right to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise. *Attorney General v. Detroit Common Council,* 58 Mich. 213. We cannot escape the conclusion that the provision in question does most seriously impede the electors in the choice of candidates for office, and that it is in conflict with the provisions of section 1 of article 18 of the constitution. It by no means follows that reasonable provision may not be made by legislation for an initiative in placing upon the ballot the names of those to be voted for,

as, for instance, by requiring a petition by a stated percentage of the voters of the party. But this provision goes further, and precludes the voters from choosing as a candidate one who declines to himself seek the office." *Dapper v. Smith*, 138 Mich. 104, 101 N. W. 60.

In the case at bar it is at once apparent that the condition imposed with reference to the payment of what is termed a filing fee most seriously interferes with the right of the electorate to freely choose from among those eligible to office whomsoever they may desire, and that this, for the reasons given, amounts to an unwarranted hindrance and impediment to the free exercise of the elective franchise. This provision must therefore fall. The act as a whole does not, however, necessarily fall because of the part thereof held to be invalid. It yet remains complete and capable of enforcement. Unless these provisions, held to be invalid, were an inducement to the passage of the act, and without which it would not have received legislative sanction, the act, as a whole, should be permitted to stand. Whether or not such invalid provisions were an inducement to the remainder should be gathered from the act itself. Before we would be justified in declaring the whole act void and of no force, it should be made apparent from an inspection of it, having in view the legislative purpose in its adoption, that the invalid portion operated as an inducement to the passage of the law. The rule seems to be "that where the act itself includes two distinct subjects the whole act must be treated as void, from the manifest impossibility of choosing between the two; but that this rule applies only in those cases where it is impossible from an inspection of the act itself to determine which part is void and which valid. When this can be done the rule does not apply, unless it shall appear that the invalid portion was designed as an inducement to pass the valid, so that the whole, taken together, will warrant the belief that the legislature would not have passed the valid part alone." *Trumble v. Trumble*, 37 Neb. 340.

"Where a statute contains provisions which are uncon-

stitutional, if the valid and invalid are not so connected as to be incapable of separation, and the valid portion is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the rest sustained, if it is manifest that the void part was not an inducement to the legislature to pass the part which is valid." *State v. Moore,* 48 Neb. 870.

Applying the rule deducible from the authorities cited, we are constrained to the view that the invalid portion was not an inducement or consideration for the passage of the valid portions, and that the statute is a valid and enforceable act of the legislature, save with reference to the provisions herein found to contravene some of the provisions of the fundamental law. It follows that the writ prayed for must be denied, and it is accordingly so ordered.

WRIT DENIED.

JOSEPH GUTSCHOW V. WASHINGTON COUNTY.*

FILED NOVEMBER 11, 1905. No. 13,864.

1. **Drains: CLAIM FOR DAMAGES: WAIVER.** When a person files a claim for damages to his premises caused by the location of a proposed drainage ditch, he thereby waives objection to any irregularities in the proceedings to establish the same. *Davis v. Boone County,* 28 Neb. 837.

2. ———: **DAMAGES.** Where an assessment to the amount of the special benefits he has received has already been assessed against the owner of lands over which a drainage ditch is proposed to be constructed, the value of such special benefits should not be deducted from any damages accruing to the land not actually taken for the construction of the proposed improvement. *Martin v. Fillmore County,* 44 Neb. 719, distinguished.

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

* Rehearing denied. See opinion, p. 800, *post.*

Brome & Burnett and *E. C. Jackson,* for plaintiff in error.

E. B. Carrigan, F. Dolezal and *Walton & Mummert,* *contra.*

LETTON, C.

This is a proceeding in error from the district court for Washington county to review the proceedings of that court in the trial of an appeal from an allowance of damages made in proceedings for the construction of a drainage ditch in that county; the ditch being the same one the proceedings to establish which were attacked in the case of *Morris v. Washington County,* 72 Neb. 174. The plaintiff Gutschow is the owner of lands through which the line of the proposed ditch runs. In the report of the engineer filed in the proceedings for the establishment of such drainage ditch, the cost of the location and construction of the ditch through the lots and lands benefited by said ditch belonging to the plaintiff is apportioned at the sum of $1,124.20. On the filing of the report a time was fixed by the county clerk for a hearing upon the same, and notice duly given according to the statute, and in pursuance to the notice the plaintiff filed objections to the jurisdiction of the county board, and also filed his claims for damages and for compensation for land actually taken. The objections to jurisdiction were overruled, and a finding made by the county board that 3 5-10 acres of the plaintiff's land were appropriated for the location of the ditch, of the value of $140, and they further appraised the damages to the remainder of the tract at the sum of $100, and overruled and disallowed the plaintiff's claim for further compensation. On appeal to the district court a trial was had to a jury and a judgment rendered in favor of the plaintiff for $225, to reverse which judgment these proceedings are brought.

So far as the objections to jurisdiction are concerned,

they are disposed of by the decisions in *Dakota County v. Cheney,* 22 Neb. 437; *Darst v. Griffin,* 31 Neb. 668, and *Dodge County v. Acom,* 61 Neb. 376, and we deem it unnecessary to further discuss this question. We have heretofore held that, where a landowner files a claim for damages caused by the location of a public road over his land, he thereby waives any objections on the ground of irregularity in locating the road. *Davis v. Boone County,* 28 Neb. 837. When the board once acquired jurisdiction, all subsequent irregularities were waived by the filing of the plaintiff's claim for damages. The district court therefore did not err in sustaining the motion to strike a part of the plaintiff's petition.

The question raised as to the right of appeal from the finding of the board that the improvement was conducive to public health, convenience or welfare has already been considered and determined in *Dodge County v. Acom, supra,* and with the rule there announced we are content.

The trial court instructed the jury that, for the diversion of the natural flow of the water of Fish creek from the natural channel thereof through the plaintiff's land, he could only be allowed nominal damages. It is urged by the defendant that this instruction, even if erroneous, was wthout prejudice, since the jury were also instructed that the measure of damages for the injury and depreciation to land not actually taken is the difference between the fair market value of the whole farm immediately before and after the location thereof, less the amount appropriated for the ditch, and futher, in this connection, that they were entitled to take into consideration the effect of the location of the ditch upon the uses to which the farm is adapted, or its productiveness, and whether the location and construction of the ditch render it more or less attractive to buyers. They were also told they should consider the size of the farm, the size and general manner of the construction of the ditch, the manner in which it crosses the lands of the appellant, and whether or not the construction of the ditch renders it more or less conven-

lent to carry on said farm. The defendant argues that under these instructions all actual damages which the plaintiff might suffer from the diversion of the waters of Fish creek are included, and that an instruction to allow only nominal damages for the diversion of Fish creek is proper. As to this proposition we have some doubt. If the instruction as to the waters of Fish creek had been omitted entirely, there is no doubt that the other instructions are broad enough to direct the jury to consider the damages, if any, suffered by the appellant by reason of the diversion of these waters, but this item of damages was removed from their consideration altogether by this instruction being given directing them to allow only nominal damages therefor. Whether the instruction is so prejudicially erroneous as to justify a reversal we are not compelled to determine at this time, but think that upon a new trial it should not be given.

The fifth assignment of error challenges the action of the trial court in refusing to give instruction No. 1 asked for by the plaintiff and in giving instruction No. 5 on its own motion as to the deduction of special benefits. Instruction No. 5 referred to is as follows: "When you have ascertained the total damages, if any you find, suffered by appellant to the portion of his land not taken, you must deduct therefrom any special benefits which you find said land may have derived from the location and construction of said ditch. In determining the special benefits accruing to land by reason of the construction of the ditch, it is proper for you to take into consideration whatever will come to the land from the drain or ditch, making it more valuable for tillage or more desirable as a place of residence, or more valuable in the general market, the true and final test being what will be the influence of the proposed improvement on the market value of the property; but you are in no event to take into consideration the general benefits which the appellant may derive from the location and construction of said ditch; and a general benefit is one which is enjoyed, not by appellant alone, but by

the property owners along the line of said proposed ditch." The objection made to the refusal of the instruction asked by the plaintiff and the giving of this instruction is that it announces an improper rule as to the deduction of special benefits. It will be seen that the rule laid down in this instruction is that which has been adopted by this court with reference to the ascertainment of damages by reason of the appropriation of land for the purposes of the construction of a highway or railroad, or for other like public purpose.

The plaintiff contends that a different rule should obtain in a case where the landowner himself is compelled to bear the burden of the special benefits which his land sustains from the improvement. A special tax of $1,124.20 has been levied and assessed upon the lands of the plaintiff to pay for the construction of this improvement. This assessment represents the value of the special benefits which will accrue to the real estate through which the ditch passes by reason of its construction, and he is compelled to pay that amount to reimburse the county for the money expended in the construction of the ditch. In the case of a highway being opened across his premises or of a railway being constructed thereon, the landowner may, in a sense, be said to pay the value of the special benefits which he derives by reason thereof, by such value being deducted from whatever damages the land not actually taken for the improvement may suffer by reason of the same. In the case of a drainage ditch, however, these benefits are assessed against him by the very act of the public authorities which appropriates his land to the public use. To allow these benefits to be deducted from any damages which he may suffer to the land not taken would be to compel him to pay twice to the public the value of the special benefits which he has received. This would manifestly be unjust and inequitable, and would impose a burden upon him in excess of that borne by those whose lands were not damaged. To illustrate, suppose two adjoining proprietors were each assessed $1,000 for special

benefits accruing to the lands by reason of the proposed improvement. If the land of one were not damaged in any way by the proposed improvement, this amount would be the extent of the burden imposed upon him; but, if the land of the other proprietor were so traversed by the line of the ditch that the value of the remainder of the tract was depreciated $2,000 by the construction of the ditch, if he were then compelled to offset against the damage $1,000 in special benefits received by reducing his compensation to that extent, his burden would be double that of his neighbor, since he would be mulcted $2,000 for the same improvement for which his neighbor pays but $1,000. In the case of a railroad or a highway the value of the special benefits accruing to the land is not assessed against, and paid by, the landowner, and hence the same should be deducted from his incidental damages; but with a drainage ditch the conditions are different, and the rule laid down by the district court would compel a double burden to be placed upon the landowner whose premises were damaged. Where special benefits have already been assessed against the owner of lands damaged by a proposed drainage ditch, the value of such special benefits should not be deducted from any damages accruing to the land not actually taken for the construction of the proposed improvement. *Livingston v. Mayor of New York,* 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *Drainage Commissioners v. Volke,* 163 Ill. 243, 45 N. E. 415; *Thomas v. County Commissioners,* 5 Ohio N. P. 449. The apportionment of the cost of the ditch to each landowner is an exercise of the power to tax, but the taking of his property and the ascertainment of the damages he may suffer thereby is an exercise of the power of eminent domain. The statute makes no provision for the deduction of damages from the amount assessed against the land as special benefits, but the method provided is that the county authorities shall establish the apportionment according to benefits first, and afterwards examine claims for damages and allow compensation therefor. No method is provided for offsetting one against the other.

It is true that in *Martin v. Fillmore County,* 44 Neb. 719, it is said that, in addition to recovering the value of the land appropriated, the landowner should recover any damages sustained by that portion of the land not appropriated, and as against the latter item special benefits, but not general benefits, may be set off. That case, however, was reversed, for the reason that no damages whatever were allowed the defendant; and it is said:

"The foregoing is a rule interpreting that clause of the constitution providing that the property of no person shall be taken or damaged for public use without just compensation therefor. Whether the act providing for the construction of such ditches (Comp. St. ch. 89) contemplates an assessment of damages in accordance with this rule is immaterial to the case." The question under consideration was neither raised nor determined in that case, and the rule announced here is not inconsistent with the result then reached.

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

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

REVERSED.

The following opinion on motion for rehearing was filed March 17, 1906. *Rehearing denied:*

Drains: DAMAGES: BENEFITS. Where an action is brought to recover damages occasioned by the construction of a drainage ditch, and it appears that the special benefits received by any particular tract of land exceed that portion of the cost of the ditch apportioned to it, the special benefits in excess of the cost may be set off against consequential damages.

LETTON, J.

The former opinion (*ante,* p. 794) filed in this case apparently having been misunderstood by counsel, we think it

proper to make more clear the meaning of the court. The proper rule was announced in the second paragraph of the syllabus, as follows:

"Where an assessment to the amount of the special benefits he has received has already been assessed against the owner of lands over which a drainage ditch is proposed to be constructed, the value of such special benefits should not be deducted from any damages accruing to the land not actually taken for the construction of the proposed improvement. *Martin v. Fillmore County,* 44 Neb. 719, distinguished."

But counsel seem to have construed the opinion to hold that the amount of the special benefits is in all cases determined by the cost of the ditch. It is clear that the value of the special benefits which may accrue to a particular tract of land by the construction of a drainage ditch may greatly exceed that portion of the cost of the ditch apportioned to that tract. The proportion of the cost assessed to any particular tract cannot exceed the special benefits accruing to that tract, but the special benefits may greatly exceed the proportion of the cost of construction which is assessed against it. As is pointed out in the opinion:

"The statute makes no provision for the deduction of damages from the amount assessed against the land as special benefits, but the method provided is that the county authorities shall establish the apportionment according to benefits first, and afterwards examine claims for damages and allow compensation therefor. No method is provided for offsetting one against the other."

This language refers to the proceedings whereby the cost of the improvement is assessed against the land benefited. At that time no method of offsetting benefits against damages is provided. However, when an action is brought to recover damages and it appears that the special benefits received by any particular tract of land exceed that portion of the cost of the ditch apportioned to it, the special benefits in excess of the cost may be offset against consequential damages, that is, such part of the

value of the special benefits as is in excess of the assessment can be used to reduce the damages.

The motion for rehearing is

OVERRULED.

HANNAH BEVARD V. LINCOLN TRACTION COMPANY.

FILED NOVEMBER 11, 1905. No. 13,957.

1. **Carriers: LIABILITY FOR INJURIES.** In order to render a street railway company liable for injuries received by a person traveling upon one of its cars, the negligence of its servants, either alone or in concurrence with the negligence or wrongful act of other persons, must be the proximate cause of the injuries.
2. **The wrongful act of a stranger is not sufficient to make it liable,** unless it might reasonably have been foreseen and guarded against by the carrier.

ERROR to the district court for Lancaster county: LINCOLN FROST, JUDGE. *Affirmed.*

Frederick Shepherd, for plaintiff in error.

Clark & Allen, contra.

LETTON, C.

This is an action for negligence against the defendant as a common carrier of passengers. The material allegations of the plaintiff's petition are that on the fourth of July, 1903, "the plaintiff was a passenger on the city-bound car over the last particularly described track, and, having paid her fare, was, without negligence or fault on her part, seated in a regular seat provided for passengers on the right hand side of said car; that at about the corner of F and Seventeenth streets, about as the car was rounding a curve, there was an explosion under the same, caused by the wheel coming in contact with an explosive on the rail, whereby the trap in the floor of the car was forced up

and open at the side and close to the plaintiff, and flame and smoke came through from beneath with such suddenness and in such quantity as to terrify and bewilder plaintiff and benumb her faculties, and plaintiff wholly without negligence on her part, but involuntarily and unavoidably, started to her feet in the instinct of self-preservation, and by the motion of the car, and by reason of the said involuntary and unavoidable start, was instantly thrown to the pavement, striking on her head and left shoulder and sustaining painful and permanent injuries of the nature and extent hereinafter shown; that the day on which the said accident accurred was a national holiday, and that during all of said day, and all over the system of the defendant, its cars were constantly exploding torpedoes and other explosives placed on the rails for the purpose of making noise, and that the defendant knew this, and had notice of the danger to the plaintiff and to its other passengers at the time and place above mentioned; that the defendant provided no broom or sweep to said car so as to have removed any explosive matter from the rail; that the defendant failed to provide a floor to said car of sufficient strength and construction to prevent the said trap from flying up and open, and so endangering plaintiff in the manner described; that defendant did not provide any watchman or guards to prevent the explosive from being placed upon the rail, and that it did not provide any guard-rail or other means to keep plaintiff upon the car; and that in all of these respects defendant was negligent."

The defendant filed a general denial, and also pleaded contributory negligence on the part of the plaintiff. At the close of the testimony the defendant moved the court to direct a verdict in its favor, which was done, and the case dismissed.

The evidence shows that the plaintiff, who is a single woman, 49 years old, residing in the city of Lincoln, had gone to the suburb of Normal on the cars of the defendant company about 2 or 3 o'clock in the afternoon; that there were many explosions upon the rail, appar-

ently of torpedoes, as she went out; that she returned about 10 o'clock at night upon one of the cars of the defendant, taking the front seat on the right-hand side of the car, a little in front of the trucks. The car was an open one, with a guard rail on one side, the other side being left open for access and egress. On the way home, and at or near the curve at the corner of Seventeenth and F streets, the plaintiff testifies that a violent explosion took place upon the track, and smoke and flame came up around the seat, and around a trap-door which was situated just back of the plaintiff's seat, by which she was greatly frightened and alarmed. She testifies that she jumped to her feet, and the next thing she knew she was upon the pavement. There were several other passengers upon the car, who testified as to the violence of the explosion, and that it startled them, but no one except the plaintiff rose to his feet until after the car stopped. One of the passengers testified that the plaintiff rose to her feet, hesitated a moment, and then jumped off the car, and that the conductor called to her not to jump. The car stopped almost immediately, and the plaintiff was picked up and was taken to her home. It appears that during the day the company had been much annoyed in the business part of the city, about six or eight blocks from this point, by the placing of torpedoes or other explosives upon the track by boys and men, and that its manager had attempted to put a stop to this, by requesting individuals to desist, by appealing to the police for protection, and upon one line by fastening gunny sacks in front of the car wheels in such a manner as to brush the explosives off the rails. This, however, proved ineffectual, by reason of boys and men running up and cutting the sacks off while the motorman and conductor were engaged. The manager of the company testified that there were no explosions during the day upon the tracks on that part of the line where the accident occurred, while two residents of that locality testified that there were many small explosions during the afternoon near this point; one of these witnesses testify-

ing that there was a much louder explosion than any of the others late in the evening after he had gone to bed, sufficiently loud to awaken him, and cause him to get up and go to the window. There is no evidence of any explosion, either at this point or elsewhere, during the day of the volume of sound of this one, or causing smoke and flame within the car, such as this one caused.

The plaintiff bases her right to recover upon the general principle that a street railway company is a common carrier of passengers, and therefore bound to exercise extraordinary care, and the utmost skill, diligence and human foresight, and is liable for the slightest negligence. It is argued that the defendant, though knowing the likelihood of dynamite and explosives being placed upon the track, did nothing to protect the passengers; that it did not patrol the track, nor provide a sweep, nor fasten down the trap in the floor of the car, and that any one of these precautions would have prevented the injury to the plaintiff. The principles thus asserted as governing the liability of street railway companies to their passengers are undoubtedly the law in this state, and this is conceded by the defendant. If the defendant had, in the exercise of the greatest care, reasonable grounds to believe that violent explosions would occur, such as were liable to frighten its passengers to such a degree that, under the influence of a temporary loss of self-control thus caused, the operation of the car might cause them injury, it would be negligence upon the part of the company to omit to take all reasonable precautions to protect its passengers against the probability of such injury.

The carrier, however, is not an insurer against accidents, and, while it is liable for the concurrent negligence of its servants and third parties, or the negligence of its servants in combination with the torts of third parties which result in personal injuries to passengers, yet it is only liable when its servants have been guilty of negligence. The element of negligence on its part or on the part of its servants must exist. The wrongful act of a

third party alone is not sufficient to make it liable. If the fact that an explosion of the violence of that which frightened the plaintiff could reasonably have been foreseen by the carrier as one of the incidents liable to occur during her transportation, it would have been guilty of negligence in failing to protect her against liability to suffer any personal injuries of which it might be the proximate cause, but, so far as the evidence shows, such explosions as had occurred during the day, though annoying, were petty in their nature compared to this, and not such as might reasonably cause the carrier to anticipate one of such great violence. Even against such petty explosions, however, the evidence shows that the carrier had appealed for police protection, and that from the number of miles of track which it was operating it was impossible for it to procure men enough to patrol the same. The plaintiff asserts that the defendant, by the use of sweeps extending in front of each truck, might have removed explosives from the rail, but the evidence shows that it would take from two to three hours to equip each car with sweeps, and that in the summer time their use produced such a cloud of dust as to make it almost impossible to carry passengers. So far as the evidence shows, an explosion of the violence of the one complained of was unprecedented in the operation of the defendant's railway, and it had no reasonable grounds to anticipate the occurence of the same. The act was the wrongful act of third parties, over whom it had no control, and whose operations it could not reasonably foresee.

Under these circumstances, we can see no reason for holding the defendant liable for plaintiff's injuries, and recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

WILLIAM A. CLINGAN V. DIXON COUNTY.

FILED NOVEMBER 11, 1905. No. 13,970.

Contributory Negligence: ERRONEOUS INSTRUCTION. Under the circumstances of this case the giving of an instruction as to contributory negligence, which there is no evidence to support, *held* prejudicial error.

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

McCarthy & McCarthy and *J. V. Pearson,* for plaintiff in error

C. A. Kingsbury and *F. A. McMaster, contra.*

LETTON, C.

This is an action to recover damages for injuries sustained by reason of the negligence of the defendant county in failing to maintain in proper repair a bridge across a stream in Dixon county. At the trial a judgment was rendered for the defendant, from which the plaintiff prosecutes error to this court.

The testimony shows that the accident happened upon a bridge which was about 50 feet long, including the plank approaches, and 14 feet wide. The floor of the bridge was made of two-inch plank, but for a width of 8 feet in the center of the bridge there was a double floor of two-inch plank, over which the travel was conducted, leaving a space of about 3 feet on each side of the double plank between that and the railing. On the morning of the accident the plaintiff was riding upon horseback, along the road leading to the bridge, and the last he remembers about what occurred before the accident is that he was riding at a walk at a point about 200 to 300 feet before he reached the bridge; the next thing that he remembers is when he recovered consciousness in the house of Mr. Rahn, after the accident. Two neighbors living

near the bridge were informed by a boy that a man was lying upon the bridge, and, when they reached there, found the plaintiff trying to support himself upon the bridge railing, with blood upon his face, and found his horse standing in the creek beneath the bridge. The plaintiff seems to have been severely injured. The railing of the bridge was not broken, and the horse had apparently slipped through between the railing and the floor. One of the floor planks was broken outside of, and close to the edge of, the double planking; it was held to the joists by a single spike in such a manner that if one stepped upon the plank it would go down, and it would rise again when the pressure was removed, leaving a hole large enough to admit a horse's hoof. The morning was misty, and there was sufficient dirt upon the bridge so that scratches and marks, apparently made by the struggling of the horse, were found near the broken plank. The dirt approach to the bridge was washed out on one side to a depth of several feet, so as to leave but a narrow track for travel before approaching the bridge.

The plaintiff's theory is that this hole on the east side of the approach frightened the horse, which the plaintiff was riding, and caused it to seek the west side of the bridge where the broken plank was, and that the horse stepped into the hole, stumbled and fell, precipitating the plaintiff upon his head, so as to cause the injuries from which he suffered. From the testimony of the witnesses for the plaintiff as to the marks upon the bridge, and the hair and blood found thereon, together with the condition that the horse's hind legs were in as to being scraped and abraded, the jury may well have found that the injury was sustained by the horse stepping in the hole, causing him to fall and throw the plaintiff. On the other hand, there was testimony given by the defendant's witnesses, which would justify the conclusion that the horse had slipped upon the slippery floor and fallen before reaching the hole, and that the marks upon the bridge floor, and upon the horse itself, were caused by its struggles in en-

deavoring to arise, and in falling from the bridge between the railing and the floor. The evidence shows that the bridge was constantly being used by the public, and that, if the travel was confined to the portion of the bridge covered by the double planking, it was entirely safe.

