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STATE OF NEBRASKA, EX REL. C. E. MCMONIES, V. CHARLES MCMONIES.

FILED JANUARY 3, 1906. No. 13,973.

1. **Villages: POOL-HALLS, REGULATION OF.** The charter of villages confers on the trustees of the village power to regulate billiard and pool-halls, but not to supress them. Authority to regulate does not give power to suppress.
2. **Mandamus: PREMATURE ACTION.** An ordinance of the village of Lyons required the proprietors of pool and billiard-halls to pay an annual occupation tax, which was to be paid on the second Tuesday of May or as soon thereafter as they became liable to the tax by engaging in the business. The relator on the first Tuesday in May tendered to the village treasurer the tax required on five tables, which the treasurer refused to accept, and thereupon relator immediately brought this action to compel him to take and receipt for the money. *Held*, That, the tax not being due or payable until the second Tuesday in May, the action was prematurely commenced and the writ properly denied.

ERROR to the district court for Burt county: EDMUND M. BARTLETT, JUDGE. *Affirmed.*

Bowes & Hodder and *J. A. Singhaus,* for plaintiff in error.

P. E. Taylor and *E. D. Wigton, contra.*

DUFFIE, C.

The first, third, fourth and seventh sections of ordinance No. 84 of the village of Lyons, Nebraska, are in the following language:

"Section 1. Each and every person, firm and association, corporation, or other organization, carrying on the occupation or business hereinafter mentioned, within the corporate limits of the village of Lyons, Nebraska, shall pay to the treasurer of said village annually, as a tax upon said occupation, or business, from the first Tuesday in May of each year the sums hereinafter provided."

"Section 3. There is hereby levied an annual tax upon occupation and business carried on within the limits of said village of Lyons, Nebraska, as follows: Billiard and pool-halls and places using similar tables for amusement or gain, first table $25, each additional table $15, bowling alleys," etc.

"Section 4. No demand shall be necessary for said taxes, but all persons subject to pay tax under this ordinance shall attend at the office of the city treasurer and pay the same on the second Tuesday of May, or, if they shall not be engaged in any business or occupation subject to tax under this ordinance on the second Tuesday of May, then, as soon as they shall be subject to pay such tax by engaging in an occupation or business which is taxed under the provisions of this ordinance or upon publication of this ordinance."

"Section 7. If any tax unpaid under the conditions of this ordinance shall not be paid when the same by terms of this ordinance becomes payable, then the nonpayment of said tax shall be deemed a misdemeanor and the party so offending shall be fined not less than $5 nor more than fifty dollars."

The relator, C. E. McMonies, was the proprietor of a billiard and pool-hall in Lyons during the year 1903, and on May 3, 1904 (it being the first Tuesday of May), he tendered to Charles McMonies, the treasurer of said village, the sum of $85, being the tax required on four pool tables and one billiard table for the year 1904. The treasurer refused to accept the money, and the relator immediately commenced this action, asking a writ of mandamus requiring him to do so and to issue a receipt therefor. The district court refused the writ, and the case is brought here for review.

The respondent defends upon two grounds: (1) That, by an ordinance passed subsequently to the tender, but prior to the trial of the case, it was made unlawful for any person to keep for public use or hire or gain within the village of Lyons any billiard or pool-hall or any billiard

or pool-tables. (2) That the tender of the tax was prematurely made. Two ordinances were introduced in evidence, each of which was passed after the commencement of this action, but before the trial in the district court. Each of the ordinances makes it illegal to operate pool and billiard-halls for hire within the village of Lyons. Numerous objections to these ordinances are made by the relator, and it is urged that there was such irregularity in their passage that they are absolutely void. We do not care to examine these objections in detail, but base the conclusion at which we have arrived upon the ground that the village trustees have no authority to pass an ordinance making it illegal to maintain a billiard and pool-hall within the limits of the village. In *Morgan v. State,* 64 Neb. 369, this court, referring to billiard-halls, said:

"The interests of peace, good order and public morality require that the billiard and pool room should be conducted according to such rules and standards, and subject to such restrictions, as may be prescribed by the municipal authorities. Such a room is not, we concede, *per se* a nuisance, but without regulation and supervision it is likely to become so anywhere, and in a village it is apt to degenerate into a trysting-place for idlers and a nidus for vice."