The plaintiff complains of the giving of instruction numbered four requested by the defendant. This instruction is as follows: "The jury are instructed that a county is not liable to respond in damages because of every depression, inequality, or defect in the surface of its public highways and bridges, even though injury may result therefrom. It is only liable when it fails to keep its public highways and bridges in a reasonably safe condition for public travel, and it is not necessary that it should keep the entire width of its highways and bridges in good condition for travel, unless the public convenience and travel demand it; and if you find from the evidence that a sufficient width of the road and bridge at the point of the alleged injury was in a reasonably safe condition for public travel, and that the plaintiff could have passed over and along the same without injury, by the exercise of ordinary care and prudence, then you will find for the defendant." This instruction is substantially the same as one which was requested and refused in the case of *City of Lincoln v. Gillilan,* 18 Neb. 114. Instructions 1 to 10, which were given in the same case, enunciate the same principles, except that they omit that portion which relieved the city from keeping the entire width of the street in good condition for travel, unless the public convenience and travel demand it. The discussion of this instruction in that case is applicable to the case at bar. While, as a general abstract proposition, the statement as to there being no requirement that the entire width of highways and bridges be kept in good condition may be correct, still, under the circumstances of this case, we think it was misleading, and should not have been given, without some modification to fit the circumstances of the case. If the defect in the bridge was such that the county authorities,

by the exercise of reasonable care, could have remedied it, and was such that the bridge was dangerous for a person using ordinary care, then the county would be liable, and the question of whether or not the county was obliged to keep the entire width of the bridge or highway safe is not material. If there was nothing in the appearance of the bridge to suggest that it was unsafe to use the portion having only single planking, a person would not be compelled to remain upon the double planking, but might use any part of the bridge, provided he use ordinary care in the manner of his use. The presumption, which applies as well to the plaintiff as to the defendant, is that all parties acted with ordinary care, and this presumption must be overcome by evidence, either direct or circumstantial. *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720. *Swift & Co. v. Holoubek*, 60 Neb. 784. But the whole matter is for the jury to determine, and a verdict for either party might be supported under the evidence.

The plaintiff further complains of the giving of paragraph 6, which submitted the question of contributory negligence, upon the ground that there is absolutely no evidence of such negligence upon the plaintiff's part. The evidence fails to disclose any negligence whatever on the part of the plaintiff, and hence this instruction should not have been given. *Chicago, B. & Q. R. Co. v. Schalkopf*, 54 Neb. 448. Under the facts in this case, this was clearly prejudicial.

Plaintiff also urges that the verdict is contrary to law, and in support of this assignment argues that the statute, which renders counties liable to damages occurring by the failure to repair bridges, contains no limitation or reservation whatever, and that it was never meant to confine the liability of the county to injuries occurring within the narrow limits of the traveled way, and that a construction of the statute, which thus limits the liability of a county, is unauthorized. We do not agree with counsel in this view of the statute. To hold that every foot of the four rods prescribed as the width of highways in this state should be

made safe for public travel would, in the present stage of development of this commonwealth, place an onerous and unnecessary burden upon its people. When the county has exercised reasonable care and prudence in keeping its bridges in repair and suitable for the ordinary necessities of travel, it has fulfilled its duty. If its bridges are kept in a reasonably safe condition for travel in the ordinary mode, it cannot be held responsible for damages; if, however, a bridge is in such a defective condition that persons in the exercise of ordinary care traveling thereon are injured through defects, which reasonable care upon the part of the county might have obviated, the county is liable therefor. There is no evidence in the record to support the allegation that the defective condition of the highway before reaching the bridge contributed to the accident, and we have held in *Goes v. Gage County*, 67 Neb. 616, that a county under township organization is not liable for such defects. The evidence at the trial took an unnecessarily wide range, and we think that upon a new trial the inquiry should be narrowed to the material questions.

We recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

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 for a new trial.

REVERSED.

ADAIR COUNTY BANK V. A. C. FORREY ET AL.

FILED NOVEMBER 11, 1905. No. 13,983.

1. Process: NONRESIDENTS. The provisions of section 65 of the code: "Where the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county against any one or more of the defendants, at the plaintiff's request"—apply to nonresidents of the state who may be found in any other county to which the summons may be issued.

2. ———: JURISDICTION. Where an action is rightly brought in any county, a summons may be issued to any other county against one or more defendants. A nonresident of the state who may be found therein is as liable to service as a resident, and the court of the county in which the action was brought thereby acquires jurisdiction.

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

McGilton, Gaines & Storey, for plaintiff in error.

B. F. Thomas, R. W. Turner and *C. E. Herring, contra.*

LETTON, C.

This action was brought by the Adair County Bank, as plaintiff, against A. C. Forrey, C. C. Croffoot and D. J. Fogarty in the county court of Douglas county, Nebraska, upon a promissory note made by Forrey and Croffoot, payable to Fogarty, or bearer, for $225, payable one year after date. Before maturity, Fogarty sold and indorsed the note to the Adair County Bank, and verbally waived demand, notice and protest. At the time the petition was filed, a summons was issued, directed to the sheriff of Douglas county, and was served personally upon Fogarty in that county. Fogarty was a resident of the state of Iowa, but was then present in Douglas county. On the same day, another summons was issued for the defendants Forrey and Croffoot, directed to the sheriff of Nuckolls county, Nebraska. Forrey and Croffoot resided in the state of Kansas, near the city of Superior, Nebraska. No service was had upon this summons, and the same was returned. The case was continued from time to time for service. On December 6, 1901, an alias summons was issued, directed to the sheriff of Nuckolls county, and was personally served upon the defendant Croffoot in that county on January 4, 1902. Croffoot entered a special appearance in the county court of Douglas county, and objected to the jurisdiction of the court, which was over-

ruled. Pleadings were afterwards made up, the cause tried upon its merits, and judgment of dismissal rendered. From this judgment an appeal was taken to the district court for Douglas county. The defendant Croffoot, in his answer, preserved his objections to the jurisdiction of the court, and alleged, in substance, that he was a resident of the state of Kansas, and that he had been fraudulently induced to come into the state of Nebraska by the plaintiff for the purpose of being served with summons therein; that his codefendant, Fogarty, was a nonresident of the state of Nebraska, and that, by reason thereof the court had no jurisdiction to issue an alias summons to any other county; that, by service of the summons on defendant in Nuckolls county, the county court of Douglas county did not acquire jurisdiction over him. He also pleaded a general denial to the allegations of the petition. A jury was impaneled, and, after the evidence was introduced and the parties rested, Croffoot moved to dismiss the action as to him, upon the ground that the court had no jurisdiction over his person or the subject of the action, and that the county court of Douglas county was without jurisdiction to issue a summons against him. The motion was sustained, and the action dismissed as to Croffoot; judgment by default was rendered against Fogarty. A motion for a new trial was filed by the plaintiff as to the dismissal of the case as to Croffoot, which was overruled, and from which order and judgment the plaintiff prosecutes error.

The principal grounds relied upon by the defendant to establish the want of jurisdiction are: First, that he was a nonresident of this state, and was induced by fraud to come into the state for the purpose of service of summons upon him; second, that since Fogarty was a nonresident of this state, he could not be properly sued in Douglas county so as to confer jurisdiction upon the court to issue an alias summons to Nuckolls county for service upon Croffoot in that county.

Sections 51 to 60, inclusive, title IV of the code, pro-

vide for the venue of actions. Section 59 applies to transitory actions such as this. Omitting part, this section provides: "An action * * * against a nonresident of this state * * * may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found." Under section 59, therefore, since Fogarty was found in Douglas county, though a nonresident of the state, the action was properly brought in that county, and the only question is as to whether a summons might properly be issued to any other county for the purpose of reaching his codefendants. Section 65, title V of the code, provides: "Where the action is rightly brought in any county, according to the provisions of title four, a summons shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request." The provisions of this section have frequently been before this court for consideration, and we have uniformly held that, if the defendant served in the county in which the action was brought was a *bona fide* defendant, whose interest was adverse to the plaintiff in the action, the venue was properly laid, and a summons might be issued to another county for other persons jointly liable. *Barry v. Wachosky,* 57 Neb. 534; *Hobson v. Cummins,* 57 Neb. 611; *McCormick Harvesting Machine Co. v. Cummins,* 59 Neb. 330; *Sciver v. Union P. R. Co.,* 68 Neb. 91.

We understand it to be conceded by the defendant in error that, if Fogarty had properly been served in Douglas county, a summons served upon Croffoot in Nuckolls county would give the court jurisdiction over his person if he were a resident of Nuckolls county; but it is argued that, since section 59 of the code provides that actions against a nonresident of this state may be brought in any county where said defendant may be found, the word "may" means "must," or "shall," and that therefore, an action against Croffoot *must* be brought in Nuckolls county, the county in which he was found, and that the county court of Douglas county never acquired jurisdiction

over him. This argument, however, entirely disregards the provisions of section 65 of the code. Even if we construe the word "may" in section 59 to mean "must," how does the case stand? The defendant Fogarty must be sued in Douglas county, since that is the county in which he was found, and, since the action was rightly brought against him, a summons may issue under the provisions of section 65 to any other county. But it is argued that, even if the action against Fogarty was properly brought in Douglas county, if it is sought to reach Croffoot, another action must be brought in Nuckolls county. Under section 59, title IV, relating to venue, the proper venue of the action was in Douglas county. The provisions of title V do not apply to venue, but provide for the manner in which actions may be commenced, and section 65 provides for the place where summons may be served when an action has been rightly brought under the provisions of title IV. It is an imperative rule of construction that effect be given, if possible, to every portion of a statute. To adopt one construction would eliminate section 65 entirely, while the other construction gives effect to both sections. Further than this, the construction contended for by defendant in error would necessitate a multiplicity of actions in a case where nonresident defendants were numerous, if service might be had upon them in different counties within this state, whereas, by the other construction, one action only would be required, though they might be summoned in different counties. These sections must be construed together, and, where an action has rightly been brought in one county, a summons may be issued to any other county in the state, and served upon any person personally present therein, whether resident or nonresident. If a person is personally present within the confines of the state, it makes no difference whether he is a resident or nonresident, so far as his liability to personal service of summons upon him is concerned. A nonresident has no greater privilege in that regard than a resident of the state. We are of the opinion that jurisdiction was

obtained over Croffoot by service of the summons in Nuckolls county.

As to the objection to the jurisdiction that defendant was fraudulently induced to come within the county of Nuckolls in this state for the purpose of service being made upon him, under the rule laid down in *Hurlburt v. Palmer*, 39 Neb. 158, this defense, as made, was for the jury to pass upon and not for the court. Further, it is asserted by the plaintiff in error that the district court sustained the motion to dismiss for want of jurisdiction upon the ground alone that a nonresident must be sued in the county where he is found, and the record, while ambiguous, seems to bear this out.

A large part of the brief of defendant in error has been devoted to the argument that Fogarty is not a defendant in good faith, and that his presence in Douglas county, so that summons might be served upon him, was collusive. But the answer does not raise this issue, the allegation therein being merely that "Fogarty is not a *bona fide* resident of Douglas county, nor was he such resident at the time of the commencement of the action herein, or at any time thereafter," etc. It is not contended by plaintiff in error that Fogarty ever was a resident of Douglas county, *bona fide* or otherwise. It is not charged in the answer that Fogarty's presence in Douglas county was by collusion with the plaintiff, and hence this contention is outside of the issues. Upon the whole record we think the case should have been submitted to the jury.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

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

REVERSED.

DAVID H. HEATON, APPELLEE, V. JOHN P. WIREMAN, APPELLANT.

FILED NOVEMBER 11, 1905. No. 13,954.

Trespass: INJUNCTION. One in the lawful and peaceable possession of real estate, especially if it be his dwelling, may restrain repeated and riotous acts of invasion and trespass until the title and right of possession can be settled in some regular and orderly way.

APPEAL from the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. H. Edmunds and *Frank J. Kelley,* for appellant.

W. W. Wood, contra.

AMES, C.

Plaintiff and defendant are owners, respectively, of adjoining tracts of land, and there is a dispute about the division line. The plaintiff had been for many years in possession to the limits to which he claimed that his ownership extended, and had established and maintained for a long time his dwelling house, vegetable garden, etc., near the disputed boundary. The defendant took it upon himself to decide the matter in controversy, and to carry his judgment into execution invaded the plaintiff's possession, destroyed his growing vegetables, plowed and dug up the soil, and proceeded to erect a fence within a few feet of the plaintiff's dwelling, arming himself for the better accomplishment of his purpose with a loaded gun, and threatening the plaintiff and the members of his family with bodily injury. This action was begun to enjoin the continuation of this conduct, which amounted to a private nuisance, until the true boundary could be ascertained, and then to procure the injunction to be made perpetual. There was a trial upon ample proofs, and a judgment was rendered comformably thereto, and to the pleading and

prayer of the petition, from which the defendant appealed.

There are two grounds alleged in the brief for a reversal. The first is that the plaintiff had an adequate remedy at law in an action, or in actions, for trespass; and the second is that the judgment is not sustained by the evidence. As to the first, the law is too well settled to require the citation of authority that one in the lawful and peaceable possession of real estate, especially if it be his dwelling, may enjoin repeated and riotous acts of invasion and trespass until the title and right of possession can be settled in some regular and orderly way. A contrary doctrine would be destructive of the peace and well-being of society. As to the second objection, it is not much insisted upon by counsel. The evidence is somewhat voluminous, and we have examined it sufficiently to be convinced that it upholds the judgment of the district court, affirmance of which we recommend.

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.

ERNEST E. HART, APPELLANT, V. W. A. SAUNDERS ET AL., APPELLEES.

FILED NOVEMBER 11, 1905. No. 13,964.

Deed: CONSTRUCTION. The construction of an ambiguous deed is ascertained from the language used and from a consideration of the situation and circumstances of the transaction of which it was a part.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed with directions.*

McGilton, Gaines & Storey and *Mayne & Hazelton,* for appellant.

W. A. Saunders and *W. W. Slabaugh, contra.*

AMES, C.

In 1891 the Citizens State Bank of Council Bluffs, Iowa, was the owner of an irregular tract of land situated in this state and known as "tax lot ten." The plot of ground thus designated comprised contiguous parts of adjoining governmental quarter sections and was particularly described as follows: "The south 64 rods of the east half of the northwest quarter of the southwest quarter and the south 8 3-10 acres of the west 10 3-10 acres of the northeast quarter of the southwest quarter of section 18, township 16 north of range 13 east of the 6th P. M., in Nebraska." On July 23, 1891, the bank sold and conveyed to Jennie L. Rice a part of this tax lot. The description contained in the deed was as follows: "A part of tax lot ten (10) and described as follows: All the west 469 feet of the south 64 rods," etc., followed by a particular description of the tax lot as the same is given above. On the same day the grantee, Mrs. Rice, conveyed to one Tunison, by precisely the same description, except a slight variation in the phraseology of the introductory part thereof, which ran "that part of tax lot ten (10) or more particularly described as all the west four hundred and sixty-nine (469) feet of the south 64 rods," etc., continuing with the particular description of the tax lot as the same is above given, and concluding with a reservation of a small tract "in the southwest corner thereof." Afterwards, and by a deed dated June 18, 1892, the bank made to Mrs. Rice a second conveyance of lands described as "the east twelve and 5-6 acres of the south sixty-four (64) rods," etc., and also continuing and concluding with the above given particular description of the tax lot. It is evident, therefore, at the time of the execution of this latter deed both

the bank and Mrs. Rice supposed that the former conveyance between the same parties was inoperative upon any part of the 12 5-6 acres. At the time Mrs. Rice made her conveyance to Tunison, she took from the puchaser a purchase-money mortgage, which she sold and assigned to one Chittenden, and which the latter foreclosed, thereby obtaining title to the mortgaged premises. After having done so, Chittenden conveyed to one Gates, and Gates to the defendent and appellee Saunders, 8.3 acres of the land embraced within the description of the 12 5-6 acres contained in the secondly above mentioned deed from the bank to Mrs. Rice. The plaintiff, Hart, claims this same 8 3-10 acres by mesne conveyance under this last mentioned deed, and brought this action to establish title to the same, but was defeated in the district court and prosecutes this appeal.

There is no question of adverse possession, nor does either party claim to be exempt from constructive notice of the recitals and descriptions contained in all the above mentioned deeds, so that the sole question is what, as between Mrs. Rice and her grantee, did her deed to Tunison convey. The defendant contends that it conveyed two parcels of land, each a part of "tax lot ten," and the plaintiff, that it contained only one. For the purpose of answering this question, we think it is pertinent to inquire whether Mrs. Rice acquired title to one or to two parcels from the bank, because it is plain that she only could have conveyed, or have intended to convey, to Tunison so much land as she acquired by this last mentioned instrument. Now that deed recites that it conveys "a part," that is a single part, of tax lot ten, and similarly the Tunison deed recites that it conveys "that part of tax lot number ten," which also indicates a single part. The ambiguity arises from the use of the words, "and the south 8.3 acres," etc., but these words occur in the particular description of the tax lot itself, and are essential for a description of the tract or plot of land off the west side of which were carved the 469 feet affected by the deeds.

That is to say, the tax lot consisted of one tract and of another tract; and of the composite tract, so constituted, 469 feet taken from the west side thereof was conveyed by the bank to Mrs. Rice, and by the latter to Tunison. That such was the intent and understanding of the parties is made manifest by the fact that the remainder of the tract, consisting of the whole of one of its original constituents, and of the other diminished by 469 feet taken from its west side, was subsequently conveyed by the bank to Mrs. Rice, and by her to another person, named Olson, under whom the plaintiff claims.

There are other features of the situation and of the circumstances of the transaction that tend to throw light upon it and upon the intent of the parties. If the bank and the Tunison deeds were intended each to convey two parcels of land, one of those parcels was on the west side of the tax lot and the other upon the east side, and the two were separated by a strip 191 feet wide, and extending 64 rods across the tax lot from north to south, and containing only about 4 acres of ground. This strip of ordinary or rather rough farm land, and thus detached from all other ownership, would have been adapted to no particular or special use, and would have been undesirable for any separate or peculiar occupancy, and would have been of but little present or prospective value. No rational motive can be, or is attempted to be, assigned for a conveyance of the two parcels which the defendant contends were conveyed by the deeds last mentioned, without including this strip also. Not only could it not have been omitted by mistake, but, if the defendant's construction is correct, some pains and ingenuity were employed for the purpose of excluding it, but, nevertheless, entirely obvious phraseology for the expression of that intent was not only not chosen, but some further pains would seem to have been taken to render the language of the instruments ambiguous, and this latter pains was also taken without assignable motive. We think the latter supposition is as inadmissible as the former, and that the reasonable pre-

sumptions are, first, that the parties did not intend to convey two parcels, reserving a practically valueless strip; and second, that, if they had so intended, they would have chosen language clear and apt for the accomplishment of that object.

The deed from Mrs. Rice to Tunison excepts "a tract three hundred (300) feet north and south and one hundred and ninety-nine (199) feet east and west in the southwest corner thereof." This exception is important in the present controversy only as bearing upon the interpretation of the instrument. If the deed conveyed a single parcel off the west side of the tax lot, the exception has an obvious meaning and the subject matter of it is readily ascertained and defined, but if the conveyance was of two parcels, one on the west and one on the east side of the tax lot, the instrument affords no means of ascertaining out of the corner of which parcel the exception or reservation is to be taken or made. A suggestion by the defendant that the words "southwest corner thereof" refer to the tax lot as an entirety is inadmissible, because the office of an exception is to reserve or retain something from that which, in its absence, the instrument would have conveyed, and it is not pretended that, in the absence of this exception, the deed would have conveyed the entire tax lot. In other words, if the exception does not refer to the description of what the deed was intended to convey, it has no meaning at all. Evidently, therefore, if the deed had been intended to convey two parcels, the exception would have specified from which of them the smaller tract, title to which it reserved or retained in the grantor, was to be carved.

By the foregoing considerations, we are convinced that the learned judge of the district court erred, and we recommend that the judgment be reversed and the cause remanded, with instructions to render a judgment for the plaintiff conformable to the prayer of his 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 the cause remanded, with instructions to render a judgment for the plaintiff conformable to the prayer of his petition.

JUDGMENT ACCORDINGLY.

CONTINENTAL CASUALTY COMPANY V. KATIE BUCHTEL.

FILED NOVEMBER 11, 1905. No. 13,960.

1. **Insurance: INJURY: NOTICE.** Where notice of an injury is received by an accident insurance company and the company acts upon such notice, it is immaterial as to what relationship existed between the sender of the notice and either the assured or the beneficiary.
2. **Proof of Loss: WAIVER.** Where the conditions of an insurance policy provide for filing final proof of loss upon blanks furnished by the company within thirty days of the injury and the company, with knowledge of the injury, neglects to furnish such blanks within the time specified, such conduct on the part of the company is a waiver of the condition as to time.

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

Billingsley & Greene, Manton Maverick and *R. H. Hagelin,* for plaintiff in error.

T. J. Doyle and *G. W. Berge, contra.*

OLDHAM, C.

On February 20, 1902, the Continental Casualty Company, defendant in the court below, issued its policy of insurance insuring the life of Joseph E. Buchtel against death by accident in the sum of $300. Katie Buchtel, plaintiff in the court below and niece of the assured, is the

beneficiary named in the policy. The assured resided at Port Hill, in the state of Idaho, at the time of his death, and the beneficiary, who was then a minor, resided with her mother in the city of Omaha, Nebraska. On the 14th day of July, 1902, the assured was killed by a falling tree in a cyclone, and had then paid the premium on his policy to April 30, 1903. Immediately after the death of the assured, the coroner of Kootenai county, Idaho, notified the defendant company of the fact of the assured's death by accident. When this notice was received, the company requested further information concerning the accident, to which the coroner replied in a letter, describing with great particularity every incident connected with the death of the assured and giving the verdict of the coroner's jury at the inquest. Subsequently, on the 27th of October, 1902, more than 100 days after the accident, defendant company wrote a letter to the coroner (Dr. G. E. Barber) as follows: "We hand you herewith proof of death blank upon which formal proof of death of Edward J. Buchtel, holder of policy No. 463,375, may be furnished us for further consideration of the case." The evidence of the defendant is that it never received any answer to this letter, but nothing is said as to whether or not the blank furnished was ever returned. About four months after the death of the assured, plaintiff's mother, having been informed of such death and also of the fact that the deceased held a policy of insurance payable to her daughter, wrote to the defendant, asking for information as to that fact. In answer to this communication, the company informed plaintiff's mother as to the number and amount of the policy, and also of the fact that the company had been notified by the coroner of the death of the assured, and that blanks for the proof of death had been sent by the company to the coroner, from which it had received no return. Plaintiff and her mother, after a considerable delay, finally succeeded in procuring from the coroner the policy of the deceased, and thereafter, on June 15, 1903, the plaintiff, by her attorney, wrote to the company, inclosing the coroner's certificate of the death of the

assured as a proof of loss, and demanded settlement of the policy, and at the same time offered to furnish any further information required. In answer to this communication the company replied as follows: "The first notice which the beneficiary herself, or any one acting for her, gave to this company was under date of November 18, more than four months after the death, when the mother of the beneficiary wrote in her behalf and stated that she was informed at the time of Mr. Buchtel's death he had a policy in this company. * * * I grant you, as you know, that the coroner had previously advised the company of the death. In response to that information, blank was furnished him on the presumption that he was acting for beneficiary. That blank has never been returned to this office and we have at the present time no affirmative proof as required by the policy. You will see from the above that, if the coroner was the agent of the beneficiary, the claim is disallowed for failure to furnish proof as required. If he was not the agent of the beneficiary, then the claim is disallowed for insufficiency of notice. I am therefore obliged to inform you that we have no legal liability on this claim and that the same is rejected for the reasons above given, and for other reasons which are not necessary to take up at this time." On the trial there was no conflict in the testimony, and, when the evidence was all in, the court directed a verdict for plaintiff and entered judgment on the verdict. To reverse this judgment defendant brings error to this court.