The plaintiff's pool-hall not being a nuisance *per se,* and the village authorities having no right to suppress it, as such, until by its management and conduct it becomes a nuisance in fact, what are the powers of the village board in dealing with it and other like places? Subdivision I of section 39, article I, chapter 14, Compiled Statutes 1903 (Ann. St. 8639), confers upon cities of the second class power "to restrain, prohibit, and suppress billiard tables and bowling alleys kept for public uses"; but section 40 (Ann. St. 8680) of the same chapter which relates to villages, provides that this class of municipalities "shall have the rights, powers, and immunities hereinafter granted, and none other, and shall be governed by the provisions of this subdivision."

It is familiar law that a municipal corporation has such powers only as are expressly granted in its charter, and those fairly implied in or incident to the express grant. 1 Dillon, Municipal Corporations (4th ed.), sec. 89, gives the following as the rule relating to their powers: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the *following powers, and no others:* First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." *State v. Irey,* 42 Neb. 186; *Sexson v. Kelley,* 3 Neb. 104; *Hurford v. City of Omaha,* 4 Neb. 336, and other cases in our own reports recognize this rule as the one proper to be applied in cases dealing with the power of the municipalities of this state. It is quite evident from the provisions of section 40, above referred to, that we must look to the language of the statute following section 40, and relating exclusively to villages, to ascertain the powers possessed by such municipalities. Section 46 (Ann. St. 8686) confers upon a village numerous general powers, but none relating to billiard and pool-halls, unless such halls can be classed as places of "amusement," which may be "licensed and regulated." The only other provision which may be fairly construed to cover the control of a billiard or pool-hall by the village authorities is found in subdivision VIII of section 69 (Ann. St. 8719) and is as follows: "To raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city or village, and regulate the same by ordinance." If billiard and pool-halls are included in section 40 under the term "other amusements," the village may license and regulate such business; and by the express language of subdivision VIII of section 69 such places or business may be "licensed and taxed and the con-

duct of the business 'regulated' by ordinance." It is familiar law that the power given a municipality to "regulate" does not authorize it to suppress or prohibit a trade or business, as the very essence of regulation is the existence of something to be regulated. Horr and Bemis, Municipal Police Ordinances, sec. 30; *State v. Mott,* 61 Md. 297, 48 Am. Rep. 105.

It is urged on behalf of respondent that the village has power to prohibit pool and billiard-halls under the general welfare clause of its charter. It cannot be disputed, we think, that, in the absence of express authority, the village has no power to prohibit or suppress any lawful business, recognized as such by the laws of the state. As we have already seen, billiard and pool-rooms are not nuisances *per se,* and the statutes of the state recognize the keeping of such halls as legal and lawful, except that minors shall not be allowed to play at the game or to be in or upon the premises so occupied. (Cr. code, sec. 222.) We conclude, therefore, that villages have no authority to prohibit or suppress billiard and pool-halls within their limits.

The defense that the tender of the tax was prematurely made must, we think, be sustained. By the express provisions of the ordinance, those liable to the tax were to appear at the office of the city treasurer on the second Tuesday of May, and make payment. It is urged by the relator that, because the fiscal year for villages commences on the first Tuesday of May, the tax may be paid at any time after that day. In other words, that the tax became due at the commencement of the fiscal year, but the ordinance extended the time of payment until the second Tuesday of May, after which time the tax became delinquent, and the party in default might be proceeded against for nonpayment. We are not inclined to accept this view of the case. In the absence of this ordinance, the relator was not required to pay any tax. Of necessity, the ordinance imposing the tax must fix a time for its payment. Otherwise there could be no delinquency and no prosecutions for nonpayment until the last day of the fiscal year,

and perhaps not then. So, also, should the treasurer of the village be informed by the terms of an ordinance of the date when any money coming to the village becomes due and payable. He is not required to accept the money of a taxpayer until the tax is due. The taxpayer cannot make him the custodian of a fund until by law he is required to receive it. It would be a question of some doubt whether the treasurer's bond would be liable for taxes paid before their maturity, but whether so or not, it is clear to us that the treasurer cannot be burdened with the safe-keeping of funds until, by the terms of the law or ordinance under which they are paid, they have become due and payable. Upon the ground, therefore, that the tender of this tax was prematurely made, we recommend 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.

DAVID ROE, APPELLEE, V. HOWARD COUNTY ET AL., APPELLANTS.

FILED JANUARY 3, 1906. No. 14,020.