Defendant relied on two defenses contained in the conditions of the policy. The first one is that a written notice from the insured, or his representative, and a certificate from the attending physician or surgeon, stating the time and place of the injury or death, should be received at the office of the company within 30 days after the date of such injury or death. The contention with reference to this defense is that the coroner, who attended the inquest, was not the representative of the assured when the notice was given. This contention is wholly without

merit, in view of the fact that the notice was received and retained by defendant, and further particulars of the death and its surrounding circumstances were requested by the defendant from the coroner, and the answer to this request, mailed on August 18, 1902, was received and retained by defendant, without any suggestion of further proof of loss, until October 27, 1902, when the letter inclosing the company's blank is alleged to have been sent for the final technical proof required. Now, while defendant's witness testified that he never received any answer to this letter, he nowhere says that the proof of loss was never filled out and returned by the coroner to the company. If, as a matter of fact, a true notice of the loss was received and acted upon by the company, the relation of the parties sending the notice to the deceased, or his beneficiary, is wholly immaterial. *Omaha Fire Ins. Co. v. Dierks,* 43 Neb. 473.

The second defense relied upon—the failure to file the blank furnished by the company within 30 days—is pleaded in a negative pregnant, as follows: "That final proofs containing answers under oath to questions in the blank furnished by the company for that purpose were not filed with the company in Chicago, Illinois, within one month from the date of the injury, and thereby all claims for benefits were waived and forfeited to the company, and the defendant company has in no manner waived the conditions of said policy so as above alleged." Now, this allegation of the answer is tantamount to admitting that proof on a blank furnished by the company was filed, but not within 30 days of the date of the accident. The fact that the company had timely notice of the death, of which it subsequently received full particulars from the coroner holding the inquest, and neglected to furnish the blank on which a more formal proof was required for more than 100 days after the accident, was clearly a waiver of the time in which this technical requirement might be relied upon. And, again, the fact that the defendant company refused and neglected to furnish

blanks to the plaintiff, when her attorney offered to furnish any information required was, under all the circumstances, a waiver of a demand for such special form of proof. And still again, when the managing officers of defendant, in answer to the letter of plaintiff's attorney, denied liability on the policy for other reasons than failure to file this notice, such denial of liability was a waiver of the proof of loss. *Home Fire Ins. Co. v. Fallon,* 45 Neb. 554.

We therefore conclude that the learned trial court was fully justified in directing a verdict for the plaintiff at the close of the testimony, and we recommend that the judgment of the district court be affirmed.

AMES and LETTON, CC., concur.

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

AFFIRMED.

JENNIE EAGER, APPELLANT, V. DEWITT EAGER, APPELLEE.*

FILED NOVEMBER 11, 1905. No. 13,958.

1. **The district court is a court of general jurisdiction and may send its original process to any part of the state, unless restricted therein by statute.**

2. **Divorce:** JURISDICTION. **Section 6, chapter 25, Compiled Statutes, 1903, confers jurisdiction upon the district court to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside.**

3. **———:** PROCESS. **Where the plaintiff resides in one county and the defendant in another, summons may issue from the county where the plaintiff resides and the action is commenced to any other county in the state where the defendant resides.**

4. **———:** JURISDICTION. **By sections 902 and 903 of the code, the action for a divorce is taken out of the general provisions of the code for the prosecution of other actions therein mentioned.**

* Rehearing denied. See opinion, p. 830, *post.*

APPEAL from the district court for Douglas county: CHARLES T. DICKENSON, JUDGE. *Reversed.*

W. T. Nelson, for appellant.

Smyth & Smith, John O. Yeiser, F. D. Eager and *G. W. Berge, contra.*

DUFFIE, C.

Jennie Eager, the appellant, brought her action in the district court for Douglas county to obtain a divorce from the appellee, DeWitt Eager. At the time of commencing her action she was, and for more than six months had been, a *bona fide* resident of Douglas county. Her husband at that time was a resident of Rock county, Nebraska. A summons was issued by the clerk of the district court for Douglas county directed to the sheriff of Rock county, who served the same personally on the appellee. In due time, and after due return of the summons by the sheriff of Rock county, the district court for Douglas county defaulted the defendant, took plaintiff's evidence in the case, and awarded a decree of divorce, and alimony in the sum of $1,000. After the decree was entered, the defendant made a special appearance in the district court for Douglas county, asking to have the judgment for alimony set aside, for the reason that no summons had been served upon him which gave the court jurisdiction to enter a personal judgment against him for alimony. The decree, so far as it awarded alimony, was set aside, and from this order Mrs. Eager has taken an appeal to this court.

The appellee contends that, under our code of civil procedure, no personal judgment can be entered against him on a suit brought by his wife for a divorce, unless service of the summons has been had on him in the county where the action is pending. Originally actions for divorce were brought in the ecclesiastical courts. The common law courts of England had no jurisdiction of such actions. The statute requires an action for divorce to be brought

in the county where the parties, or one of the parties, to the action reside. An action for divorce, together with some other specified actions, are exempted from the operations of the code of civil procedure. Section 902 of the code is to the effect that, "until the legislature shall otherwise provide, the code shall not affect proceedings on habeas corpus, quo warranto, or to assess damages for private property taken for public use, nor proceedings under the statutes for the settlement of estates of deceased persons, nor proceedings under statutes relating to dower, divorce, or alimony," etc. While the code has provided for the venue of all ordinary actions in general terms, a special statute relating to the action of divorce was enacted by the general assembly, and is found in chapter 25, Compiled Statutes, 1903. By section 6 of that chapter (Ann. St. 5328) it is provided as follows: "A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, on the application by the petition of the aggrieved party in either of the following cases:" etc. It will be observed that this is a special statute conferring authority upon the district court to grant a divorce, and that court has jurisdiction where either of the parties to the action resides in the county where the action is brought. This, of necessity, implies that the court having jurisdiction of the subject matter of the action, and jurisdiction to try the case in the county where the action is brought, may acquire jurisdiction of the person of the defendant by issuing a summons to any county in the state where the defendant resides; and it needs no argument to demonstrate that, if the court has jurisdiction of the person of the defendant, it may enter a personal judgment against him for alimony, which is a mere incident to the action for divorce.

It is a well-understood rule that courts of general jurisdiction of any state can acquire jurisdiction of a party defendant by process issued to any county in the state, unless such jurisdiction is restricted by a statutory law.

In Wells, Jurisdiction, sec. 113, it is said: "As to the general jurisdiction of the courts of a state this is, of course, coextensive with its sovereignty, which is limited only by the territory of the state, and attaches to all the property and persons within the limits thereof," etc. Courts of general jurisdiction have, therefore, the right to deal with the person or property of anyone residing within the boundary of the state in all matters where jurisdiction has not been limited by statute. The legislature having said that the district court of the county where one of the parties to a divorce action resides has jurisdiction to grant a divorce, by necessary implication, gives the court power to acquire jurisdiction over the person of the defendant by service of its process in any county of the state where he may reside. The case is a special one, not coming under any provision of the code, but falling under the provisions of sections 902 and 903 of the code, recognizing an exceptional and special proceeding in this class of cases. This is also, we think, recognized in *Brown v. Brown,* 10 Neb. 349.

We recommend that the decree of the district court be reversed, and the order and decree granting a divorce and alimony to the plaintiff in the action be reinstated.

ALBERT 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 order and decree granting a divorce and alimony to the plaintiff in the action is reinstated.

REVERSED.

The following opinion on motion for rehearing was filed March 22, 1906. *Former judgment modified and cause reversed. Rehearing denied:*

LETTON, J.

We are satisfied with the conclusion reached in the former opinion, *ante,* p. 827, as to the jurisdiction of the

district court, but our attention has been called to the fact that the decree awarding alimony was set aside at the same term of court at which it was rendered, though the order was not spread upon the journal and was not made a matter of record, until at the following term a *nunc pro tunc* order was made reciting the fact. It was within the discretionary power of the court, upon good cause shown, to set the decree aside at the same term at which it was rendered. *Bradley v. Slater,* 55 Neb. 334. No exception was taken to this action. At the next term of court further proceedings were had upon the question of jurisdiction, and the court held that it had no jurisdiction and dismissed the plaintiff's petition for alimony. From this final order the plaintiff appealed to this court, where the judgment of the district court was reversed, but the decree for alimony was ordered to be reinstated. As we have seen, this decree was set aside at a prior term. This was a final disposition of that decree. It was as effectually nullified as if it had never been rendered, and it is beyond the power of this court to direct its reinstatement.

For these reasons, the former judgment of this court, so far as it reinstates the decree for alimony, is set aside, and the cause is reversed and remanded for further proceedings.

REVERSED.

HENRY A. CLIFFORD V. HANS THUN ET AL.

FILED NOVEMBER 11, 1905. No. 13,965.

1. **Amended Petition: LIMITATIONS: DEMURRER.** An amended petition setting up a new cause of action, which is barred when the amended petition is filed, is vulnerable to a demurrer. *Buerstetta v. Bank,* 57 Neb. 504.

2. **Foreclosure Sale: SUIT TO REDEEM: LIMITATIONS.** One seeking to redeem from a foreclosure sale based on a tax lien must bring his action therefor within two years from the date of the tax sale.

3. **A notice by publication** was directed to "The Globe Investment Company," the true name of the corporation being "Globe Investment Company." *Held*, That the variance was so slight as to be immaterial.

4. **Notice.** The same notice was directed to "H. A. Wyman, Receiver of the Globe Investment Company," Wyman's true name being "Henry A. Wyman." *Held*, That, as the petition showed that Wyman was appointed receiver by the court of a sister state, he was not a necessary party to the action and a defect in the notice to him was immaterial.

ERROR to the district court for Brown county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

Charles Battelle, for plaintiff in error.

A. W. Scattergood, contra.

DUFFIE, C.

February 21, 1903, Henry A. Clifford, the plaintiff in error, filed his petition in the district court for Brown county for the foreclosure of a mortgage on 80 acres of land made to the Globe Investment Company by Henry Thun and Dora, his wife. September 5, 1903, he filed an amended petition, in which he alleges that on August 6, 1901, the land covered by his mortgage was sold for the delinquent taxes due thereon for the years 1895-1900, both inclusive; that one Skillman was the purchaser at said sale, and that on August 22, 1901, said Skillman commenced an action to foreclose his tax certificate, making numerous parties defendant to said action, and, among others, *The* Globe Investment Company and H. A. Wyman as receiver of said company; that one Toy, who held a tax certificate about nine years old, filed an answer and cross-bill asking a foreclosure thereof; that a decree was entered foreclosing the tax liens held by Skillman and Toy, and that on December 24, 1901, all the real estate was sold to satisfy said decree, Hans Thun becoming the purchaser. The petition further recites that the plaintiff is the owner and holder of a mortgage, made by Henry Thun

and wife to the Globe Investment Company, covering the premises in controversy; that the same is due and unpaid, and he prays to be allowed to redeem the premises from the tax sale foreclosure, and for the foreclosure of his mortgage. To this amended petition Hans Thun entered a demurrer, alleging that it did not state facts sufficient to constitute a cause of action or to entitle the plaintiff to the relief demanded.

It will be noticed that the original petition filed by the plaintiff asked no relief other than the foreclosure of his mortgage. The amended petition filed on September 5, 1903, while asking a foreclosure of the plaintiff's mortgage, also set up an entirely different and independent cause of action against the defendants, viz., the right to redeem any interest in the land which the defendants had acquired under a tax foreclosure sale. It was held in *Selby v. Pueppka*, 73 Neb. 179, that section 3, article IX of the constitution of the state, providing for two years' time within which to redeem from tax sales, applies to judicial as well as administrative sales. In that case it was urged that the confirmation of the sale and the making of a deed cut off the owner's right to redeem, and this was the intimation of the court in *Logan County v. McKinley-Lanning Loan & Trust Co.*, 70 Neb. 406. In that case the question was not squarely before the court and was not the principal question considered. Objection was made to a confirmation of the sale upon the theory that such confirmation would extinguish the owner's right to redeem, and the case was apparently argued upon that theory; but the question of whether a confirmation would have that effect was not before the court and was not determined. In the *Selby* case the question was squarely raised and it is said:

"The terms of the constitution are very sweeping. Art. IX, sec. 3. A right of redemption is given from all sales of real estate for the nonpayment of taxes for two years after the sale. This provision has been held to be self-executing. *Lincoln Street R. Co. v. City of Lincoln*, 61

Neb. 109. It has also been declared to apply to judicial sales as well as to administrative sales. *Logan County v. Carnahan,* 66 Neb. 685. We see no reason for suggesting any change in the ruling. The confirmation applied only to the regularity of the proceeding. It held the sale valid and regular, but in no way adjudicated the right of redemption from it. The latter existed by virtue of a self-executing constitutional provision independent of the court. The court's action must be held to have been taken with this right in view. Of course, in this view, that confirmation, like the other proceedings in this sale, was had provisionally and subject to the right of redemption—the costs of the sale, as well as the costs of foreclosure, being added to the taxes and interest in making the redemption."

We are still satisfied with this view of the case, and the plaintiff's amended petition asking to redeem, having been filed more than two years after the land had been sold for taxes, the plaintiff's right of redemption had expired. It is claimed that the decree foreclosing the tax lien is void because the defendant, "Globe Investment Company," was summoned under the name of "The Globe Investment Company," and that "Henry A. Wyman," receiver of the Globe Investment Company, was summoned as "H. A. Wyman," only the initial of his first name being used, and that notice by publication only was given. The variation in the name of the corporation was so slight as to leave no doubt of its identity, and is wholly immaterial. *Lane v. Innes,* 43 Minn. 137. The receiver of a corporation appointed by the courts of another state not being a necessary party to an action brought against the corporation in this state, the failure to give the real and true name of Wyman in the proceeding is of no account.

It is further objected that the court was without jurisdiction to foreclose the tax certificate held by Toy, it being issued on a sale made nine years previous to the filing of his cross-bill. That the lien for taxes originally held by Toy under this certificate had, in the language of this court in *Alexander v. Shaffer,* 38 Neb. 812, become "ex-

tinguished absolutely" by his failure to foreclose it within the time allowed by statute is true, but that the court mistook the law, and gave Toy a decree for the amount claimed, did not oust it of jurisdiction to hear and determine the case. The decree was erroneous and reversible on appeal, but not void and subject to collateral attack.

Again, the tax lien held by Skillman had not been barred and the decree, to the extent that it awarded him relief, was in all respects legal and free from error. That it included an amount erroneously awarded to Toy could affect the plaintiff only as to the amount that he should pay in case of redemption, if he was awarded the right to redeem.

It is further urged that the plaintiff owning the mortgage at the time was not a party defendant to the tax foreclosure suit, and that his right of redemption has not been extinguished by the decree. The plaintiff by his bill is seeking to enforce a right of redemption as distinguished from an equity of redemption; a right based upon a provision of the constitution and the statutes of the state, and it is by these provisions that his right is to be measured and determined and not by the decree entered by the district court in the tax foreclosure action, which, as before stated, did not attempt to determine or cut off the privilege awarded him by the laws of the state to redeem from the tax sale within two years from its date. The difficulty under which he labors is that this right was not asserted within the time limited, and his right to redeem has been barred by lapse of time, fixed, not by the decree, but by statute.

We conclude that the court was right in sustaining the defendant's demurrer to the plaintiff's amended petition, and we recommend the affirmance of the order.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

ALEXANDER J. HART ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED NOVEMBER 11, 1905. No. 13,810.

1. Cities: PARKS AND BOULEVARDS: SPECIAL ASSESSMENTS. Section 101*b*, chapter 12*a*, Compiled Statutes 1903, authorizes a special assessment on such real estate as may be "specifically" benefited by a park or boulevard to pay for the land appropriated or purchased for such improvement.
2. Statutes Not in Conflict. The provisions of that section are not controlled by nor in conflict with section 158 of the above chapter, which provides generally for the assessment of damages for the appropriation of private property for street purposes upon abutting or adjacent real estate.
3. Bonds. Section 101*b*, *supra*, does not require the issuance of bonds under any and all circumstances when lands are appropriated for the construction of parks, parkways or boulevards, but only where the special assessment is insufficient for that purpose.
4. Special Benefits: QUESTION OF FACT. Ordinarily, whether a particular lot or tract of land is specially benefited by a park, parkway or boulevard is a question of fact, upon which the distance of the land from such improvement would have a bearing, but the mere fact that real estate is three-quarters of a mile from a boulevard will not enable the court to say as a matter of law that it is not specially benefited thereby.

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

H. W. Pennock, for appellants.

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

ALBERT, C.

Section 101*b*, chapter 12*a*, Compiled Statutes 1903 (Ann. St. 7552), relating to cities of the metropolitan class, provides for the appointment of park commissioners, and defines their powers and duties. One of the duties enjoined upon such commissioner is "from time to time to devise, suggest and recommend to the mayor and coun-

cil a system of public parks, parkways and boulevards or additions thereto within the city, or within three miles of the limits thereof, and to designate the lands, lots or grounds necessary to be used, purchased or appropriated for such purpose." There follows, in the same section, this provision: "And thereupon it shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or grounds so designated, the power to appropriate lands, lots or grounds for such purpose being hereby conferred on the mayor and council, and for the purpose of making payments for such lands, lots or grounds so appropriated or purchased as hereinafter provided, assess such real estate as may be specifically benefited by reason of the appropriation or purchase thereof for such purpose, and issue bonds as may be required for such purpose, to the extent and amount required in excess of such assessments." The preliminary steps required by this section for the levy of a special assessment to pay for the lands appropriated for a boulevard connecting two parks of the city of Omaha were taken and their regularity is not assailed at this time. Such special assessment was levied against the property which was found to be specifically benefited, including certain lots belonging to the appellant, Della C. Patrick, which are about three-fourths of a mile from the improvement in question. This suit, so far as said appellant is concerned, was brought to restrain the collection of the assessment levied against her property. She was denied relief below, hence her appeal.

It is claimed that the assessment is void because appellant's property neither abuts upon such boulevard nor is adjacent thereto. It is argued that section 101*b*, *supra*, was not intended to specify the real estate which might be assessed for the purpose of opening a boulevard, but merely to cover, in general terms, the organization, powers and duties of the park commissioners, and that the power to assess for such purpose is restricted by section 158 (Ann. St. 7626) of the same chapter to property abutting

or adjacent property. The language of this section, so far as material at present, is as follows: "The council shall have power, and is hereby authorized, to assess the damages awarded or recovered for grading, change of grade, or for the appropriation of private property, upon the lots and lands benefited, which shall abut or be adjacent to the street, avenue or alley graded, or for the opening, extending or widening of which private property shall be appropriated," etc. In support of this argument the appellant also relies on *McCormick v. City of Omaha,* 37 Neb. 829, where it was held that a provision of the Omaha charter of 1887, identical with section 158, *supra,* was held to confer the only statutory power to assess the cost of opening and extending a street, and section 69 of that chapter, which in general terms, granted the power to assess for paving and extending a street, was not applicable. It is now contended that section 69 sustains the same relation to the case referred to that section 101*b* sustains to this case. This construction cannot be sustained. Section 69, *supra,* is too long to set out at length. It contains a general grant of power to levy and collect special taxes to pay for opening, extending, grading, "parking," curbing and beautifying streets. It expressly limits the tax for grading, curbing, guttering and paving to the property abutting on that portion of the street improved. It contains no provision for the payment of damages arising from the exercise of the right of eminent domain. Because of such omission, the court held, in *McCormick v. City of Omaha, supra,* that there was no authority under section 69 to levy a special assessment to pay such damages; but that resort must be had to another section of the same chapter, which we have heretofore said is identical with section 158, *supra.* But section 101*b, supra,* in express terms requires the mayor and council to levy a special assessment upon "such real estate as may be 'specifically' benefited," etc. The difference between a section of a statute which confers no authority upon the municipal authorities to act, and one which not only confers such

authority, but makes it mandatory upon such authorities to act, and the effect of that difference on the value of *McCormick v. City of Omaha, supra,* as a precedent in this case are too obvious to require elucidation. The provisions of section 158 in nowise conflict with those of section 101*b*. Each gives the municipal authorities power to levy special assessments. By the general provisions of the former, such power is restricted to abutting or adjacent real estate. By the express provisions of the latter, such power is extended, in special cases, to real estate "specifically benefited." The assessment in question falling within the latter, the special provisions thereof as to the property subject to the assessment must prevail. To hold otherwise would be to ignore the legislative intent, expressed in plain and unmistakable language. That this court cannot lawfully do.

It is charged that the assessment is unjust and oppressive. But no irregularity in the proceedings of the municipal authorities is pointed out. On the face of the record, it would seem that all the steps essential to a valid levy had been taken. No fraud, gross injustice or mistake has been shown which would bring the case within the rule announced in *Wead v. City of Omaha,* 73 Neb. 321. The charge appears to be based solely on the fact that the appellants' property, being about three-fourths of a mile from the boulevard, cannot be "specifically" benefited thereby. But whether property is thus benefited is a question of fact, which must depend upon the facts and circumstances in each case. On such question, the distance of the property from the boulevard would undoubtedly have an important bearing. But this court is now asked to say, as a matter of law, that, because the property is three-fourths of a mile from the boulevard, it receives no special benefit therefrom, and inferentially, that the assessment thereof for the purpose stated amounts to fraud, gross injustice or mistake. This the court, acting within its constitutional bounds, is unable to do. We do not mean to be understood to say that the distance might not

be so great in a given case as to enable the court to say, as a matter of law, that the property was not specially benefited. That question stands open. What we do hold is that this court cannot say, in view of all the facts and circumstances, that, because the property is three-fourths of a mile from the boulevard, it derives no special benefit from such thoroughfare.

It is next contended that the assessment is void because the entire cost of opening the boulevard was assessed to private property, while section 101*b* provides for the issuance of bonds therefor. The section does not unqualifiedly provide that bonds shall be issued, but only "to the extent and amount required in excess of such assessments." If the assessments levied according to law were sufficient to pay the entire cost of the improvement, there was no "excess," and bonds were not required. The legislature certainly never intended to compel an unnecessary bond issue.

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

JACKSON, C., concurs.

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

AFFIRMED.

ROBERT HUBLER V. JOHNSON-MCLEAN COMPANY.

FILED NOVEMBER 11, 1905. No. 13,956.

1. **Master and Servant: CONTRIBUTORY NEGLIGENCE.** In an action for personal injuries, where the plaintiff is charged with contributory negligence, evidence of an unfounded belief on his part as to a condition which caused the injuries is immaterial, where it appears that he might have known, and that a due regard for his own safety required him to know, the truth.
2. **Directing Verdict.** Evidence examined, and *held* that a motion to direct a verdict against the plaintiff was properly sustained.

ERROR to the district court for Douglas county: GUY T. GRAVES, JUDGE. *Affirmed.*

Cooper & Dunn, for plaintiff in error.

Wharton, Baird & Sons and *T. J. Mahoney, contra.*

ALBERT, C.

While the plaintiff was in the employ of the defendant and at work in its planing-mill, his hand was lacerated and maimed by a saw in use in the mill, and this action was brought by him to recover damages therefor, on the theory that his injuries were the result of negligence on the part of the defendant. When the plaintiff rested, the court directed a verdict against him. Judgment was given accordingly. The evidence shows that the injuries were inflicted by a rip-saw, which was a part of the machinery of the mill. This saw was about two feet in diameter, and was placed at the center of a platform, extending north and south six feet, and east and west three and a half feet. The platform was attached to a framework at the ends and sides, consisting of pieces about four inches wide. About midway between the ends, and midway between the sides of the platform, there was a groove or opening extending parallel with the sides of the table, through which the saw projected some inches above the platform. Immediately under the framework of the platform was another framework of about the same length and width, and with like side and end pieces, but differing from the former in that a piece extended north and south from one end to the other, about midway between the sides. The shaft on which the saw hung was attached to this piece. The platform was movable, and by raising or lowering it the height of the saw above it could be adjusted to the thickness of the lumber to be cut. When the maximum height was desired, the platform was lowered until the end and side pieces of its framework rested on the corresponding

end and side pieces of the frame below. At the time of the accident, the defendant's foreman, the sawyer, who operated the rip-saw, and the plaintiff, who appears to have been employed only to carry lumber to and from this saw and the planing-machine, were at work about the rip-saw. A new saw had been put in and a piece of lumber was placed upon the platform to be sawed, the saw set in motion and the lumber cut a few inches, when it was discovered that the platform should be lowered to accommodate the cutting height of the saw to the thickness of the lumber. The lumber was removed, and, without stopping the saw, an attempt was made to lower the platform. It was discovered that sawdust had accumulated on the framework below, so that the platform could not be lowered as required. The foreman then ordered the sawdust removed. It is not quite clear that this order was directed to the plaintiff, and it appears from his testimony that the removal of the sawdust was not within the scope of his employment. But assuming, as we do for the present purposes, that the order was directed to him, the plaintiff proceeded to execute it, and while thus engaged his hand came in contact with the moving saw, and as a result he received the injuries in question. The plaintiff had been employed about this machine some five or six weeks preceding the accident, and had been employed about the mill on former occasions, in all about six months. His testimony shows that he knew the saw was in motion when the order was given, and that he neither heard nor saw anything to indicate that it was to be stopped, or had been stopped, up to the time of the accident.

It is insisted that the facts stated bring this case within a rule stated in *Chicago, R. I. & P. R. Co. v. McCarty,* 49 Neb. 475, which is as follows:

"When a master gives a servant a command requiring the doing of an act not within the usual scope of the servant's duty, which must be performed at once or not at all, without opportunity for deliberation, the servant is not charged with contributory negligence, even though

there may have been danger apparent to him in the performance of the act, unless the danger was so patent that a prudent man would not have obeyed."

The two cases are hardly parallel. In that case the order to the employee, who was a common laborer, was to board a moving train. It was one that had to be obeyed instantly, if at all, and left no opportunity for deliberation. It required the employee to perform the act, dangerous in itself, under the circumstances shown in the case, and obedience to it involved grave risk to the employee in spite of all precautions he could take for his own safety. In the case at bar, the precise act ordered was not of itself dangerous. It involved no risk of any consequence to one knowing the position of the saw and that it was in motion, and acting with due regard for his own safety. The order was not like that in the other case, which had to be obeyed instantly, if at all, but allowed time for deliberation, and the taking of due precautions by the employee to guard against injury. The plaintiff knew the position of the saw, and that it was in motion when the order was given. His evidence shows no reason for a belief on his part that it had been stopped. As a reasonable being, of mature years, he must have known the danger of coming in contact with it. Although within a few inches of the saw, and in a position where, by the slightest effort, he might have seen and known whether the saw was in motion, he did not look, and seems to have taken no steps whatever to inform himself. The answer charges the plaintiff with contributory negligence. As was said in the case just cited: "The test of contributory negligence in such cases, as in others, is whether the servant in obeying conducts himself as a man of ordinary prudence would conduct himself under the circumstances." Tested by that rule, the facts disclosed by plaintiff's own testimony show, in our opinion, such a degree of negligence on his part as to preclude a recovery, and that the court properly directed a verdict against him.

Complaint is made because the court excluded testimony

offered on behalf of the plaintiff to the effect that it was customary to stop the saw while adjusting the platform. It is not claimed that the plaintiff was aware of any such custom. On the contrary, his own evidence shows that he did not remember ever having seen the platform adjusted, save on this particular occasion. The evidence was offered for the purpose of showing negligence on the part of the defendant. But, while we do not pass upon that question, we may assume, for present purposes, that negligence on the part of the defendant is conclusively established, and yet the plaintiff is not entitled to recover because his own negligence, as it appears to us, was the proximate cause of his injury.

Complaint is also made because the court excluded certain evidence tending to show that the light in the room where the saw was operated was insufficient. The evidence would not have saved the case, had it been admitted, because the only reasonable inference to be drawn from the plaintiff's testimony is that he could have seen the saw, had he looked for it, and that he failed to see it simply because he failed to look. If there was any error in the exclusion of this testimony, it was error without prejudice.

It is also insisted that the court erred in refusing to permit the plaintiff to state what his belief was at the time of the accident, as to whether the saw was in motion or not. His mere unfounded belief as to a condition which caused the injury is wholly immaterial, where it appears that he might have known, and that a due regard for his own safety required him to know, the truth. To act upon such a belief in the face of the facts and circumstances within his knowledge would of itself be negligence.

The further complaint is made that the court refused to permit the plaintiff to read certain portions of a deposition of a witness taken and filed on behalf of the defendant. Without going into other matters urged in justification of the ruling on this point, it will suffice to say that the

evidence offered tended to prove nothing which we have not assumed in the discussion of this case, and nothing which, had it been admitted, could have changed the result.

It is recommended 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.

CHARLES S. FRYER, APPELLEE, V. WILLIAM I. FRYER ET AL., APPELLEES; COLUMBIA NATIONAL BANK ET AL., APPELLANTS.

FILED NOVEMBER 11, 1905. No. 13,971.

Mortgages: FORECLOSURE: EVIDENCE. The rule requiring evidence in support of the allegation, in a petition for the foreclosure of a mortgage, that no proceedings at law have been had, etc., is available to an attaching creditor resisting the foreclosure and plaintiff's claim of priority.

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

Wilson & Brown and *Sawyer & Snell,* for appellants.

George A. Adams, contra.

ALBERT, C.

The plaintiff brought this suit to foreclose a mortgage which was given in the form of an absolute deed for the purpose of securing, as it is alleged in the petition, a certain indebtedness. The petition contains the usual allegation to the effect that no proceedings at law have been had for the recovery of the debt, or any part thereof. This allegation was put in issue by the appellants, the Columbia National Bank and the First National Bank,

who were among the parties defendant in the court below, each claiming a lien on the property, superior to that of the plaintiff, by virtue of certain attachments levied upon the mortgaged premises in actions instituted by them, respectively, against the principal mortgage debtor. The mortgagors made default. The court entered a decree of foreclosure, giving the mortgagee a first lien.

It is now claimed that there was a failure of proof on the negative proposition that no proceedings at law have been had for the recovery of his debt, or any part thereof. We have searched the record with more than usual care for evidence tending to support that proposition, and confess to an inability to find the slightest evidence tending in that direction. The plaintiff, however, contends that the rule requiring such proof does not apply to the appellants, who are not mortgagors, but merely claimants under attachment liens. This contention finds some slight support in dictum to be found in *Henry & Coatsworth Co. v. McCurdy,* 36 Neb. 863, where doubt is expressed as to whether an incumbrancer seeking to establish and foreclose his incumbrance in the same action, may invoke that rule, "the provision being," say the court, "for the benefit of the mortgagor." No authorities are cited in support of that position, nor was the point necessarily involved in that case. A different conclusion was reached in *Pratt v. Galloway,* 1 Neb. (Unof.) 168. A rehearing was had before another department, and the same conclusion reached in an opinion by OLDHAM, C., concurred in by both of his associates. 1 Neb. (Unof.) 172. We are unable to discover, either in the statute requiring such averment, or the reason upon which such statute is based, any good reason for holding that the failure of proof thereon is available only to the mortgagor, or those claiming under him as grantees. That a failure of proof on this point is fatal, when the question is raised by the mortgagor or his grantees, is settled by numerous decisions of this court. It is equally fatal, we think, when raised by attaching creditors as in this case. *Plumber v. Park,* 62 Neb. 665.

The question of the sufficiency of the evidence to sustain the decree in other particulars is raised. But it would be unprofitable to go into that question, because whatever conclusion we should reach thereon would not change the recommendation which, in view of the entire record, we have agreed upon.

It is therefore recommended that the decree of the district court be reversed and the cause remanded for further proceedings acording 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.

STATE OF NEBRASKA, EX REL. W. W. STEPHENS, ADMINISTRATOR, V. HOSMER H. HENDEE, COUNTY JUDGE.

FILED NOVEMBER 11, 1905. No. 14,321.

Mandamus is a discretionary writ, and it is no abuse of discretion to deny the writ, where its object is to compel the transfer of a trust fund from the custody of an official whose bond is sufficient to protect it to one whose bond is not sufficient for that purpose.

ERROR to the district court for Saline county: LESLIE G. HURD, JUDGE. *Affirmed.*

R. M. Proudfit, F. I. Foss and *R. D. Brown,* for plaintiff in error.

A. S. Sands and *Hall, Woods & Pound, contra.*

ALBERT, C.

About the 10th of January, 1905, one George Smith, who had been living alone on his farm in Saline county, was found dead in his house. The coroner took possession of

the body and personal effects of the deceased. Among his personal effects were $52.85 in cash, and a certificate of deposit for $3,300 issued to him by the First National Bank of Friend. The coroner turned the personal effects over to the county judge of the county, who is the respondent in this proceeding. The following month, W. W. Stephens, the relator, was duly appointed administrator of the estate of the deceased, giving a bond which was fixed at $500 and duly approved. On the same day he accompanied the county judge to the bank which had issued the certificate of deposit, and, for some reason which is not very clear, both he and the county judge indorsed the certificate in their respective official capacities, and the proceeds were placed to the credit of the county judge. Afterwards the relator came to the conclusion that he was entitled to the custody of the assets of the estate, and made a demand in writing on the county judge that all funds in possession of the latter be turned over to him. This demand was accompanied by an administrator's bond, signed by the relator and certain sureties, conditioned according to law. Both writings were delivered to the county judge, who refused to comply with the demand. The bond has not been approved, although its sufficiency is not called in question. Thereupon the relator applied to the district court for a writ of mandamus commanding the respondent to pay over the money in question, with interest. The district court denied the writ, and the cause is now here on error.

The application is grounded on the proposition that the county judge holds the money in his official capacity. Whether that proposition is sound is a question which would admit of some argument, and one upon which we do not undertake to pass, because, assuming the proposition to be true, we think the writ was properly denied. The writ of mandamus is a discretionary writ. *Moores v. State,* 71 Neb. 522; *Donahue v. State,* 70 Neb. 72; *Van Akin v. Dunn,* 117 Mich. 421; *People v. Jeroloman,* 139 N. Y. 14. In the last case the court said:

"A mandamus is only granted in the sound discretion

of the court. This discretion is not, of course, a capricious or arbitrary exercise of the power of the court to refuse relief even in a proper case. Where, however, it appears that with reference to the very question at issue the conduct of the party applying for the writ has been such as to render it inequitable to grant him relief by mandamus, the court may, in the exercise of its discretion, refuse the writ."

In the case at bar, the relator is an administrator acting under a $500 bond, and seeks to compel the respondent to turn over to him as such administrator almost $3,500, which he insists the respondent holds in his official capacity as county judge. If the latter thus holds the money, it is protected by his official bond, and, whatever the technical right of the relator to the possession of the money, a writ of mandamus should not issue to compel a transfer thereof from one whose official bond is presumably sufficient to protect it to one whose bond is obviously inadequate.

It is true that before this proceeding was instituted the relator tendered an additional bond in the sum of $7,000 and the sufficiency of the sureties thereto are not questioned. But the law contemplates a judicial order fixing the amount of the bond in such cases, and the approval thereof by the county judge. There appears no order fixing the amount of an additional bond, nor does it appear that there was any order made requiring an additional bond. The additional bond has not been approved, nor does it seem that any demand has been made that it be approved. The present proceeding is brought, not to require the county court to fix the amount of an additional bond, or to approve the bond tendered, but to compel the county judge to pay over the funds.

We are satisfied that the writ was properly denied, and we 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.

STATE OF NEBRASKA, EX REL. WILLIAM R. MELLOR, RELATOR, V. D. C. GROW ET AL., RESPONDENTS.

FILED NOVEMBER 11, 1905. No. 14,392.

1. **Taxation**: CORRECTION OF ASSESSMENTS. Chapter 112, laws 1905, amendatory of section 121, article 1, chapter 77, Compiled Statutes 1903, authorizes a county board to correct "evident errors of assessment, or of apparent gross injustice, in over valuation or under valuation of real property," at any of its annual meetings, whether such errors or injustice be due to some act of the assessor or to that of the board itself.

2. **Petition**: PARTIES. The several owners of different tracts or lots of land may unite in a petition to the board for relief from such errors and injustice.

3. **Decision of County Board**: CONCLUSIVENESS. Where the county board has jurisdiction of the subject matter and the parties, and grants such relief, its orders in that behalf are not subject to review in a collateral proceeding, but are conclusive until set aside on error or appeal.

ORIGINAL application for a writ of mandamus to compel respondents to vacate certain orders reducing assessments for taxation. *Writ denied.*

Norris Brown, Attorney General, W. T. Thompson and *R. J. Nightingale,* for relator.

J. S. Pedler and *H. M. Mathew, contra.*

ALBERT, C.

This is an original application to this court for a writ of mandamus requiring the respondents, who constitute the board of equalization of Sherman county, to vacate certain orders, made by that body in 1905, at its annual meeting,

reducing the assessed valuation of certain real estate in that county, and the restoration of the original valuation thereof on the tax list. The lands were duly assessed, and the assessment duly acted upon by the board of equalization, in 1904. At the sitting of the board of equalization in 1905 four petitions, each describing several tracts of land and signed by the owners of the respective tracts, were presented to such board. The petitions allege, in substance, that there are evident errors of assessment, and gross injustice in overvaluation of the real estate described in the petitions "as valued and equalized by the board for the purpose of taxation" in 1904, and the relief sought in each case was a reduction of such valuation. Evidence was taken, and the board granted the relief prayed. The relator thereupon made due demand on the board for a vacation of the several orders granting relief to the petitioners, and for the restoration of the original valuation of their lands to the tax list. The latter demand was also made on the county clerk, who is ex officio a member of the board of equalization. The respondents severally refused to comply with the demands, whereupon the relator filed this application.

The case involves an examination of some of the provisions of what is commonly known as the revenue act of 1903, and which, as originally passed, constitutes chapter 77, Compiled Statutes 1903 (Ann. St. 10400-10643). Section 105, article I (Ann. St. 10504), of that chapter provides that "all real property in this state, subject to taxation, shall be assessed on the first day of April, 1904, and every fourth year thereafter, which assessment shall be used as basis of valuation for taxation until the next quadrennial assessment except as hereinafter provided." The exception, so far as this case is concerned, at least, refers exclusively to such changes as may be lawfully made by the board of equalization. Section 121 of the above chapter (Ann. St. 10520), relates to the sessions, powers and duties of the county board of equalization, and provides, among other things, that the board shall, "at its meeting

in the year 1904, and every fourth year thereafter, equalize the valuation of real property of the county by raising the valuation of such tracts and lots as are assessed too low, and by lowering the valuation of such tracts and lots as are assessed too high."

It will be observed that, under the provisions of the sections just referred to, the valuation of real estate, as returned by the assessor and acted upon and adopted by the board of equalization in 1904, aside from the right of appeal to the district court given by section 124 of the act (Ann. St. 10523) and the inherent power of the legislature to amend or repeal the law, was irrevocably fixed and settled until the next quadrennial assessment. But in 1905 an act to amend section 121, *supra,* was passed with an emergency clause, whereby the power of the county board to raise or lower the valuation of real property was enlarged, by inserting immediately after the sentence ending with the word "high," in the above quotation, the following: "But in cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property the county board of equalization may at any of its annual meetings consider and correct the same by raising, after due notice has been given to the interested party or parties, or by lowering the assessed valuation of such real property." Laws 1905, ch. 112, sec. 1. In short, as the law stood when the petitions in question were presented and acted upon, the county board had authority to correct "evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property."

There is no dispute as to the law thus far, but the relator contends that the words "assessments" and "valuation," as used in the amendment of 1905, relate exclusively to the acts of the assessor, and, as the corrections in questions were of alleged "evident error of assessment and of apparent gross injustice in overvaluation of the land" as "valued and equalized" by the board itself in 1904, they were not within the amendment, and the board was without jurisdic-

tion to correct them at its annual meeting in 1905. This contention involves a narrower construction of the language of the amendment than we are disposed to give it. While the words "assessment" and "valuation" may be properly used to designate certain acts of the assessor, they are as properly, and more frequently, used to designate the official estimate of the value of property subject to taxation. While the assessor makes such official estimate, it is not conclusive, but is subject to revision by the county board of equalization, which body frequently substitutes its own estimate of the value of a particular portion of the property for that of the assessor. See sec. 121, *supra*. Consequently, the completed assessment or valuation of property, which forms the basis of taxation, includes, not only the estimates of the assessor, but also those of the board of equalization. There is nothing in the amendatory act which leads us to believe that the legislature used the two words in the restricted sense which the relator would give them. The act is remedial, and was intended to reach cases where, because of "evident error of assessment or of apparent gross injustice of overvaluation, or undervaluation," a taxpayer would bear more or less than his just share of the burden of taxation. The necessity for a remedy is just as urgent where the error or injustice is in the act of the board, as where it is in the act of the assessor, and it is not probable that the legislature lost sight of this necessity, nor that it intended to provide a remedy in the one class of cases and not in those of the other.

But the relator argues that any one aggrieved by any action of the board had already a remedy by appeal or error, consequently the amendment was not necessary to afford relief in that class of cases. But it is equally true that, without the amendment, one aggrieved by any act of the assessor could have such act reviewed by the board of equalization, and, failing there, could appeal to the district court. But these remedies were hardly adequate. Under the revenue act of 1903, real estate was to be as-

sessed in 1904, and every fourth year thereafter, and the acts of the assessor could be reviewed by the board and the assessments equalized by that body only at its quadrennial meetings. The assessment finally adopted by the board at such meetings as a basis for taxation would remain such basis for the next four years, unless corrected on appeal to the district court, which under the law had to be prosecuted within 20 days. Error was available for a longer period, but, as is well known, it is an unsatisfactory remedy in such cases. Through inadvertence or unavoidable accident the time for pursuing these remedies was frequently allowed to expire before the necessary steps were taken to make them available. Besides, cases might arise in which they would not be available under any circumstances, as where the buildings and improvements constituting the chief value of a particular piece of land were destroyed, or a comparatively worthless piece of land improved by the erection of costly buildings after the quadrennial meeting of the board. In each case the valuation adopted by the board as a basis for taxation, if just when adopted, would be grossly unjust after such changed condition of the property. As the law stood before the amendment, there was no remedy for cases of that kind, or for any other error or injustice in assessment or valuation, not jurisdictional, and they were required to stand until the next quadrennial assessment. It seems to us that the amendment was intended to mitigate such hardships, not by giving a remedy for every case of error or injustice, however slight, but for the class therein specified, whether the same are committed by the assessor or by the board itself.

By stipulation, and otherwise, an attempt is made to bring before this court the evidence taken before the county board at the hearing of the several petitions hereinbefore mentioned. But that evidence cannot be reviewed in this proceeding. The board had jurisdiction of the subject matter and the parties, and its orders in the premises are conclusive, and will be presumed to have been based on sufficient evidence, until reversed on appeal or error. 1 Desty, Taxation, p. 603.

Complaint is made that several property owners joined in one petition in each case. That is not a just ground of complaint. In cases of this kind, parties frequently, if not generally, act without an attorney, and technical exactness and nicety of pleading is neither expected nor required. The petitions are sufficient to confer jurisdiction, and that is sufficient where, as in this case, they are assailed collaterally.

It is recommended that the writ be denied.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the writ of mandamus is denied.

WRIT DENIED.

ERNEST WENDT V. NELLIE B. STEWART.

FILED NOVEMBER 11, 1905. No. 13,885.

Vendor and Purchaser: RIGHTS IN CROPS. Where, by the terms of a lease, rent is reserved in a share of the crops, the landlord and tenant are tenants in common of the growing crops, and in such case a purchaser of the real estate from the landlord during the term of the lease, in the absence of an agreement to the contrary, is not entitled to a portion of the crop belonging to the landlord which had been severed from the realty prior to the time he acquired title to the land upon which the crop was grown.

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

Frederick Shepherd and *Mockett & Polk,* for plaintiff in error.

Stewart & Munger, contra.

JACKSON, C.

On the 6th day of August, 1902, J. J. Rankin and E. T. Buxton entered into a written contract with L. L. E. Stew-

art, whereby they agreed to sell to Stewart a tract of land in Lancaster county, and to convey the same by warranty deed upon the payment of $2,500. From the record it is inferred that the legal title was in Rankin, but that Buxton had a beneficiary interest in the land. On the 12th day of August of that year, Rankin, joining with his wife, executed a warranty deed for the premises to Nellie B. Stewart, in whose behalf it would appear that L. L. E. Stewart was acting when the contract was made, and on the 22d day of October of that year, Buxton, joining with his wife, executed a quitclaim deed to Nellie B. Stewart, and from the stipulation appearing in the record it seems that the transaction was closed by the payment of the purchase money and the delivery of the deed on the 4th day of November of that year. At the time of the execution of the contract and the consummation thereof by the payment of the purchase money and the delivery of the deeds, Ernest Wendt was in possession of the real estate under a written lease from Rankin, terminating on March 1, 1903. The lease contained this provision: "And the said second party (Ernest Wendt), in consideration of the leasing of the above premises, hereby covenants and agrees with the party of the first part (J. Joseph Rankin) to pay the said party of the first part as rent for the same as follows, to wit: Two-fifths (2-5) of all the crops raised on said land, the same to be delivered in Emerald, Nebraska, during the rent period, at whatsoever place the first party may designate." Wendt disposed of the crop and paid the proceeds thereof to Rankin's agent, partly on December 18, 1902, and the balance on January 12, 1903. Nellie B. Stewart, the grantee in the deeds referred to, sued Wendt in the district court for Lancaster county for that portion of the proceeds of the crop paid to Rankin as rent, and recovered judgment, from which judgment Wendt prosecutes error.