1. **Appeal: TRIAL DE NOVO.** In appeals in equity cases, this court will examine the evidence and arrive at an opinion of the facts established, uninfluenced by the conclusion arrived at by the trial court, except in so far as a presumption in support of such conclusions is derived from the opportunity which the trial judge has of seeing and hearing the witnesses, and of judging their candor, their knowledge of the facts, their intelligence, and bias, or partiality, if any is exhibited.

2. **Surface Water, Diversion of.** Where water, be it surface water, the result of rain or snow, or the water of springs, flows in a well-defined course, be it ditch or swale or draw in its primitive condi-

tion, and seeks its discharge in a neighboring stream, its flow cannot be arrested or interfered with by a landowner to the injury of the neighboring proprietors, and what a private proprietor may not do neither can the public authorities, except in the exercise of the right of eminent domain.

3. Roads: CONSTRUCTION: DAMAGES: PRESUMPTION. The court will not presume that the commissioners appointed to assess damages to the owners of land over which it runs, considered it necessary, in the proper construction of the road, to divert the water, naturally seeking an outlet in a draw, and conduct it in an artificial ditch along the highway for a mile or more and there discharge it in such manner that it damaged the land of the plaintiff, or that plaintiff was allowed damage for such disposition of the water.

4. An easement by prescription can be acquired only by an adverse user for ten years, and the commencement of the time required for the prescription to ripen dates from the time when the party was damaged or had a cause of action arising from the adverse user.

APPEAL from the district court for Howard county: JOHN R. HANNA, JUDGE. *Affirmed.*

Frank J. Taylor and *T. T. Bell,* for appellants.

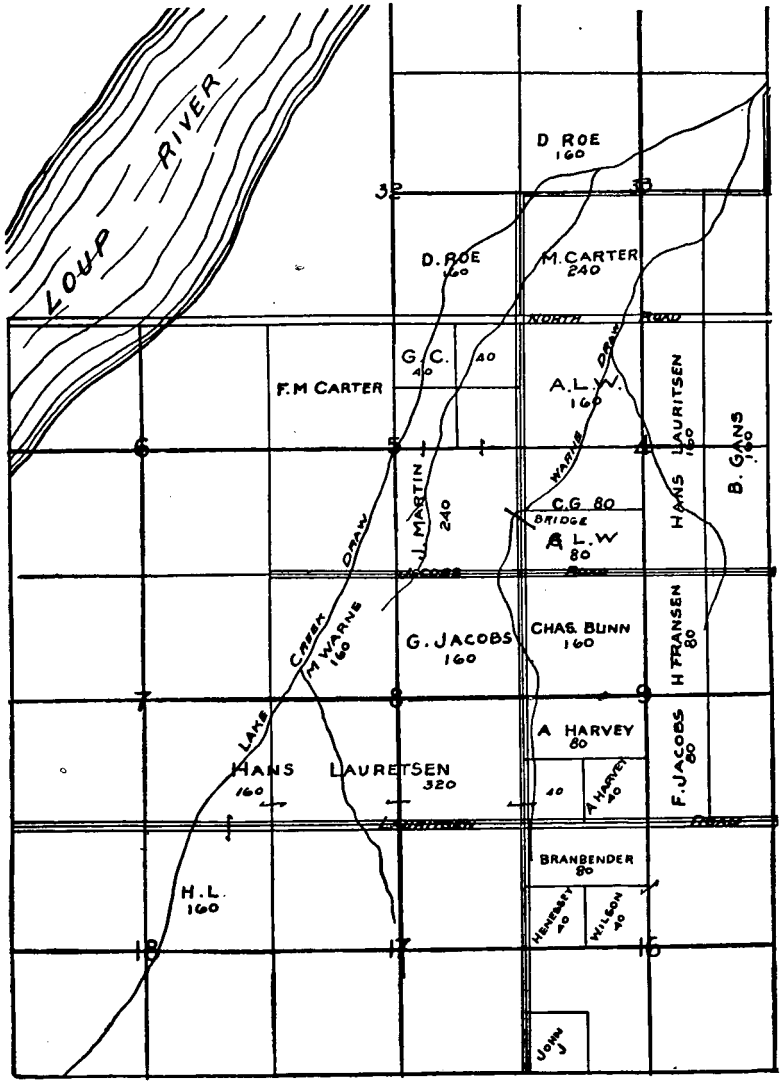
A. A. Kendall and *W. H. Thompson, contra.*

DUFFIE, C.