The only question presented is whether or not the share of the crop reserved by the landlord in the lease to Wendt passed with the title to the land, there being no reserva-

tion in the deeds of conveyance, which were absolute in form. It is provided by section 1073 of the code: "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached, by virtue of any execution, attachment, or other process against the landlord or tenant, the interest of such landlord or tenant, against whom such process did not issue, shall not be affected thereby." Construing this section of the code, it was held in *Sims v. Jones,* 54 Neb. 769, that it was a distinct recognition by the legislature of the doctrine that the landlord and tenant are tenants in common of the growing crops, where rent is reserved in a share of the crops. The landlord, being a tenant in common with the tenant in the growing crops, becomes the owner of a share of the crops as soon as they are so far advanced that they may be said to be property. This rule would not be affected by that provision of the lease requiring the tenant to gather that portion of the crop belonging to the landlord. The landlord held the legal title to the land upon which the crop was grown until the consummation of the terms of the contract of sale, which, as we have shown, was on the 4th day of November, 1902, and, under the holding in *Yeazel v. White,* 40 Neb. 432, was, during that time, entitled to harvest and hold any portion of his share of the crops grown thereon that were in a proper condition for harvesting. In that case the conclusion was reached that the purchaser at a judicial sale did not acquire title to that portion of the crop severed from the realty before the confirmation of the sale, and such, without doubt, is the law in this state. As affecting that question, there seems to be no distinction in principle between the purchaser at a judicial sale and one who purchased directly from the holder of the title. It appears from the record that a portion of the crop, at least, had been severed from the realty before the title to the land passed from the landlord to the defendant in error and that the judgment in her favor included the value of that portion of the crop.

It follows, therefore, that the judgment of the district court was erroneous.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings in conformity with this opinion.

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 further proceedings in conformity with this opinion.

REVERSED.

CALVIN J. BROOKS V. EDGAR C. STANLEY.

FILED NOVEMBER 11, 1905. No. 13,948.

A single assignment of error, covering several rulings of the trial court, in the following language: "Errors of law occurring at the trial and duly excepted to by the defendant, as follows, as shown on page 6," etc., *held* too general to call for consideration, especially where it appears, as in this case, that objections to one or more of the questions included in the assignment were properly overruled.

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

Warrington & Stewart and *G. W. Fox,* for plaintiff in error.

H. M. Sinclair and *E. A. Cook, contra.*

JACKSON, C.

The defendant in error, hereinafter styled plaintiff, recovered judgment in the district court against the plaintiff in error, hereinafter styled defendant, for the possession of about half an acre of farm land. The controversy arose over a dispute about the location of a government corner. The defendant prosecutes error.

The first assignment of error covers the ruling of the trial court upon the objections of the defendant to some 12 different questions propounded to the plaintiff's witnesses, the exact language of the assignment being: "Errors of law occurring at the trial and duly excepted to by the defendant as follows, as shown on page 6," etc. This assignment of error is too general to call for consideration under the rule adopted and followed in this court, and will be disregarded, especially where it appears, as in this case, that objections to one or more of the questions included in the assignment were properly overruled. We are aware that a similar assignment was held good in *Darner v. Daggett,* 35 Neb. 695, but in a later opinion by the same author the rule of that case was especially disapproved. *Phœnix Ins Co. v. King,* 54 Neb. 630.

The second and third assignments of error are that the verdict is not sustained by sufficient evidence and is contrary to law. We have read the entire record, and from a consideration of all the evidence do not hesitate to say that the claim of the plaintiff, as to the place where the government corner was actually located, is sustained by an overwhelming weight of the evidence, and it is difficult to understand how a jury could arrive at any different conclusion from the one reached.

The giving of instructions 4, 5, 7 and 9 by the court on its own motion is also assigned as error. Instruction 4 is: "You are instructed that the real question in issue in this case is whether or not the strip of land in controversy belongs to the land described in plaintiff's petition, or whether it belongs to the land of the defendant, and it will be your duty to determine where the correct boundary line is between plaintiff's and defendant's property." It is complained of this instruction that it omits to advise the jury that it would be their duty to determine from the evidence where the correct boundary line is, but the instruction is not open to this criticism. It does not purport to be a rule of procedure. By the in-

struction the court defines the issue and informs the jury of the real question to be by them determined. They were, by later appropriate instructions, informed as to the burden of proof and the rules of law applicable to the determination of the controversy.

Instruction 5 is as follows: "The court instructs the jury that, in questions of boundary, natural objects, called for, marked lines, and reputed boundaries, well established, should be preferred, in ascertaining the identity of a tract of land, to the courses and distances of the calls of the grant." The complaint about this instruction is that it is not applicable to the testimony and tended to mislead the jury. This contention cannot be sustained. It appears from measurements made by surveyors subsequent to the government survey that the distances between section corners, as shown by the government field notes, do not correspond with actual measurements. On the other hand, the testimony is such as to leave no doubt that certain mounds, witness marks and stakes evidenced the actual location of government corners, and these mounds, witness marks and stakes must control over the courses and distances shown by the field notes. The early settlers established their lines corresponding with the location of such corners, marked their boundaries by rows of trees, and by common assent recognized the boundaries so established for many years—in fact, until the evidences of the corner in dispute were obliterated by the plow, except the remains of a cedar stake found later at a point where the plaintiff claims the government corner in dispute to have been located. In view of these facts, the instruction is held applicable to the evidence.

The first sentence of instruction 7 is: "If you find from the evidence that a quarter corner was in fact located by the government surveyor on the north side of section 18, then that corner will mark the plaintiff's and defendant's boundary, regardless of any excess that may exist in the survey of the whole north line." It is said that

this sentence is misleading, because it is not broad enough under the evidence. It is a sufficient answer to say that, if the defendant was not satisfied with this instruction and desired one more specific, it was his privilege and duty to submit such an instruction to the court, with a request that it be given to the jury. This he did not do, and he cannot now be heard to complain of the instruction in question.

Through instruction 9 the court said to the jury: "You are instructed that, if you believe from the evidence that the line claimed by the plaintiff is the correct line, then you will find for the plaintiff." It is contended that this instruction is also too general. Our remarks relative to the objection to instruction 7 are equally applicable to the objection to instruction 9.

We find no error in the instructions complained of, and 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.

LOUIS C. HOLTHAUS, APPELLANT, V. ADAMS COUNTY ET AL., APPELLEES.

FILED NOVEMBER 11, 1905. No. 13,953.

1. **Taxation: EXEMPTIONS: PROPERTY ABANDONED FOR RELIGIOUS PURPOSES.** The abandonment of property formerly used exclusively for religious and educational purposes, with the intention of never again using the property for such purposes, together with the fact that since such abandonment the property has not been used for the purposes stated, or for any other purpose that would exempt it from taxation, renders such property liable to taxation from the time of such abandonment.

2. **Tax List: EVIDENCE.** A tax list made in conformity with the provisions of the statute is *prima facie* evidence that a levy of taxes was made by the proper authorities, and is conclusive as against a claim of irregularities in making such levies.

3. **Taxes: COLLECTION.** The provisions of the revenue law of 1903, changing the method of procedure in the enforcement of the collection of taxes, are available for the collection of taxes delinquent prior to the time such revenue law went into effect.

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

Tibbets Bros. & Morey, for appellant.

F. P. Olmstead and *W. F. Button, contra.*

JACKSON, C.

This is an appeal from the district court for Adams county. The facts important to the inquiry are these: The order of Sisters of Visitation acquired by donation block 6 in Mumaw's addition to the city of Hastings, and erected thereon an academy building, which they used exclusively for educational and religious purposes from the year 1890 to November, 1896, when they abandoned the property with the intention of never again using it for the purpose stated. To aid in the erection of the building the order borrowed a large sum of money, and secured the payment of the same by mortgage covering said real estate. Since the abandonment of the property by the order of the Sisters of Visitation it has been unoccupied, except by a tenant of the mortgagee, who was permitted to live there without consideration, other than his services in the care of the property; the mortgagee having taken possession of the property upon its abandonment by the sisters. The plaintiff, appellant herein, succeeded to the rights of the mortgagee, and for several years made no effort to collect the debt secured by his mortgage, but finally instituted a proceeding wherein the mortgage was foreclosed, and through such proceeding acquired the legal title, which he now holds. From the years 1897 to 1902, both inclu-

sive, the assessor's books, as made up in the office of the county clerk of that county by an assistant employed in that office, contained a description of the real estate involved, and after such description the word, "exempt," written by the assistant. The assessor each year valued the property for the purpose of taxation and made due return thereof. The tax list, as made up by the county clerk each year, contained a description of the property, the valuation placed thereon by the assessor, and the several amounts of taxes, presumably corresponding with the levies made by the state, county and other municipal authorities. Opposite these entries on the tax list was written, by whom and when the record does not disclose, the word "exempt." For some of the years the mortgagee paid the tax imposed by the city of Hastings. All other taxes for those years are unpaid. At the tax sale, required by law to be held for the sale of all real property upon which taxes were delinquent, the county treasurer of Adams county, in the year 1903, offered said real estate for sale for all taxes delinquent thereon at that time, but the property was not sold for want of bidders. The word "exempt" was by some one erased from the tax lists. The plaintiff instituted this action in February, 1904, against the county of Adams, the treasurer of that county, and the city of Hastings, wherein he sought to have the taxes for the years stated decreed void, and to enjoin the defendants from attempting to enforce the collection thereof. The defendant city of Hastings interposed a demurrer to the petition, which was sustained, and the action dismissed as to that defendant. The county of Adams and its treasurer filed an answer and cross-petition, wherein they sought a foreclosure of the lien for the taxes during the controverted years. They also demurred to the plaintiff's petition. The plaintiff answered to the cross-petition. In the trial court the defendants' demurrer to the plaintiff's petition was sustained, and the cause proceeded to trial upon the cross-petition of the defendant and the answer thereto. The

trial resulted in a decree sustaining the validity of the taxes and foreclosing the lien, as prayed. Plaintiff appealed, and the case is now here for review.

The contention of the appellant is that the property was exempt from taxation during the controverted years, and that under the evidence, even though it be held that the property was subject to taxation, the decree cannot be sustained. The first contention involves a construction of the constitutional and statutory provisions relative to the exemption of property in this state from taxation. The constitutional provision (art. IX, sec. 2) is: "The property of the state, counties, and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general law." It is provided by statute (Comp. St. 1903, ch. 77, art. I, sec. 13; Ann St. 10412): "The following property shall be exempt from taxation: First, all property of the state, counties, and municipal corporations. Second, such other property as may be used exclusively for agricultural and horticultural societies, for schools, religious, cemetery and charitable purposes." The construction of these provisions was involved in the case of *Scott v. Society of Russian Israelites,* 59 Neb. 571. The first paragraph of the syllabus in that case is:

"Property used directly, immediately and exclusively for religious purposes is exempt from taxation, without regard to the question of absolute ownership."

Mr. Justice NORVAL, who delivered the opinion of the court, in commenting upon the constitutional and statutory provisions quoted above, said:

"The language of the provisions quoted is plain. There is exempt from taxation all property used exclusively for religious purposes. It is the exclusive use for the purpose named which determines whether the property is subject to the burden of taxation or not."

In support of this contention he quoted largely from *Washburn College v. Commissioners of Shawnee County*, 8 Kan. 344. The law of Kansas is similar to our own, and Mr. Justice Brewer, in the opinion in that case said:

"To bring this property within the terms of the section quoted it must be 'used exclusively for literary and educational purposes.' This involves three things—first, that the property is used; second, that it is used for educational purposes; and third, that it is used for no other purpose."

The conclusion reached in that case was that certain real estate, owned by an educational society, and purchased with a view of thereafter erecting buildings thereon to be used for educational purposes, but not yet improved or used for that purpose, was not exempt from taxation under the laws of Kansas. With the reasoning in that case we agree, and, applying the principle there involved to the case at bar, it seems clear that, from the time the order of the Sisters of Visitation abandoned the property, with the purpose of never again using it for educational and religious purposes, the property was subject to taxation, and taxes might be lawfully levied and assessed thereon.

It is claimed on the part of the appellant that the mortgage was made and allowed to run in reliance upon the exemption of said premises from taxation. His position in that respect is untenable. The mortgagee may have contracted with the mortgagor that the property should continue to be used for educational and religious purposes during the period covered by his mortgage, although the existence of any such agreement or understanding is denied by the sisters having the institution in charge, but such contract cannot avoid the effect of our revenue law, or exempt the property from taxation, except as the contracting parties should keep themselves within the provisions of the statute relative to the exemption of property from taxation. It is argued that the statute invites the investment of money in educational institutions for the public benefit, and exempts such property from taxa-

tion, and that, once so invested, the protection of the statute should not be removed until such institution is devoted to other purposes. It is a sufficient answer to say that the protection of the statute has never been removed. The law remains the same, and the appellant, by taking advantage of its privileges, might have continued the property within its terms, but there is no pretense that the appellant, from the time he took possession of the property, ever contemplated using it for religious or educational purposes. On the contrary, the evidence discloses that he held it with a view of some time disposing of it to some one who might use it for that purpose.

The next contention involves two questions. It is averred in the cross-petition that taxes were legally assessed and levied on the property during each of the years in question. The answer to the cross-petition is a general denial, and the only evidence that taxes were in fact levied on the property during those years was the tax lists in the hands of the county treasurer. It is the contention of the appellant that the tax lists are not sufficient evidence that a levy was in fact made. With this contention we cannot agree. A tax list is a public record required to be made by the county clerk, and in which he is required to transcribe the several assessments, and to enter into distinct columns the description of lands and lots and values, and each description of tax, and to apportion the tax among the respective funds to which it belongs according to the number of mills levied for each of said funds, showing a summary of each distinct tax. The tax list, so completed, with the warrant of the clerk attached, is the source of the treasurer's authority to enforce the collection thereof, and is *prima facie* evidence, at least, that levies were made corresponding with the entries therein, and if, as contended by appellant, no such levies were in fact made, it was incumbent upon him to offer some proof to overcome the presumption arising out of the introduction of the tax list in evidence. The case of *Merrill v. Wright*, 41 Neb. 351, cited in support of the contention of the appel-

lant, in so far as it holds that, to uphold the validity of a tax lien sought to be foreclosed, neither the levy nor assessment of taxes will be presumed from the mere introduction in evidence of a treasurer's certificate of purchase at a tax sale, where the existence of such levy and assessment have been put in issue by the answer, is expressly overruled in the case of *Ure v. Reichenberg,* 63 Neb. 899. Furthermore, the exact claim of the appellant is not that no levy was made by the proper authorities, but that no levy was made as against this property, and in support of that contention the fact is cited that at one time there appeared on the tax lists the word "exempt," and that the property was treated as exempt by the county treasurer until the year 1900, when the county treasurer carried forward the amount of the unpaid tax as being delinquent. The question of whether the property was exempt from taxation or not is a question of law, and not one resting in the discretion of a county treasurer. The course followed by the county treasurer in that respect, and the entry of the word "exempt," would at most be mere irregularities, and as against such irregularities the court will regard the amount of the taxes against the property in question, as borne upon the books of the county, as unalterably established.

The remaining question is the right of the county to foreclose its tax lien without having first bid the property in and obtained a tax sale certificate, and it is conceded that this contention is well taken under the authority of *Logan County v. Carnahan,* 66 Neb. 685, unless the right exists by virtue of the provisions of the revenue law of 1903. The provision of the new revenue law under which appellees seek to sustain the decree is found in section 231, article I, chapter 77, Compiled Statutes, 1903 (Ann. St. 10630), and is as follows: "Every county in this state shall have a lien upon each tract or lot of land for all taxes due thereon whether such taxes are for one or more years, or are due to the state, county, township, school district, road district, city, village or other municipal subdivisions

of said county, and may, at any time after such tract or lot of land has been offered for sale for such taxes or any part thereof and not sold for want of bidders, proceed to foreclose said lien and cause said tract or lot to be sold for the satisfaction thereof in the same manner and with like effect as if such lien were a mortgage for the amount thereof executed to said county by the owner of said tract or lot of land." This provision was in force from and after September 1, 1903, and relates solely to the procedure to be adopted by the county to enforce its lien, and was, in our judgment, available to the appellees for the enforcement of the collection of the taxes in question.

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.

KANSAS CITY & OMAHA RAILWAY COMPANY v. STATE OF NEBRASKA, EX REL. KEARNEY COUNTY.

FILED NOVEMBER 11, 1905. No. 13,982.

Highways: PRESCRIPTION. To establish a public highway by prescription there must be a continuous user by the public, under a claim of right distinctly manifest by some appropriate act on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land. *Lewis v. City of Lincoln*, 55 Neb. 1.

ERROR to the district court for Kearney county: ED L. ADAMS, JUDGE. *Reversed and dismissed.*

J. W. Deweese, J. L. McPheely and *Frank E. Bishop*, for plaintiff in error.

Lewis C. Paulson, contra.

JACKSON, C.

The county of Kearney instituted an action against the Kansas City & Omaha Railway Company to compel the railway company to put in a crossing at a point where it was alleged that the company's right of way crossed a public highway. In the petition it was alleged that the company's railway crossed a public highway in the county of Kearney and state of Nebraska, said highway being on section line lying to the east of the southeast quarter of section 24, township 6, range 13; that the railway company had been notified by the supervisor of the road district, in which it was alleged that the road was situated, to put in a crossing over its right of way at the point where the public highway crossed the company's right of way; that the company had refused to comply with the requirements of the notice and to put the crossing in, as requested. By the company's answer the existence of a public highway along the section line in question was put in issue. Upon the trial there was a finding for the relator, and a peremptory writ of mandamus was allowed to compel the construction of the crossing. The railway company prosecutes error, and contends that the evidence does not sustain the judgment.

It appears from the evidence that the section line in question is part of the county line between the counties of Adams and Kearney, and there is no pretense that any action was ever taken on the part of the authorities of either county to establish a public highway along this line, and the only evidence that a public highway did in fact exist there was brought out in an effort to establish the existence of such highway by user. It appears that the company's railway was built across the section line in question in the year 1887, and that at the point where it crosses the alleged public highway there is a fill of 14 feet, and that, at least since the railway was built, no one has traveled the section line at the point where it is crossed by the railway. The railway extends

from the east to the west, and on the south of the railway for several years the section line for one-half mile has been fenced in pasture, and is not open for travel. It is evident that, prior to the time the railway was built, the land on either side of the section line was open prairie, and the country sparsely settled.

Concerning the use of the section line as a public highway, W. A. King testified on behalf of the plaintiff that in the year 1903 he was the road overseer in road district No. 11 in May township, Kearney county; that for some distance both north and south of the railway the alleged public highway was in his district; that the railway crossed the section line in a kind of a draw; that there was a 12 or 14 foot fill; that the next section line north of the railway was a little over half a mile; that the section line for about 60 or 70 rods on the north had been traveled for about 23 years, and that then they angled off into the hills; that it had been traveled clear down to the railway track; and that it was impossible to cross the railway at that point. On cross-examination he testified that the last time he was along that line was in the fall of 1903; that at that time he could travel down to the fill; that he had not crossed the railway track, nor had any one else, since it had been laid there; that he had never seen any one else travel the section line, but that there was a traveled road there on the north; that the section line was fenced on the south of the railway, and had never been worked as a road; that, prior to the time the railway was built they did not travel down through the swale where the railway crosses; that there was no fence in there, and they traveled 60 or 70 rods on the line, and then they angled off into the hills southeast, and they did not travel across where the railway now is. Carl Norman testified that he had been acquainted with the section line in question for about six years; that he had seen people come down the section line to the railway and turn around and go back; that he had seen them turn out to the west to strike the railway gate and cross down through, and that

he had seen them turn east and take down the fence and go through. E. E. Canfield testified that he lived not quite a mile from the crossing; that, before the railway was built, nearly two-thirds of the section line along section 24 was traveled a considerable; that he went through there often himself; that there was nothing to hinder them from going in either direction from the section line; that he had traveled through there for 24 years, and that there was a fence extending across the section line south of the railway and another fence about half a mile south of that. Carl Bjorklund testified that he lived in Kearney county for 26 years; that as to the section line east of section 24 he saw a road there about 1882, 1883 and 1884; he crossed over to Juniata and Hastings. When asked as to travel since that time, he said: "Well, I see last winter the people hauled straw on the field where I am working, right by the road there, and they had to angle out over the pasture and out through Sand creek. He took out two straw stacks there, and I had to go there four times, and had to crawl through the wire and take the wire down and hang them up." George Cobb testified that he did not know the conditions that existed prior to the time that the railway was built; that for 12 years the road had been traveled north of the railway track; that there had been no travel south on the section line, except when he traveled up there once in a while fixing the fence, and that there was a pretty fair road north of the railway track.

That is the substance of the evidence offered on behalf of the plaintiff to establish the existence of a public highway across the railway track at the place in dispute, and it falls far short of being sufficient to justify a court in finding that there was, in fact, a public highway there. The existence of a public road may be shown by user alone, but only within certain well defined rules.

"To establish a highway by prescription there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that

required to bar an action for the recovery of title to land." *Lewis v. City of Lincoln*, 55 Neb. 1.

To establish the existence of a legal public road over the premises of a private person by user alone, it must appear that the user was with the knowledge of the owner. *Graham v. Hartnett*, 10 Neb. 517. In this case there is an absolute lack of evidence that the public authorities ever improved the line in question as a public highway, or exercised any control or dominion over it, or made any claim that a highway did in fact exist, until the supervisor of the road district in April, 1903, attempted to serve a notice on the railway company to construct a crossing at the point where the railway crossed the section line. It is true that a witness testified that on the section line north of the railway a culvert had been constructed, but when, or by whom, the evidence does not disclose. There is no evidence of the use of the section line as a public highway with the knowledge or consent of the owners of the abutting property, or of such use even adverse to the abutting property owners; and from a consideration of the whole evidence it is evident that the use of such section line as a public highway was limited to the early settlement in that community, and up to the time when the owners began to inclose their land for pasture, or improve the same for other purposes.

Under such circumstances, a writ of mandamus should not issue for the purpose sought in this action.

We recommend that the judgment of the district court be reversed and the cause dismissed.

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 dismissed.

REVERSED.

INDEX.

Adverse Possession.

1. Where a husband in adverse possession of land dies, the possession of the widow may be tacked to that of the husband so as to raise the bar of the statute of limitations. *Larson v. Anderson* 361
2. The possession of the widow of one in adverse possession of land is a continuation of the adverse possession of the husband, and will not be presumed to be adverse to the claims of their children and heirs. *Larson v. Anderson*... 361
3. The widow's right to possession of land of her deceased husband is not hostile to that of her husband's heirs, unless she notifies them that she claims it in her own right. *Larson v. Anderson*..... 361

Appeal and Error. See ATTORNEY AND CLIENT, 2. CONTEMPT, 1. COUNTIES AND COUNTY OFFICERS, 6. CRIMINAL LAW. EXCEPTIONS, BILL OF. INJUNCTION, 3. INSURANCE, 7. INTOXICATING LIQUORS, 5, 6. JUSTICE OF THE PEACE. MALICIOUS PROSECUTION. TRIAL.

Bond.

1. It is not error to allow the filing of an amended appeal bond. *McGinnis v. Johnson Co*..... 356
2. Supersedeas denied. *Prante v. Lompe*..... 210

Evidence.

3. Admission of evidence in action based on fraud, *held* not prejudicial. *McKibbin v. Day*..... 424
4. Admission of evidence in an action for damages caused from overflow, *held* not prejudicial. *Chicago, B. & Q. R. Co. v. Mitchell*..... 563
5. Evidence in an action on a liquor license bond, *held* sufficient to require the submission of the question of conspiracy to assault plaintiff to the jury. *Quist v. American B. & T. Co*..... 692

Instructions.

6. Where a case has been reversed and remanded, with directions to submit certain issues to the jury, and is tried a second time on the same issues, the supreme court, on a

Appeal and Error—*Continued.*

second appeal, will examine the correctness of the instructions. *Morrill v. McNeill*..... 291

7. Refusal to instruct that the party alleging negligence has the burden of proving it, *held* erroneous. *Lincoln Traction Co. v. Shepherd*..... 374

8. An instruction which withdraws from the jury an issue of fact concerning which there is a conflict of evidence is erroneous. *Hensel v. Hoffman*..... 382

9. Instructions in an action based on fraud, *held* not prejudicial. *McKibbin v. Day*..... 424

10. Instructions in an action against a railroad company for causing overflow approved. *Chicago, B. & Q. R. Co. v. Mitchell* 563

11. An instruction to the effect that, if the jury found that defendant had ratified a settlement, they should find for plaintiff, failed to state what acts amount to a ratification. *Held* erroneous. *Morrill v. McNeill*..... 291

Law of Case.

12. A point necessarily determined on appeal becomes the law of the case. *First Nat. Bank v. Gibson*..... 236

13. Where on appeal a petition is held to state a cause of action as against a general demurrer, this ruling becomes the law of the case on a second appeal unless objected to in the district court. *First Nat. Bank v. Gibson*..... 236

Practice and Review.

14. Errors occurring at the trial will not be reviewed, unless presented to the trial court by a motion for a new trial. *Hanson v. Nathan*..... 288

15. A motion for a new trial is not necessary to a review of a judgment of the district court on an appeal from the order of a license board granting or refusing license to sell intoxicating liquors. *Lee v. Brittain*..... 591

16. Where a case is tried on the theory that the pleadings present a certain issue, the supreme court will not examine the pleadings to determine their sufficiency to clearly make the issue. *Morrill v. McNeill*..... 291

17. A petition in error will not be dismissed on motion for want of a bill of exceptions, where the only question is one of law, and it is presented by a transcript of the proceedings of the lower court. *Johnson v. Emerick*..... 303

18. On appeal for trial *de novo*, an error in compelling appellant to elect on which of two causes of action he would proceed cannot be corrected. *Webber v. Ingersoll*..... 393

19. Where one relies on a variance, unless the question is

Appeal and Error—*Concluded.*
raised during the trial, it will not be considered on error. *Spencer v. Wilson*..... 459

20. Where the transcript does not show a final judgment, the proceedings in error will be dismissed. *Wall v. Kerr*..... 603

21. Where the transcript does not contain the judgment or final order to be reviewed, the petition in error will be dismissed. *Modern Woodmen of America v. Plummer*..... 711

22. A single assignment of error covering several rulings, *held* too general, where objections to one or more of the questions included in the assignment were properly overruled. *Brooks v. Stanley*..... 858

Transcript.

23. In proceedings in error, the plaintiff must file a transcript of the proceedings of the lower court with his petition in error, and the original papers cannot be used as a substitute therefor. *Smith v. Delane*..... 594

Verdict.

24. A verdict will not be set aside for want of evidence, unless the want is so great as to show that the verdict is manifestly wrong. *Union P. R. Co. v. Fickenscher*..... 497
Fitch v. Martin..... 538

25. An appellate court will not set aside a verdict for want of evidence, if there is sufficient evidence to have supported a judgment by default, unless the evidence against the verdict is so strong as to indicate that the verdict must have been predicated upon something other than the evidence. *Union P. R. Co. v. Fickenscher*..... 507

26. When the answer fails to state a defense, but admits plaintiff's cause of action, and the verdict and judgment are supported by the petition, errors occurring at the trial are without prejudice. *Miller v. Loverene & Browne Co*..... 557

Appearance. See PROCESS, 3.
Filing a motion for a new trial constitutes an appearance. *Tootle-Weakley M. Co. v. Billingsley*..... 531

Attorney and Client.

1. An attorney has a lien for services and disbursements on moneys received on his client's behalf, though the client is an executor or trustee and the services were on behalf of the estate. *Burleigh v. Palmer*..... 122

2. Where a client agrees to pay a certain amount in consideration of the release of an attorney's lien, and suit is brought upon such agreement, *held* that evidence of the amount of the attorney's services or the terms of employment was properly rejected. *Burleigh v. Palmer*..... 122

Attorney and Client—*Concluded.*

3. A contract between an attorney and client is not necessarily invalid because part of the services to be rendered is the procurement of legislative action, nor because such contract provides for a contingent fee. *Stroemer v. Van Orsdel* 132, 143
4. A contract between attorney and client will be enforced, unless unlawful means are contemplated or employed in its execution. *Stroemer v. Van Orsdel*.....132, 143

Bankruptcy.

1. A trustee in bankruptcy succeeds to the bankrupt's title to choses in action, subject to any defense to which they would have been liable in the hands of the latter. *Nebraska Moline Plow Co. v. Blackburn*..... 246
2. A trustee in bankruptcy, acting for creditors, may maintain a creditor's bill without reducing the claims of the creditors to judgment. *Shreck v. Hanlon*..... 264
3. The question of fraud in conveyances made prior to July 1, 1898, could not be determined in a hearing on application by a bankrupt for his discharge. *Shreck v. Hanlon*..... 264
4. A vendee who borrows money to purchase land, pledging the land for its payment, *held* to take merely the equitable title, subject to a lien in favor of the lender, and that his trustee in bankruptcy has no better position. *Beer v. Wisner*, 437
5. A party against whom a judgment has been rendered in favor of the trustee of a bankrupt may, by proper proceedings in equity, offset against it a claim allowed in his favor in the bankruptcy proceedings. *Tootle-Weakley M. Co. v. Billingsley* 531
6. Evidence in an action by a trustee in bankruptcy to recover a preference, *held* to sustain the judgment. *Hargreaves Bros. v. Hackney*..... 700
7. Instructions in an action by a trustee in bankruptcy to recover a preference, *held* not prejudicial. *Hargreaves Bros. v. Hackney*..... 700

Banks and Banking.

1. Damages to a national bank for misfeasance or mismanagement of its officers are assets of the bank, recoverable only by the bank or for the benefit of the stockholders and creditors. *Yates v. Jones Nat. Bank*..... 734
2. The officers of a national bank are personally liable under the common law for false reports made and published by them. *Yates v. Jones Nat. Bank*..... 734
3. It is no defense to an action against officers of a national bank for making false reports that such reports were made

Banks and Banking—*Concluded.*
without knowledge of their falsity. *Yates v. Jones Nat. Bank* 734

4. Evidence in an action against officers of a national bank for misfeasance, *held* to sustain the findings. *Yates v. Jones Nat. Bank*..... 734

5. An assignee of negotiable paper after maturity takes it subject to defenses. *May v. First Nat. Bank*..... 251

Bonds. See APPEAL AND ERROR, 1.
It is essential to a recovery on a bond to plead a breach of the condition. *Lancaster County v. Fitzgerald*..... 433

Carriers. See EVIDENCE, 16, 18. STREET RAILWAYS.

1. In an action for damages against a street railway company, where plaintiff alleges negligence, which is denied, defendant is not required to disprove negligence by a preponderance of evidence. *Lincoln Traction Co. v. Shepherd*.. 369

2. Where, in an action against a carrier for personal injury, it appears that some defect in appliances or act of its employees contributed to the injury, a presumption of negligence arises, and unless rebutted establishes negligence of the carrier. *Lincoln Traction Co. v. Shepherd*..... 374

3. In the absence of evidence as to the class, condition and price of live stock, damages cannot be awarded for a decline in price against a carrier negligently refusing to accept and transport it. *Chicago, B. & Q. R. Co. v. Todd*..... 712

4. Where a railroad company negligently refuses to receive and transport live stock it is liable in damages. *Chicago, B. & Q. R. Co. v. Todd*..... 712

Clerks of Courts. See PENALTIES.

1. Where before the act (laws 1899, ch. 31) amendatory of sec. 3, ch. 28, Comp. St. 1903, limiting the salary of clerks of district courts, a clerk collected fees for making complete records, but died before such records were made, and after said act went into effect his successor made these records and received fees therefor from his predecessor's representatives; in an action by the county on the official bond of such successor, *held*, that he was properly chargeable with such fees. *Boettcher v. Lancaster County*..... 148

2. Under ch. 31, laws 1899, a clerk of the district court is required to account for fees earned by him as a member of the board of commissioners of insanity. *Boettcher v. Lancaster County*..... 148

3. Under ch. 31, laws 1899, the clerk of the district court is required to account for fees earned by him for official serv-

Clerks of Courts—*Concluded.*
ices, whether collected or not. *Boettcher v. Lancaster County* 148

4. The clerk of the district court is not required to account for fees collected by him for services rendered by his predecessor before ch. 31, laws 1899, went into effect. *Boettcher v. Lancaster County*..... 148

Common Law.
By statute, so much of the common law of England as is applicable and not inconsistent with the constitution of the United States or the constitution and statutes of this state is in force in this state. *Kinkead v. Turgeon*..... 580

Constitutional Law. See ELECTIONS, 4-6. STATUTES, 4, 5. TAXATION, 2.

1. Where portions of an act were the inducement for its passage, and such parts are unconstitutional, the act is void *in toto*. *State v. Galusha*..... 188

2. Provisions found in the schedule of the constitution are not in all instances to be construed as of a temporary character, and the language used should be given its ordinary meaning. *State v. Galusha*..... 188

3. Courts will give weighty consideration to the legislative construction of the constitution when legislation is had regarding subjects of a political nature. But when such construction clearly appears to be unwarranted it will not be followed. *State v. Galusha*..... 188

4. The provisions of the biennial election law (laws 1905, ch. 65) are in conflict with the constitution relative to the election of judicial officers and regents of the university. *State v. Galusha*..... 188

5. Sec. 11, art. III of the constitution, requiring the subject of an act to be clearly expressed in the title, is complied with if the subject is manifest from the language of the title, a recital in detail being not indispensable. *Alperson v. Whalen*..... 680

6. The title of ch. 93, laws 1901, which provides penalties for blackmail, meets the requirements of sec. 11, art. III of the constitution. *In re Algoe*..... 353

7. The provisions of secs. 12 and 13 (laws 1905, ch. 76) relating to the election of city aldermen, *held* valid. *State v. Malone*, 645

8. The provision in sec. 12, ch. 76, laws 1905, for an election of city aldermen is not special legislation inhibited by the constitution, because one city only comes under the operation of the law. *State v. Malone*..... 645

Constitutional Law—*Concluded.*

9. Ch. 47, laws 1905, providing for biennial elections, *held* unconstitutional. *State v. Plasters*..... 652
10. Ch. 14, laws 1887, relating to cities of the second class, being amendatory of ch. 14, laws 1885, which has been held void, is also invalid. *City of Plattsmouth v. Murphy*..... 749
11. Ch. 139, laws 1903, an act to prevent the use of the flag for advertising, does not deprive one of his property without due process of law, and is not class legislation. *Halter v. State* 757
12. Notwithstanding the fourteenth amendment to the federal constitution, the state in the exercise of police power may enact laws to promote the health, comfort, safety and welfare of society. *Halter v. State*..... 757
13. Whether legislation is calculated to promote the health, comfort, safety and welfare of society is a legitimate subject of inquiry by the court, when the constitutionality of the act is assailed. *Halter v. State*..... 757
14. An act which is calculated to foster sentiments of patriotism is not vulnerable to the objection that it is not calculated to promote the welfare of society. *Halter v. State*..... 757

Contempt. See INJUNCTION, 1-3.

1. A judgment in a summary proceeding for contempt may be reviewed without a motion for a new trial. *Crites v. State*, 687
2. Presumptions and intendments will not be indulged in to sustain convictions for contempt of court. *Crites v. State*.. 687
3. In a contempt proceeding, a recital that defendant is guilty of contemptuous behavior is a mere conclusion, and insufficient to show that the offense was in fact committed. *Crites v. State*..... 687

Contracts. See ATTORNEY AND CLIENT, 3, 4. COUNTIES AND COUNTY OFFICERS, 1-3.

1. Where a written order for threshing machinery contains a condition that it shall not be binding until accepted, the signer of the order is not bound until its acceptance. *Robinson & Co. v. Ralph*..... 55
2. While public policy forbids the enforcement of illegal contracts, it insists on the enforcement of lawful contracts. *Stroemer v. Van Orsdel*..... 132
3. One cannot recover damages for breach of contract, where the failure to comply was his own. *Apking v. Hoefer*.... 325
4. One basing a claim on a contract must accept it in its entirety. *Beer v. Wisner*..... 437
5. A contract should be construed in the light of surrounding

Contracts—*Concluded.*

circumstances and the condition of the parties at the time of making it. *Fiscus v. Wilson*..... 444

6. Where parties to a contract have, with a knowledge of its terms, given it a particular construction, such construction will generally be adopted by the courts. *Fiscus v. Wilson*.. 444

7. Where a contract of employment by the year has been entered into for a definite period, continued service thereafter will be presumed to have been performed under the original contract. *Fitch v. Martin*..... 538

Corporations.

1. A notice by publication was directed to "The Globe Investment Company," the true name of the corporation being "Globe Investment Company." *Held*, that the variance was immaterial. *Clifford v. Thun*..... 831

2. In an action against a corporation on a contract, the presumption is that the contract is *intra vires* and that the officers executing it acted within the law, unless the petition states facts showing the contrary. *Willow Springs Irrig. Dist. v. Wilson*..... 269

3. Where a claim has been disallowed by the auditing board of a corporation, an original action may be instituted on the claim, in the absence of a statute directing other proceedings to enforce it. *Willow Springs Irrig. Dist. v. Wilson*... 269

4. Contracts of a corporation to furnish the services of licensed physicians for an agreed compensation are not prohibited by statute nor against public policy, and the corporation may recover for services furnished pursuant to such contracts. *State Electro-Medical Inst. v. Platner*..... 23

5. Qualified and licensed physicians may form a corporation; and making contracts for the services of its members and other licensed physicians is not a violation of sec. 7, ch. 55, Comp. St., forbidding the practice of medicine without a license. *State Electro-Medical Inst. v. State*..... 40

Costs. See PARTITION.

Making payment of costs in an action dismissed a prerequisite to the prosecution of another rests in the discretion of the trial court. *Yates v. Jones Nat. Bank*..... 734

Counties and County Officers. See TAXATION, 5-8. WASTE.

1. A contract by a county for constructing a ditch, not begun, is a contract not completed within the time specified, under sec. 20, art. I, ch. 89, Comp. St. *Gutschow v. Washington County*..... 378

2. Under sec. 20, art. I, ch. 89, Comp. St., that a bidder on a

Counties and County Officers—*Concluded.*

contract with a county is the only bidder, does not render the contract illegal. *Gutschow v. Washington County*..... 378

3. A bid for ditch construction which proposes "to construct, excavate and complete by working sections" at a fixed price responds to a notice requiring bids "by each working section." *Gutschow v. Washington County*..... 378

4. If money of the state in the hands of a county treasurer is deposited in a depository bank and lost, the treasurer cannot use the money of the county to make good the loss; and his action in doing so without authority from the county board will not estop the county to recover the money from the state. *Lancaster County v. State*..... 215

5. A county is competent to sue for the enforcement of all contracts and obligations in its behalf, unless the statute expressly provides otherwise. *Johnson County v. Chamberlain Banking House*..... 549

6. In an action for damages against a county, an instruction as to contributory negligence, *held* prejudicially erroneous. *Clingan v. Dixon County*..... 807

Courts.

The district court is a court of general jurisdiction and may send its original process to any part of the state, unless restricted by statute. *Eager v. Eager*..... 827

Covenants.

A married woman is not bound by the covenants in a deed or mortgage made for the sole purpose of releasing her dower interest. *Pochin v. Conley*..... 429

Creditors' Suit. See BANKRUPTCY, 2. EVIDENCE, 13.

1. A judgment creditor, with the aid of equity, may reach any property or interest of his debtor not exempt from execution. *Weckerly v. Taylor*..... 84

2. One cannot maintain a creditor's suit before judgment on his claim, hence, until a judgment is obtained the statute of limitations will not run against such a suit. *Ainsworth v. Roubal*..... 723

3. A creditor may, before judgment, attach an estate fraudulently conveyed, and, after judgment, enforce his lien by a creditor's suit. *Ainsworth v. Roubal*..... 723

4. Where a conveyance is set aside as fraudulent and the land is insufficient to pay the judgment, the fraudulent grantee may be compelled to apply on the judgment the rents which accrued while the land was in his possession. *First Nat. Bank v. Gibson*..... 236

Criminal Law. See CONSTITUTIONAL LAW, 6. EMBEZZLEMENT. HOMICIDE. INDICTMENT AND INFORMATION. LARCENY. RAPE.

Evidence.

1. One cannot be convicted of a felony upon his own unsupported extrajudicial confession that a crime has been committed. *Blacker v. State*..... 671
2. Evidence in a prosecution for uttering a forged deed, *held* insufficient to support the verdict. *Blacker v. State*..... 671
3. Matters of common observation are not matters for expert medical testimony; but it is not in all cases reversible error to allow a witness to testify to a fact of science or nature which is a matter of common knowledge. *Turley v. State*.. 471
4. It is not error to refuse a new trial for newly discovered evidence, if the proposed evidence might have been produced upon the trial or is cumulative. *Turley v. State*..... 471
5. Evidence in a prosecution for larceny, *held* insufficient to sustain the verdict. *Ladeaux v. State*..... 19

Instructions.

6. An instruction is not prejudicially erroneous which states only a part of the elements of the crime charged, when the other elements are stated in other instructions. *Higbee v. State* 331
7. It is not error to refuse instructions on self-defense, where the court has properly submitted that question to the jury. *Connolly v. State*..... 340
8. It is not error to refuse an instruction, where the evidence does not make it applicable. *Connolly v. State*..... 340
9. It is the duty of the trial judge to instruct on all issues, whether requested to do so or not; and if he omit to instruct on certain points it is erroneous. *Young v. State*... 346
10. In a trial for murder, *held* that an instruction that the law does not require the defendant to flee from his assailant was properly refused. *Turley v. State*..... 471
11. An instruction in a trial for murder that, when competent evidence is introduced tending to prove that defendant acted in self-defense, it is incumbent upon the state to prove beyond a reasonable doubt that he did not so act, *held* proper. *Turley v. State*..... 471
12. On a trial for murder, instructions on self-defense, when considered together, sustained. *Turley v. State*..... 471
13. In a trial for murder, where there is evidence of self-defense, under all the instructions, *held* that no reversible error in instructing on that question appears. *Turley v. State* 471

Criminal Law—*Concluded.*

14. Alleged improper statements of counsel in argument will not be reviewed unless objected to and ruled on, and the statements, objections, and ruling be preserved in the bill of exceptions. *Connolly v. State*..... 340

Deeds. See COVENANTS.

1. If a grantor of quitclaim obtains an instrument that fortifies the interest which his deed was intended to convey, such instrument inures to the benefit of his grantee. *Ford v. Axelson* 92

2. The construction of an ambiguous deed is ascertained from its language and from the circumstances of the transaction. *Hart v. Saunders*..... 818

Depositions.

Depositions taken after alienation of land pending suit, and before the alienee becomes a party, may be used against the alienee. *Morris v. Linton*..... 411

Dismissal and Nonsuit. See COSTS. ESTOPPEL, 1. JUDGMENT, 8.

Divorce. See HUSBAND AND WIFE, 2, 3.

1. Under sec. 6, ch. 25, Comp. St., the district court of any county in the state where the parties, or one of them, reside has jurisdiction of a suit for divorce. *Eager v. Eager*..... 827

2. In a suit for divorce under sec. 6, ch. 25, Comp. St., where the plaintiff resides and sues in one county and the defendant resides in another, summons may issue to the county where the defendant resides. *Eager v. Eager*..... 827

3. By secs. 902 and 903 of the code, suits for a divorce are taken out of the general provisions of the code. *Eager v. Eager* 827

Domicile. See HOMICIDE, 1.

Drains.

1. When one files a claim for damages caused by the location of a drainage ditch, he thereby waives objection to irregularities in the proceedings to establish the same. *Gutschow v. Washington County*..... 794

2. Where an assessment equal to benefits has been levied for a drainage ditch, the value of such benefits should not be deducted from damages to land not taken. *Gutschow v. Washington County*..... 794

3. Where benefits received from a drainage ditch exceed the cost apportioned, the benefits in excess of the cost may be set off against consequential damages. *Gutschow v. Washington County*..... 800

Elections. See CONSTITUTIONAL LAW, 7-9. STATUTES, 2, 3.

1. Secs. 4, 10, 15, 20, 21, art. VI, and secs. 13, 20, art. XVIII of the constitution, *held* to fix the terms of office, the time of the beginning and termination of such terms, the time of the first election of judges and regents of the university, and to provide that thereafter, at the general election next preceding the termination of each term of office, a successor be elected, and for a regular succession in such terms of office, and to make it mandatory that a general election be held in each of the odd numbered years. *State v. Galusha*.. 188

2. Under sec. 13, art. XVI of the constitution, *held*, whether annual elections are required depends upon the offices created by the fundamental law, and the time as therein provided at which an election must be held to fill such offices. *State v. Galusha*..... 188

3. Where by the fundamental law certain offices are created, the terms thereof prescribed, and also the time for the election of successors, the legislature is without authority to postpone the election of such successors until the general election held in the next year, and to extend the term of office of the incumbents during the intervening time, and to provide for an election in a different year in which to elect such successors, and a different time for the beginning of such terms of office. *State v. Galusha*..... 188

4. The provisions of the primary act (ch. 66, laws 1905), limiting the right of parties to participate in a primary election to those casting at least one per cent of the total vote cast at the last election, is a reasonable classification of parties and constitutional. *State v. Drexel*..... 776

5. The provisions of ch. 66, laws 1905, making the right of an elector to participate in a primary election to depend upon his party affiliation, are constitutional. *State v. Drexel*.... 776

6. The provision of ch. 66, laws 1905, requiring candidates for election to pay a filing fee, *held* to be in conflict with sec. 22, art. I of the constitution. *State v. Drexel*..... 776

Embezzlement.

1. Evidence in a prosecution for embezzlement of a "right in action" under sec. 121 of the criminal code, *held* to establish the crime. *Higbee v. State*..... 331

2. An allegation in an information for embezzlement that the party injured is a corporation is sustained by proof that it is a *de facto* corporation. *Higbee v. State*..... 331

3. In a prosecution for embezzlement the venue is properly laid in the county where the purpose is formed to convert

Embezzlement—*Concluded.*

the right of action, and the decisive steps taken to carry out that purpose. *Higbee v. State*..... 331

4. In embezzlement of a right of action, evidence that the party against whom the right of action existed paid the money involved is sufficient *prima facie* evidence of value. *Higbee v. State*..... 331

5. An instruction which recites some of the elements of embezzlement, and states that the things recited constitute the crime, is erroneous, though another instruction contradicts it and states the other things necessary to constitute guilt. *Higbee v. State*..... 331

6. In a prosecution against an agent for embezzling the rights in action of his employer, an instruction *held* erroneous which did not include felonious intent. *Higbee v. State*.... 331

Equity. See JUDGMENT, 9-11.

1. The maxim, "Prior in time, prior in right," applies in a contest between rival claimants under equitable titles to real estate. *Johnson v. Hayward*..... 157

2. That a creditor has resorted to expensive and vexatious means to collect a debt affords no ground for denying him equitable relief. *Anthes v. Schroeder*..... 172

Estoppel. See COUNTIES AND COUNTY OFFICERS, 4.

1. The voluntary dismissal of an action before final submission does not operate as an estoppel to a future action. *Yates v. Jones Nat. Bank*..... 734

2. If an assignor of a chattel mortgage given to secure a note past due at the time of the assignment was estopped from enforcing it against a subsequent mortgagee for value, his assignee is also estopped. *May v. First Nat. Bank*..... 251

3. Where one by his conduct induces another to act on the supposition that certain conditions exist, he is estopped to deny the existence of such conditions. *Anthes v. Schroeder*, 172

4. Where one by words or conduct causes another to believe in the existence of a certain state of things, and to alter his position, the former is concluded from averring a different state of things. *Larson v. Anderson*..... 361

5. Where a party gives a reason for his decision and conduct touching a controversy, he is estopped, after litigation has begun, from changing his ground and putting his conduct on a different consideration. *First State Bank v. Stephens Bros.* 616

Evidence. See APPEAL AND ERROR, 3-5, 7. BANKRUPTCY, 6. CARRIERS, 1. CRIMINAL LAW, 1-5. EMBEZZLEMENT, 1, 2. MALICIOUS PROSECUTION, 2. MORTGAGES, 4. MUNICIPAL CORPORATIONS, 12. QUIETING TITLE. RAILROADS, 6-9. RAPE, 4. REPLEVIN. TAXATION, 13. TRUSTS, 3.

1. Courts do not take judicial notice of judgments or decrees in cases other than the then pending case. *Allison v. Fidelity Mut. Fire Ins. Co*..... 366
2. The public seal of another state affixed to a copy of a written law of that state is admissible as evidence of such law. *Rieck v. Griffin*..... 102
3. The unwritten law of another state may be proved by parol evidence. *Rieck v. Griffin*..... 102
4. Parol evidence is inadmissible to vary the terms of a written contract of sale. *Apking v. Hoefer*..... 325
5. The admission of oral evidence to explain possession of and to prove that delivery of a written contract was conditional, *held* not a violation of the rule which prohibits oral evidence to contradict or vary a written contract. *Dodd v. Kemnitz* 634
6. Possession of a contract is presumptive evidence of delivery, but the presumption may be rebutted. *Dodd v. Kemnitz*... 634
7. Market reports in journals, such as the commercial world relies on, are competent evidence of the state of the market. *Chicago, B. & Q. R. Co. v. Todd*..... 712
8. A declaration to be part of the *res gestæ* need not necessarily be coincident in point of time with the main fact proved. *City of Lexington v. Fleharty*..... 626
9. The burden of proof of negligence does not shift, but rests upon the party alleging it. *Lincoln Traction Co. v. Shepherd* 374
10. An admission by a deceased person that an account in a certain book is correct will not warrant the admission in evidence of a copy of this account. *Fitch v. Martin*..... 538
11. A judicial record of a sister state must be authenticated by a certificate of the presiding judge. *Chapman v. Chapman* 388
12. Evidence *held* to show a conveyance fraudulent. *Ainsworth v. Roubal*..... 723
13. Evidence in a creditor's suit, *held* to support the judgment. *Shreck v. Hanlon*..... 264
14. Evidence *held* to justify the trial court in vacating a decree. *Arnout v. Chadwick*..... 620
15. Evidence in an action for damages, *held* to sustain the judgment. *Spencer v. Wilson*..... 459

Evidence—*Concluded.*

16. Evidence in an action for injuries on a railroad, *held* to support a verdict in plaintiff's favor. *Chicago, R. I. & P. R. Co. v. Kerr*..... 1

17. Evidence in an action for personal injuries, *held* not to sustain the judgment. *Lincoln G. & E. L. Co. v. Thomas*..... 257

18. Evidence in an action for personal injuries, *held* to present a question for the jury. *Chicago, B. & Q. R. Co. v. Harley*.. 462

19. Evidence in a personal injury case against a city, *held* to justify the submission of the case to the jury. *City of Lexington v. Fleharty*..... 626

20. Evidence in a foreclosure suit, *held* insufficient. *Winston v. Armstrong*..... 604

21. Evidence *held* to sustain finding of partnership. *McKibbin v. Day*..... 424

22. Evidence in a suit to quiet title, *held* to uphold the judgment. *Webber v. Ingersoll*..... 393

23. Evidence in suit to establish a trust, *held* sufficient. *Johnson v. Hayward*..... 157

Exceptions, Bill of.

Unless a bill of exceptions is authenticated as required by law, the supreme court cannot consider it. *Miles v. State*..... 684

Executors and Administrators. See ATTORNEY AND CLIENT, 1. MANDAMUS, 4. WITNESSES, 2.

1. An administrator is not entitled to possession of property as against the equitable owner, in the absence of proof that creditors of the estate have superior equitable claims. *Koslowski v. Newman*..... 704

2. The limitation in sec. 117, ch. 23, Comp. St., applies to irregular administrative sales, but not to sales that are absolutely void. *Brandon v. Jensen*..... 569

3. A homestead of less value than $2,000 cannot be disposed of at administrator's sale, and a license granted by the district court purporting to authorize such a sale is void. *Brandon v. Jensen*..... 569

Fees. See CLERKS OF COURTS. PENALTIES. WITNESSES, 4.

Forcible Entry and Detainer.

Where the right to bring an action of forcible entry and detainer is barred against a grantor, it is against his grantee. *Weatherford v. Union P. R. Co*..... 229

Forgery. See CRIMINAL LAW, 1, 2.

Fraudulent Conveyances. See CREDITORS' SUIT, 3, 4. EVIDENCE, 12, 13.

Garnishment. See JUDGMENT, 4.

Highways.

To establish a highway by prescription there must be continuous user by the public, under a claim of right distinctly manifest by some appropriate act on the part of the public authorities, for a period equal to that required to bar recovery of title to land. *Kansas City & O. R. Co. v. State*..... 868

Homestead. See EXECUTORS AND ADMINISTRATORS, 3.

1. One who purchases land with the intention of making it his home may impress it with a homestead character if he occupies it with his family within a reasonable time after the purchase. *Hair v. Davenport*..... 117
2. A person cannot at the same time have two homesteads. *Hair v. Davenport*..... 117
3. One cannot acquire a second homestead until the first has been abandoned or conveyed, or contracted to be conveyed. *Hair v. Davenport*..... 117
4. A homestead is constituted by the two acts of selection and residence. *Palmer v. Sawyer*..... 108
5. A debtor does not lose his homestead exemption though, by reason of death and the removal of his family, he has no one living with him *Palmer v. Sawyer*..... 108

Homicide.

1. A box stall at a fair ground used by a man as his office and sleeping apartment, he having no other place of abode, and which contains his clothing and all of his belongings, is in legal effect his domicile. *Young v. State*..... 346
2. Where one charged with murder admits the killing, pleads self-defense, and introduces evidence to establish his defense, he is entitled to an instruction on that issue. *Young v. State*..... 346
3. Where one is assailed in his home, he may use such means as are necessary to repel the assailant, even to the taking of life, but the slayer must believe, and have ground to believe, that the killing is necessary to repel the assailant. *Young v. State*..... 346
4. On a trial for murder, and a plea of self-defense, it is competent to show that deceased was at the time in the lawful possession of the premises where the homicide occurred. *Turley v. State*..... 471

Husband and Wife. See ADVERSE POSSESSION. COVENANTS. INTOXICATING LIQUORS, 1-3. WITNESSES, 1.

1. A conract between husband and wife, made after severance of the marital relation, providing for a division of

Husband and Wife—*Concluded.*
property, will be upheld, where no fraud or imposition appears. *Hiett v. Hiett*..... 96
2. In a suit for maintenance after separation, the spouse first repudiating marital obligations must establish freedom from fault. *Chapman v. Chapman*..... 388
3. In an action by a wife for maintenance, it is error to render a judgment in her favor for a sum in gross. *Chapman v. Chapman*..... 388

Indictment and Information. See RAPE, 2, 3, 6.
1. A criminal information must charge explicitly all that is essential to constitute the offense sought to be described. *Hase v. State*..... 493
2. It is not necessary to charge an offense in the exact language of the statute, provided the words employed are equivalent in meaning to those contained therein. *Hase v. State*..... 493
3. Where words appear in an information which might be stricken out, leaving an offense sufficiently charged, and such words do not tend to negative any of the essential averments therein, they may be treated as surplusage. *Hase v. State*..... 493
4. Information *held* sufficient to charge the crime of assault with intent to commit murder. *Hase v. State*..... 493
5. When two counts of an information involve the same facts, and call for the same evidence to support them, the court will not ordinarily require an election. *Higbee v. State*... 331

Inheritance Tax. See TAXATION, 1-3.

Injunction. See WASTE.
1. One is not punishable for contempt for disregarding a void order of injunction; but an injunction granted, where the court has jurisdiction, must be obeyed. *Miles v. State*, 684
2. Where one knowingly disobeys an injunction which is not void, he is liable for contempt. *Miles v. State*..... 684
3. Where the evidence on a trial for contempt for violation of an injunction is not preserved by a proper bill of exceptions, the only question is whether the pleadings support the judgment. *Miles v. State*..... 684
4. A court of equity will interefere by injunction to restrain repeated acts of trespass, though defendants are solvent. *Hornung v. Herring*..... 637
5. One in the lawful possession of real estate may restrain repeated acts of trespass until the title can be determined. *Heaton v. Wireman*..... 817

Instructions. See APPEAL AND ERROR, 6-11, BANKRUPTCY, 7. COUNTIES AND COUNTY OFFICERS, 6. CRIMINAL LAW, 6-13. EMBEZZLEMENT, 5, 6. HOMICIDE, 2. LANDLORD AND TENANT, 4. MALICIOUS PROSECUTION, 3. MUNICIPAL CORPORATIONS, 15. TRIAL, 2.

Insurance.

1. The state auditor is clothed with a broad discretion in determining whether a fraternal beneficial society is entitled to a license to do business, but it is a legal discretion. *State v. Searle*..... 486
2. The mortuary fund of a fraternal beneficial society should be kept separate from the other funds of such society, and the state auditor may require this to be done before granting license to continue business. *State v. Searle*..... 486
3. Under the petition, *held* that the state auditor should have called attention of a beneficial society to irregularities before refusing it a license. *State v. Searle*..... 486
4. A certificate of a beneficial association is a contract of insurance between the member and the association. *Soehner v. Grand Lodge, O. S. H*..... 399
5. Where under the laws of a beneficial society it is the duty of members to pay dues to the secretary of the local lodge, the secretary receiving such dues is the agent of the grand lodge. *Soehner v. Grand Lodge, O. S. H*..... 399
6. Conditions in a policy of insurance limiting or avoiding liability are strictly construed against the insurer. *Soehner v. Grand Lodge, O. S. H*..... 399
7. In an action on an insurance certificate, *held* error to direct a verdict for defendant. *Soehner v. Grand Lodge, O. S. H*.. 399
8. An untrue representation in an application for insurance will not vitiate the policy unless it is of such a nature that it might have been an inducement to issue the policy. *Bankers Union of the World v. Mixon*..... 36
9. Where a certificate of membership in a railway relief department expressly provides that the indemnity therein provided shall be waived or forfeited by an action for damages against the railway company, the terms of the contract determine the consequences of an election. *Walters v. Chicago, B. & Q. R. Co*..... 551
10. Where notice of an injury is received and acted on by an accident insurance company, the relationship between the sender of the notice and either the assured or the beneficiary is immaterial. *Continental Casualty Co. v. Buchtel*.. 823
11. It is competent for the insured to waive all claim under the policy in case of death resulting from smallpox, and to

Insurance—*Concluded.*

make such waiver binding on the beneficiary. *Bankers Union of the World v. Mixon*..... 36

12. If, with knowledge of facts permitting a forfeiture, the insurer treats the policy as in force, the forfeiture is waived. *Soehner v. Grand Lodge, O. S. H*..... 399

13. Where an insurance policy provides for filing final proof of loss on blanks furnished by the company within 30 days of the injury, and the company, with knowledge of the injury, neglects to furnish such blanks within the time, it is a waiver of the condition. *Continental Casualty Co. v. Buchtel* 823

Intoxicating Liquors. See APPEAL AND ERROR, 15. PLEADING, 5.

1. One selling intoxicating liquor is liable, not only for the actual results of the sale, but for all damages from disqualification resulting from or contributed to by such sale, without reference to length of time of the disqualification. *Jessen v. Willhite*..... 608

2. Where a husband becomes an habitual drunkard, and abandons and ceases to support his family, whether such loss of support is permanent is a question for the jury. *Jessen v. Willhite*..... 608

3. In an action by a wife to recover in behalf of herself and children damages from the sale of liquor to her husand, the defendant cannot show in mitigation of damages that the wife has commenced proceedings for divorce. *Jessen v. Willhite*..... 608

4. The act of 1895 (laws 1895, ch. 22) is ineffectual as an amendment or repeal of sec. 6, ch. 50, Comp. St., which requires an applicant for liquor license to give bond in the sum of $5,000, with at least two sureties, freeholders of the county. *Lee v. Brittain*..... 591

5. A transcript of the evidence is not essential to give the district court jurisdiction of an appeal from an order granting a liquor license; a transcript of the proceedings containing such order being sufficient. *State v. McGuire*... 769

6. Where the district court has acquired jurisdiction of an appeal from a license board, and the board fails to transmit the evidence taken at the hearing, the district court may enter a rule requiring the board to supply the omission. *State v. McGuire*..... 769

Irrigation. See WATERS, 3.

Judgment.

1. The district court may enter a judgment *nunc pro tunc* on motion and notice. *Phelps v. Wolff*..... 44

Judgment—*Concluded.*

2. An entry which has been held by the supreme court insufficient to constitute a final judgment is not a bar to an application for the entry of a judgment *nunc pro tunc*. *Phelps v. Wolff*..... 44

3. A judgment *nunc pro tunc* must be no broader than the judgment actually rendered. *Phelps v. Wolff*..... 44

4. A judgment in garnishment in one state is a bar to an action by the principal defendant against the garnishee in the state of the residence of the former. *Hadacheck v. Chicago; B. & Q. R. Co*..... 385

5. The rule that the plea of *res judicata* applies to every point which properly belonged to the subject matter of litigation yields in cases where a valid excuse for failure to allege facts and seek relief in the former action is shown. *First Nat. Bank v. Gibson*..... 232

6. A cause of action once determined on the merits cannot be relitigated. *Yates v. Jones Nat. Bank*..... 734

7. Judgments on demurrer which go to the merits of the case are final; but judgments on demurrer based on a technical defect of pleading, or lack of jurisdiction, will not support the plea of *res judicata*. *Yates v. Jones Nat. Bank*..... 734

8. The dismissal of a bill without prejudice does not conclude the parties thereto. *Morris v. Linton*..... 411

9. Actual fraud is not necessary to justify a trial court in setting aside a decree rendered at a former term on the ground of fraud. *Arnout v. Chadwick*..... 620

10. A court of equity will not relieve against a judgment obtained against a party by reason of negligence of his attorney. *Tootle-Weakley M. Co. v. Billingsley*..... 531

11. In a suit to set aside a decree affecting title to real estate, plaintiff cannot recover unless he has some interest in the property. *Stull v. Masilonka*..... 309

12. Delay in recording a judgment will not invalidate it in the absence of fraud. *Gallaway v. Rochester L. & B. Co*..... 695

13. An officer's return to a summons, showing service by leaving at the "last" usual place of residence, *held* not to support a judgment based thereon. *Ruby v. Pierce*..... 754

14. A judgment overruling a motion for restitution in mandamus on the ground that respondent was not entitled to restitution, and that his remedy was in an action at law, will be adhered to. *Horton v. Hayden*..... 339

Jurisdiction. See DIVORCE.

Jury.

The objection that a juror is disqualified because of having been convicted of a felony may be waived. *Turley v. State,* 471

Justice of the Peace.

To confer jurisdiction on a district court on appeal from a judgment of a justice, the justice's docket must show that an undertaking was executed and delivered to the justice for record within time. *Caster v. Scheuneman*..... 243

Landlord and Tenant.

1. Where a tenant holds over his term, the law presumes a continuation of his original tenancy for another like term, but this presumption is not conclusive. *Rosenberg v. Sprecher* 176
2. To sustain an action for the use and occupation of real estate, the relation of landlord and tenant must exist. *Rosenberg v. Sprecher*..... 176
3. Where a tenant holds over his term, the landlord may elect to treat him as a trespasser or as a tenant for a new term, and his election is conclusive against him. *Rosenberg v. Sprecher* 176
4. Instructions in an action for use and occupation, *held* erroneous. *Rosenberg v. Sprecher*..... 176
5. A tenancy from year to year will be presumed, where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord. *West v. Lungren*..... 105
6. The presumption that a tenant holding over is a tenant from year to year may be rebutted by proof of a different agreement, or of facts inconsistent with the presumption. *West v. Lungren*..... 105

Larceny.

The crime of larceny defined. *Ladeaux v. State*..... 19

Libel and Slander.

1. The manner in which a public officer conducted the duties of his office is a fair subject for comment by the press when he is a candidate for reelection. *Farley v. McBride*.. 49
2. Where a newspaper states that the sheriff of the county, who is a candidate for reelection, had obtained money on an imaginary account for expenses, if false, it is libelous *per se*. *Farley v. McBride*..... 49

Limitation of Actions. See ADVERSE POSSESSION, 1. EXECUTORS AND ADMINISTRATORS, 2. TAXATION, 16.

1. Where leave of the legislature is necessary to sue the state, the statute of limitations will not begin to run until such leave is given. *Lancaster County v. State*..... 215

Limitation of Actions—*Concluded.*

2. Actions for relief on the ground of fraud must be brought within four years from the discovery of the fraud or such facts as, if followed up, would lead to its discovery. *Weckerly v. Taylor*..... 84
3. Where an injury to crops and lands is caused by the negligent construction of a railroad embankment, the cause of action accrues at the date of the injury. *Chicago, B. & Q. R. Co. v. Mitchell*..... 563
4. While an issue is being litigated in the courts, the statute of limitations will not run thereon. *First Nat. Bank v. Gibson* 236
5. An amended petition setting up a new cause of action, barred when the amended petition is filed, is demurrable. *Clifford v. Thun*..... 831
6. An application for a deficiency judgment should be made within five years from confirmation of the foreclosure sale. *Pochin v. Conley*..... 429

Malicious Prosecution.

1. In an action for malicious prosecution, where two complaints were filed, *held* error to exclude testimony that a full disclosure was made to the prosecuting attorney before the filing of the second complaint, which was the one on which the plaintiff was bound over. *Schroeder v. Blum*... 60
2. In an action for malicious prosecution, where the prosecuting witness testifies to an overt criminal act within his own knowledge, which is denied, corroborative evidence that the act was committed is relevant and material. *Schroeder v. Blum*..... 60
3. In an action for malicious prosecution, an instruction that facts cannot be considered which existed prior to the criminal proceedings, not communicated to the party instituting the prosecution, is erroneous. *Schroeder v. Blum*..... 60

Mandamus. See SCHOOLS AND SCHOOL DISTRICTS.

1. Mandamus will be denied, unless it appear that a substantial right is in jeopardy for want of a plain, adequate remedy in law. *State v. McGuire*..... 769
2. To compel a license board to reduce to writing testimony taken on the hearing of an application for a liquor license, one must show, not only a right to have the evidence reviewed, but that he intends to have it reviewed. *State v. McGuire* 769
3. Invalid provisions of an act, not operating to avoid the whole, will not excuse performance of a duty enjoined by the valid portions of the act. *State v. Malone*..... 645

Mandamus—*Concluded.*

4. It is not abuse of discretion to deny mandamus, where its object is to compel the transfer of a trust fund from a county judge whose bond is sufficient to an administrator whose bond is insufficient. *State v. Hendee*..... 847

Master and Servant. See CONTRACTS, 7. EVIDENCE, 17.

1. In an action for personal injuries, where the plaintiff is charged with contributory negligence, evidence of an unfounded belief on his part as to a condition which caused the injuries is immaterial, where due regard for his own safety required him to know the truth. *Hubler v. Johnson-McLean Co*..... 840
2. In an action for personal injuries, motion to direct a verdict for defendant, *held* properly sustained. *Hubler v. Johnson-McLean Co*..... 840
3. The master is liable for the acts of his servant within the general scope of his employment. *Chicago, R. I. & P. R. Co. v. Kerr*..... 1

Mortgages. See EVIDENCE, 20. LIMITATION OF ACTIONS, 6.

1. Plaintiff in a foreclosure suit *held* not guilty of laches. *Phelps v. Wolff*..... 44
2. A mortgage securing a *bona fide* indebtedness *held* valid, though the note be invalid for want of a revenue stamp. *Morris v. Linton*..... 411
3. The rule requiring evidence to support the allegation, in a petition to foreclose a mortgage, that no proceedings at law have been had, is available to an attaching creditor resisting the foreclosure and plaintiff's claim of priority. *Fryer v. Fryer*..... 845
4. Under the evidence, *held*, that the district court had acquired jurisdiction in foreclosure proceedings, and that the decree and sale were not void. *Stull v. Masilonka*..... 309
5. Where a valid mortgage has been foreclosed, though the foreclosure proceedings were void, neither the mortgagor nor one claiming under him can assail the title acquired without offering to pay the decree. *Stull v. Masilonka*..... 309

Municipal Corporations. See CONSTITUTIONAL LAW, 7, 8. MANDAMUS, 3.

1. Sec. 101*b*, ch. 12*a*, Comp. St., authorizes a special assessment on such real estate as may be "specifically" benefited by a park or boulevard to pay for land appropriated or purchased for such improvement. *Hart v. City of Omaha*..... 836
2. Sec. 101*b*, ch. 12*a*, Comp. St., providing for assessments for parks and boulevards, is not controlled by nor in conflict

Municipal Corporations—*Continued.*

with sec. 158, which provides for assessment of damages for the appropriation of private property for street purposes. *Hart v. City of Omaha*..... 836

3. Sec. 101*b*, ch. 12*a*, Comp. St, does not require the issuance of bonds under all circumstances where lands are appropriated for the construction of parks or boulevards, but only where the special assessment is insufficient. *Hart v. City of Omaha*..... 836

4. Ordinarily, whether a particular lot or tract of land is specially benefited by a boulevard is a question of fact, and that real estate is three-quarters of a mile from a boulevard will not authorize the court to say as a matter of law that it is not specially benefited. *Hart v. City of Omaha*... 836

5. A call for a special session of a city council, "for the purpose of considering communications, petitions, resolutions, committee reports, and ordinances on first, second and third reading and passage," where such call is recorded, is sufficient to enable the council to introduce, read and pass ordinances at such special meeting. *Richardson v. City of Omaha* 297

6. A resolution of the city council of Omaha, directing that certain permanent sidewalks shall be constructed "of stone or artificial stone," *held* a compliance with an ordinance requiring a designation of the kind of material with which permanent sidewalks shall be constructed. *Richardson v. City of Omaha*..... 297

7. A contract of a city in violation of a mandatory provision of its charter is void. *City of Plattsmouth v. Murphy*..... 749

8. A city is not required to search for defects in streets and sidewalks, where there is no reason to suppose defects exist. *City of Omaha v. Kochem*..... 718

9. A city is not charged with implied notice of a latent defect in a sidewalk by the existence of a defect therein of a different character. *City of Omaha v. Kochem*..... 718

10. A city must keep its sidewalks in reasonably safe condition, but is not charged with implied notice of a latent defect in a sidewalk, not apparent on ordinary inspection. *City of Omaha v. Kochem*..... 718

11. Contributory negligence is not imputable to one as a matter of law from the mere fact that he attempts to pass over a walk that is obstructed. *City of Beatrice v. Forbes*..... 125

12. Evidence as to the condition of a sidewalk, in an action for damages, *held* sufficient to justify the submission of the case to the jury. *City of Omaha v. Lewis*..... 184

Municipal Corporations—*Concluded.*

13. In an action for damages for injuries against a city, where the evidence is such that reasonable men might fairly differ as to the plaintiff's negligence causing the injury, the case should go to the jury. *City of Beatrice v. Forbes*..... 125

14. In an action for negligence against an electric light company, *held*, that the direction of a verdict for defendant was proper. *Powell v. New Omaha T.-H. E. L. Co*..... 280

15. Instructions in a personal injury case against a city, *held* to state the law. *City of Lexington v. Fleharty*..... 626

New Trial. See CRIMINAL LAW, 4.

Affidavits in support of motion for new trial on the ground of newly discovered evidence, which fail to state facts showing diligence, are insufficient. *Jessen v. Willhite*..... 608

Notice. See CORPORATIONS, 1. TAXATION, 17.

Officers. See PENALTIES.

1. Ordinarily, the words "term" or "term of office," when used in reference to the tenure of office, mean a fixed and definite period of time. *State v. Galusha*..... 188

2. Sec. 20, art. VI of the constitution, *held* not to mean that the legal terms of office of the officers provided for in the article shall consist of the fixed periods therein mentioned, and in addition the indeterminate period which an incumbent may hold after the expiration of his fixed term, and until a successor shall be qualified. *State v. Galusha*..... 188

3. The legislature cannot appoint county officers, nor by an act solely for that purpose extend the terms of such officers. *State v. Plasters*..... 652

Partition.

Where proceedings in partition are amicable, it is proper to allow an attorney's fee to be paid by the parties in proportion to their interest. *Johnson v. Emerick*..... 303

Partnership. See EVIDENCE, 21.

Party Walls.

One who consents to the uncovering of a portion of a roof to allow a party wall to be built higher cannot recover damages from leakage, unless he proves that the injury resulted from the negligence of the defendant. *Rtiff v. Garvey*..... 522

Payment.

In the absence of evidence, an agent for collection who cancels the obligation of the debtor is presumed to have done so in consideration of the face amount of the claim. *Lexington Bank v. Phenix Ins. Co*..... 548

Penalties.

1. The statute allowing a public officer 25 cents for each certificate and seal does not contemplate that he must formulate a statement of facts to which he certifies. *Sheibley v. Hurley* 31
2. The clerk of the district court cannot be required to search the records of his office to ascertain what liens, if any, exist against lands described in an abstract of title, and enter upon the abstract the result of such search. *Sheibley v. Hurley*..... 31
3. In an action against a public officer to recover a penalty, under sec. 34, ch. 28, Comp. St., if the fee received was for services he was not required to render, together with other services for which it would have been illegal to exact a fee, it will not be presumed that the fee exacted was more than the service for which he was entitled to compensation was reasonably worth. *Sheibley v. Hurley*..... 31

Physicians and Surgeons. See CORPORATIONS, 4, 5.

1. A corporation is not such a person as can be licensed to practice medicine under ch. 55, Comp. St. *State Electro-Medical Inst. v. State*..... 40
2. Under ch. 55, Comp. St., one who undertakes to judge the nature of disease or to determine the remedy therefor must have the personal qualifications prescribed therein. *State Electro-Medical Inst. v. State*..... 40

Pleading. See BONDS. LIMITATION OF ACTIONS, 5. RAILROADS, 4, 5. STATES, 3.

1. Where want of jurisdiction does not appear on the face of the record, it may be pleaded in the answer. *Templin v. Kimsey*..... 614
2. That defendant first raised the question of jurisdiction on a special appearance, which was overruled, does not affect his right to include a plea to jurisdiction in his answer. *Templin v. Kimsey*..... 614
3. An assignment of a chose in action, even without consideration, is not presumptively fraudulent as to a creditor who becomes such nearly four years afterwards. Circumstances must be pleaded from which fraud may be inferred. *Weckerly v. Taylor*..... 84
4. In an action to recover money paid on a judgment in mandamus which was reversed, a petition which alleges payment of the money and reversal of the judgment, without alleging that plaintiff is entitled to the money, does not state a cause of action. *Horton v. Hayden*..... 339
5. A petition against a surety upon a liquor license bond that

Pleading—*Concluded.*

does not allege the granting of a license does not state a cause of action. *Quist v. American B. & T. Co*..... 692

6. A petition which alleges that a contract of a corporation was made, executed and delivered by it by its officer and agent is not demurrable on the ground that authority by the agent does not appear. *Johnson County v. Chamberlain Banking House*..... 549

7. Where from the answer and the evidence it appears that both parties have placed the same construction on a petition, the supreme court will not ignore such construction in ruling on its sufficiency. *Chicago, R. I. & P. R. Co. v. Kerr*, 1

8. A defective or ambiguous petition may be aided by averments in the answer. *Chicago, R. I. & P. R. Co. v. Kerr*... 1

9. Where a petition is first assailed in the supreme court, its allegations will receive a liberal construction. *Chicago, R. I. & P. R. Co. v. Kerr*..... 1

10. An admission of a conclusion of law may be avoided by averments in the same pleading which show the admission to be erroneous. *Hensel v. Hoffman*..... 382

11. If defendant admits that he entered into a contract with plaintiffs by an associate name, he concedes that plaintiffs have capacity to enforce the same in the contract name. *Miller v. Loverene & Browne Co*..... 557

12. Petition in district court *held* not a departure from the issues in the county court. *Rieck v. Griffin*..... 102

13. A denial in an answer in an action on contract, together with a statement that a different contract was made, is not a change of issue from a general denial. *McGinnis v. Johnson Co*..... 356

14. An answer setting up the statute of limitations is not a technical plea of confession and avoidance. *Webber v. Ingersoll* 393

Pledges.

Where an agent pledges machinery to one advancing money to pay freight thereon, the pledgee has a lien on the property. *Robinson & Co. v. Ralph*..... 55

Principal and Agent. See TRUSTS, 1.

One occupying confidential relations toward another will not be permitted to make use of knowledge or opportunities to his own advantage and the injury of the party with whom he is dealing. *Morrison v. Hunter*..... 559

Process. See JUDGMENT, 13.

1. Under sec. 65 of the code, where an action is rightly brought in any county, a summons may be issued to any other

Process—*Concluded.*

county against nonresidents who may be found therein. *Adair County Bank v. Forrey*..... 811

2. Where an action is rightly brought in any county, a nonresident who may be found in another county is liable to service therein as a resident, and the court thereby acquires jurisdiction. *Adair County Bank v. Forrey*..... 811

3. Where one makes a special appearance, objecting to jurisdiction because of irregularities in the service of process, he must point out the defects upon which he relies. *Smith v. Delane*..... 594

4. The statutory provisions for service other than personal service are construed strictly and all steps required to be taken must be followed with substantial accuracy. *Stull v. Masilonka*..... 322

Property.

The law of the situs governs immovable property. *Morris v. Linton*..... 411

Quieting Title. See EVIDENCE, 22.

Evidence in a suit to quiet title *held* to sustain the decree. *Coppom v. Forman*..... 275

Railroads. See CARRIERS. 3, 4. TRIAL, 3.

1. Railway companies are vested with a broad discretion in locating and discontinuing freight and passenger stations, and courts will not interfere except in cases of its abuse. *Chicago & N. W. R. Co. v. State*..... 77

2. It is not an abuse of discretion for a railway company to discontinue the employment of an agent at a country place five to seven miles from three villages where regular service is maintained. *Chicago & N. W. R. Co. v. State*..... 77

3. A railroad company is not required to fence its right of way across a public highway, whether it is established by legal authority or by adverse user for the statutory time. *Chicago, B. & Q. R. Co. v. Dowhower*..... 600

4. Petition in an action for injuries on a ralroad, *held* to state a cause of action and to support the judgment. *Chicago, R. I. & P. R. Co. v. Kerr*..... 1

5. Petition in an action for damages against a railroad company for negligently constructing embankments, causing overflow, *held* to state a cause of action. *Chicago, B. & Q. R. Co. v. Mitchell*..... 563

6. Evidence in an action for damages against a railroad company causing damage from overflow, *held* to support judgment. *Chicago, B. & Q. R. Co. v. Mitchell*..... 563

Railroads—*Concluded.*

7. Evidence in an action to recover damages for injuries resulting from fire alleged to have been caused by a railroad company, *held* to support the verdict. *Union P. R. Co. v. Fickenscher* 497
8. Evidence in an action for damages for injury to live stock, *held* not to show negligence in the operation of a train. *Chicago, B. & Q. R. Co. v. Dowhower*..... 600
9. In an action for damages by fire, plaintiff must identify the fire which caused the damage with the fire originated by defendant. *Union P. R. Co. v. Fickenscher*..... 507

Rape.

1. Secs. 11 and 12 of the criminal code describe three classes of crimes, each of which is totally distinct from the other two. *Hubert v. State*..... 220
2. An information for the crime of rape under the first clause of sec. 12 of the criminal code must charge that the act was done with force and against the will or consent of the prosecutrix. *Hubert v. State*..... 220
3. An information for the crime of rape under the second clause of sec. 12 of the criminal code must charge the person upon whom the offense was committed as being a female child under 18 years of age, and the accused as being a male person of the age of 18 years or over; and, in case the prosecutrix is over 15 years of age, her previous chastity must be alleged. *Hubert v. State*..... 220
4. On a trial for rape, the state should not be permitted to introduce evidence of acts and alleged statements of the accused which do not tend to corroborate the evidence of the prosecutrix, or impeach or discredit his own testimony. *Hubert v. State*..... 220
5. Sec. 12 of the criminal code, as amended, defines but one crime and prescribes the punishment therefor. *Hubert v. State* 226
6. If a man 18 years of age or upwards is guilty of the sexual act with a female child not over the age of 15 years, or under 18 years and not previously unchaste, the law will presume that the act was done forcibly and against her will. *Hubert v. State*..... 226

Real Estate Agents.

1. Services as a real estate broker, without a written contract, cannot be recovered for on a *quantum meruit*. *Rodenbrock v. Gress*..... 409
2. The contract of a broker to find a purchaser for land at a price satisfactory to the seller is performed when buyer and seller are brought together. *Johnson v. Hayward*..... 166

Replevin. See SALES, 4.

In replevin verdict and judgment *held* supported by the evidence. *May v. First Nat. Bank*..... 251

Riparian Rights. See WATERS, 4-7.

Sales. See EVIDENCE, 4.

1. Generally, when the terms of sale of personal property have been agreed on and everything the seller has to do is complete, the sale becomes absolute without payment or delivery, and title vests in the buyer. *Baker v. McDonald*..... 595
2. Where time of payment is not fixed by a contract of sale, the law presumes a cash sale, and the buyer is not entitled to possession until the price is paid or tendered. *Baker v. McDonald* 595
3. Where the amount to be paid for hay is to be determined by measurement, a measurement resulting from fraud or mistake is not binding, and a tender based thereon does not entitle the purchaser to possession. *Baker v. McDonald*.... 595
4. Where there is fraud in a sale, the seller may recover possession of the property by an action in replevin on the ground of special ownership and right of possession, but he cannot maintain such action under claim of absolute ownership without rescinding the contract and tendering the amount paid. *Baker v. McDonald*..... 595
5. One is not a *bona fide* purchaser for value until he has paid the purchase price or become irrevocably bound for its payment. *Nebraska Moline Plow Co. v. Blackburn*..... 246
6. In an action for fraud as to value in the sale of goods, the measure of damages is the difference between the value as represented and the real value. *McKibbin v. Day*..... 424
7. Where goods of a bankrupt were used by defendant, *held*, that there was an implied contract to pay the market value of the goods, which could be enforced by an action on the contract. *Teetzel v. Davidson Bros. Marble Co*..... 529
8. A purchaser who accepts and consumes goods, without objection, admits that they comply in quality with the terms of his purchase. *Cohen v. Hawkins*..... 249
9. Where coal was ordered December 7, 1901, for the winter trade, an offer to deliver March 28, 1902, is such an unreasonable delay as to release the buyer. *McGinnis v. Johnson Co*..... 356
10. Whether an offer to deliver coal was made within a reasonable time is a question of law. *McGinnis v. Johnson Co*.... 356

Schools and School Districts.

1. A foster-parent of a child of school age may by mandamus compel the board of education to admit such child to attendance, without payment of tuition, in the public schools where the foster-parent resides. *McNish v. State*..... 261
2. To be entitled to such relief, it is not necessary that the foster-parent shall have legally adopted the child. *McNish v. State* 261

States. See LIMITATION OF ACTIONS, 1.

1. Where the law makes no provision for the payment of his claim, a creditor of the state is not required to file it within two years after its accrual with the auditor for adjustment. *Lancaster County v. State*..... 211
2. A resolution of the state senate, passed in accordance with sec. 1106 of the code, will authorize a claimant to sue the state. *Lancaster County v. State*..... 211
3. Petition in action against state *held* sufficient to resist a general demurrer. *Lancaster County v. State*..... 211
4. The power to prohibit the use of the national flag may be exercised by the several states. *Halter v. State*..... 757

Statute of Frauds.

A contract with an agent for the purchase of real estate is not a contract for the creation of an estate or trust in lands within the statute of frauds. *Johnson v. Hayward*..... 157

Statutes. See CONSTITUTIONAL LAW. INTOXICATING LIQUORS, 4. MANDAMUS, 3.

1. A repealing clause in a statute repeals prior statutes to the extent only that they conflict with the act last passed. *State v. Drexel*..... 776
2. The title to ch. 66, laws 1905, regulating primary elections does not embrace legislation concerning the registration of voters for general elections. *State v. Drexel*..... 776
3. The title to ch. 66, laws 1905, is not broad enough to permit legislation concerning the form of ballots to be used at a general election. *State v. Drexel*..... 776
4. Where a statute contains provisions which are unconstitutional, if the valid portion is not dependent upon the part that is void, the latter alone will be disregarded, if the void part was not an inducement to the legislature to pass the valid part. *State v. Drexel*..... 776
5. The invalid provisions of ch. 66, laws 1905, *held* not to affect the remainder of the act. *State v. Drexel*..... 776
6. Ch. 11, laws 1901, amendatory of sec. 19, ch. 10, Comp.

Statutes—*Concluded.*

St. 1899, relating to official bonds, *held* void. *Knight v. Lancaster County* 82

7. In construing a statute, effect, if possible, must be given to every clause and part of the statute. *State v. Fink* 641

Street Railways. See CARRIERS, 1, 2.

1. In an action against a street railway company for damages for personal injuries, the burden of proof of negligence does not shift upon proof that the injuries resulted from a derailment of the car. *Omaha Street R. Co. v. Boesen* 764

2. The presumption of negligence arising from the derailment of a street car is met by evidence which makes it equally probable that the accident was not due to negligence of the defendant. *Omaha Street R. Co. v. Boesen* 764

3. A street railway company is not an insurer of its passengers, and it fulfills its obligations when it exercises the utmost diligence and foresight consistent with the practical conduct of its business. *Omaha Street R. Co. v. Boesen* 764

4. To render a street railway company liable for injuries, the negligence of its servants must be the proximate cause of the injuries. *Bevard v. Lincoln Traction Co* 802

5. The wrongful act of a stranger will not make a street railway company liable, unless it might have been foreseen and guarded against. *Bevard v. Lincoln Traction Co* 802

Subrogation.

1. Ordinarily, a junior mortgagee is not entitled to be subrogated to a lien which did not exist when his mortgage was taken. *Anthes v. Schroeder* 172

2. Evidence *held* to show that a lien to which plaintiff seeks to be subrogated existed at the time his mortgage was taken. *Anthes v. Schroeder* 172

3. Plaintiff *held* not guilty of such laches as to deprive him of his right to subrogation. *Anthes v. Schroeder* 172

Taxation. See MUNICIPAL CORPORATIONS, 1-4, 6. WASTE.

1. The tax provided for in the inheritance tax law (laws 1901, ch. 54, as amended, laws 1905, ch. 117) is not a property tax, but a tax on the right of succession to property by inheritance or will. *State v. Vinsonhaler* 675

2. The enumeration of subjects of taxation in sec. 1, art. IX of the constitution, is not exclusive, and the legislature has power to provide for taxation upon inheritances. *State v. Vinsonhaler* 675

3. Ch. 54, laws 1901, as amended, laws 1905, ch. 117, only requires the tax to be levied on the share that each heir or devisee takes. *State v. Vinsonhaler* 675

Taxation—*Continued.*

4. The abandonment of property used for religious and educational purposes, with the intent never again to use it for such purposes, renders it liable to taxation from the time of such abandonment. *Holthaus v. Adams County*..... 861
5. A county is not liable for state taxes in the hands of a county treasurer, if lost without fault of the county. *Lancaster County v. State*..... 215
6. Ch. 112, laws 1905, amendatory of sec. 121, art. I, ch. 77, Comp. St. 1903, authorizes a county board to correct errors of assessment or of apparent gross injustice in valuation at any of its annual meetings. *State v. Grow*..... 850
7. The several owners of different tracts of land may unite in a petition to the county board of equalization for relief from errors and injustice of assessment. *State v. Grow*..... 850
8. Where the county board of equalization has jurisdiction, its orders are conclusive. *State v. Grow*..... 850
9. The valuation made by an assessor is presumed to be correct, and the burden is upon those attacking it before the board of equalization to show that it should be increased. *Woods v. Lincoln Gas & E. L. Co*..... 526
10. The findings of a board of equalization must be so manifestly wrong that reasonable minds could not differ thereon before they will be disturbed. *Woods v. Lincoln Gas & E. L. Co*..... 526
11. The discretion of a board of equalization will not be disturbed unless manifestly wrong. *Field v. Lincoln Traction Co.*..... 418
12. Under sec. 311 of the code, a bill of exceptions of proceedings before a county board of equalization may be settled and approved by its presiding officer, if within the time and on notice to the adverse party, as therein provided. *Field v. Nebraska Tel. Co*..... 419
13. A tax list made in conformity with statute is *prima facie* evidence that a levy was made by the proper authorities, and is conclusive as against a claim of irregularities in making such levies. *Holthaus v. Adams County*..... 861
14. The provisions of the revenue law of 1903 (laws 1903, ch. 73), changing the method of procedure in the enforcement of the collection of taxes, are available for the collection of taxes delinquent prior to the time such revenue law went into effect. *Holthaus v. Adams County*..... 861
15. Sec. 26, ch. 75, laws 1903, *held* not to authorize the sale of tax sale certificates owned by the state, or by any county or city, for less than the amount due thereon. *State v. Fink*.. 641

Taxation—*Concluded.*

16. One seeking to redeem from a foreclosure sale based on a tax lien must bring suit within two years from the date of the tax sale. *Clifford v. Thun*..... 831

17. Notice by publication was directed to "H. A. Wyman, Receiver," Wyman's true name being "Henry A. Wyman." *Held*, that, as the petition showed that Wyman was appointed receiver by the court of a sister state, he was not a necessary party to a suit to redeem from a sale on foreclosure of a tax lien, and a defect in the notice to him was immaterial. *Clifford v. Thun*..... 831

Trespass. See EVIDENCE, 15. INJUNCTION, 4, 5.

Trial. See APPEAL AND ERROR. CRIMINAL LAW. INSURANCE, 7. MASTER AND SERVANT, 2. MUNICIPAL CORPORATIONS, 12, 13.

1. Error in the admission of evidence may ordinarily be cured by striking it from the record and withdrawing it from the jury by an instruction. *McKibbin v. Day*..... 424

2. Where one produces proof to sustain his theory of the case, he is entitled to have such theory submitted by suitable instructions, without qualifying words calculated to mislead the jury. *Brownfield v. Union P. R. Co*..... 440

3. Where the proximate cause of an injury depends upon a state of facts from which different minds might draw different inferences, it is a proper question for the jury. *Chicago, B. & Q. R. Co. v. Harley*..... 462

4. If a party desires to complain of the absence of the official reporter, he should call the attention of the trial court thereto, obtain a ruling, and if forced to trial without the reporter, preserve his exceptions. *Tootle-Weakley M. Co. v. Billingsley* 531

Trusts.

1. Where one employed to purchase real estate purchases it for himself, he becomes a trustee for his principal. *Johnson v. Hayward*..... 157

2. Distinction between trusts executed and executory stated. *Morris v. Linton*..... 411

3. Evidence in a suit against an agent for conveyance of land, *held* to establish confidential relations entitling plaintiff to relief. *Morrison v. Hunter*..... 559

Vendor and Purchaser.

1. Where rent is reserved in a share of the crops, the landlord and tenant are tenants in common of the growing crops, and a purchaser of the real estate during the term of the lease is not entitled to a portion of the crop belong-

Vendor and Purchaser—*Concluded.*

ing to the landlord which had been severed from the realty. *Wendt v. Stewart* 855

2. A purchaser with notice from a *bona fide* purchaser without notice is entitled to protection against a claim, invalid as against his grantor. *Ford v. Axelson* 92

Venue. See EMBEZZLEMENT, 3.

Verdict. See APPEAL AND ERROR, 24-26.

Waiver. See DRAINS, 1. INSURANCE, 11-13. JURY.

Waste.

1. When taxes on land are past due, the county may restrain waste, where it would reduce the value of the property to an amount insufficient to pay the taxes. *Lancaster County v. Fitzgerald* 433

2. Where taxes are past due, to maintain a suit for waste it is not necessary that a county first purchase the property at tax sale. *Lancaster County v. Fitzgerald* 433

Waters. See DRAINS.

1. A landowner is not answerable to an adjoining proprietor for causing surface water to flow on the premises of the latter to his damage unless guilty of negligence. *Aldritt v. Fleischauer* 66

2. A landowner may drain ponds which have no natural outlet by discharging the waters thereof into a natural surface-water drain over the land of another, if he does so in a reasonable manner and without negligence. *Aldritt v. Fleischauer* 66

3. While an irrigation district may contract with an engineer to survey and furnish plans for the construction of a proposed canal, such work is preliminary to the work of construction, and the expense is not to be paid out of the construction fund. *Willow Springs Irrig. Dist. v. Wilson* 269

4. The title to the bed of a navigable river in Nebraska is in the state, and the rights of a riparian proprietor thereon are bounded by the banks of the river. *Kinkead v. Turgeon,* 573

5. Under the common law, a riparian owner of lands holds to the thread of the stream, subject to the public easement of navigation. *Kinkead v. Turgeon* 580

6. The common law relating to the rights of riparian owners is applicable in this state. *Kinkead v. Turgeon* 580

7. Where the Missouri river suddenly abandons its former bed, the respective riparian owners are entitled to the soil

Waters—*Concluded.*

formerly under its waters as far as the thread of the stream, and may maintain ejectment therefor. *Kinkead v. Turgeon* 580

Wills.

A received from B $5,000, and agreed to pay B annually $300 during the lifetime of B, the $5,000 to remain to A upon the death of B and payments as aforesaid. *Held* not an attempt at a testamentary disposition of B's property. *Fiscus v. Wilson*..... 444

Witnesses.

1. In an action against a married woman, where the proceeding is adversary, her husband is not a competent witness against her. *Weckerly v. Taylor*..... 772
2. One who has filed a claim against an estate for legal services is not incompetent to testify as to certain independent acts performed when deceased had no personal connection with such acts. *Fitch v. Martin*..... 538
3. On a subsequent trial, the evidence of a deceased witness taken at a second trial cannot be impeached by showing that statements at the first trial are inconsistent therewith, where upon the second trial his attention was not directed to such statements. *Omaha Street R. Co. v. Boesen*..... 764
4. An expert witness, in the absence of a special contract, is entitled only to the statutory fee. *Main v. Sherman County*, 155