The decree of the district court contains findings upon all the issues made by the pleadings with an exception hereinafter referred to. These findings, together with a plat of the surrounding country introduced by the plaintiff present the matter in dispute between the parties in as brief and clear a manner as any synopsis of the pleadings which we could make. After a general finding for the plaintiff the decree continues as follows:

"The court further finds that at the time this action was commenced and previously thereto the plaintiff was a resident taxpayer of the said county of Howard, and was the owner and in possession of the southeast quarter of section 32 and the northwest quarter of section 33, and that

Miles Carter was the owner and in possession of the southwest quarter of 33, all in township 14 north, of range 10



west, in said county. The court finds that at the said times, A. L. Warne was the owner and in possession of the northwest quarter and the south half of the southwest

quarter of section 4, and that J. M. Martin was the owner and in possesion of the southeast quarter of section 5, all in township 13 north, of range 10 west, in said county. The court finds that sections 4, 8, 9, 16 and 17, in said township 13, are low, flat and nearly level lands, and are wet and swampy during a great portion of the year, and that a large amount of surface and seepage waters collect thereon and flow therefrom. The court finds that said surface and seepage waters, by the processes of nature, formed and gathered into a draw or a low drain and watercourse known as the 'Warne draw,' which watercourse runs in a northeasterly course or direction from the land of said Martin into the public road running north and south between sections 4 and 5, and in an easterly direction across said road, and then in a northeasterly direction across the lands of said Warne and one George Gans, who owns the north half of the southwest quarter of section 4, lying between the two tracts of the said Warne, thence on across lands of the said Warne, and across the lands of the said Carter, and several miles to the Loup river. That the said draw or watercourse is deeper than the surrounding lands, and has well-defined banks and an open course in some places, and is fed by springs, and the surface and seepage waters from sections 8, 9, 16 and 17 aforesaid, and that said waters have constantly flowed in said draw and watercourse for many years, and that said draw and watercourse is the only natural course and outlet for said waters, and that said northeasterly direction is the only natural direction for said waters to flow and the only direction that they did flow previous to the acts complained of by plaintiff, and that said waters never did flow down said road in a northerly direction, nor at the place or in the place where the same now flow, previous to the acts complained of by the plaintiff. The court finds that after the road between sections 4 and 5 and 32 and 33 was opened to public travel, and, to wit, in the year 1887, a culvert was built by said county across said road at the point where said Warne draw and water-

course crosses said road, to enable the waters coming down said draw to pass thereunder and provide a safe crossing for the public over said draw, and that the dirt was taken from the sides of the road near said culvert to grade the approaches to said culvert, and that thereafter, in the year 1893, said culvert was washed out by the waters coming down said draw and was swept to the east side of the road, and said watercourse became filled up where it crossed said road and remained so until the year 1897, when the proper authorities of said county ordered it opened, and a new culvert built; that said new culvert was built during said year last mentioned, being 16 feet in length, and about 8 feet wide, and 3½ feet high, to enable water to pass thereunder, and more dirt was taken from the sides of the road to grade the approaches to said culvert, thereby making ditches at the sides of the road for a short distance from said culvert. The court finds that in the year 1891 the said A. L. Warne opened a ditch along the west side of said road, running north and south between sections 4 and 5 and 32 and 33; that the southern terminus of said ditch, so constructed, was at the west end of said culvert constructed across said Warne draw as aforesaid, and that the northern terminus of said ditch, so constructed, was about 25 rods south of the quarter section corner between said sections 32 and 33, and that said Warne worked on said ditch from time to time during several years thereafter; and that said work was without authority and not authorized by the properly constituted authorities of said county, and was constructed for the purpose of draining the water coming down said Warne draw from said Warne's land and carrying it north in said ditch, along said road, to the northern terminus of said ditch, where it was discharged in said road, and from there it went onto the land of Miles Carter, and from there onto the land of the plaintiff in section 33; that, in passing down said ditch, the same overflowed and went upon the land of the plaintiff in section 32 continuously and in large quantities in the year 1903, to the damage of

plaintiff's crops growing on said land. The court finds that in the year 1899 and thereafter the county authorities of said county assumed control of said ditch, excavating and greatly enlarging the same, and made use of said ditch to convey the waters coming down said draw in a northerly direction, and thereby changed the course and direction of the water from its natural course, and that said authorities thereby permitted said water to be discharged into the public road, there to pass onto the lands of plaintiff to his damage. The court finds that previous to the commencement of this action plaintiff notified and requested the defendant Lauritsen, road supervisor, and other defendants as county commissioners, to fill up said ditch and stop the flow of water upon plaintiff's land, which request was not granted. The court finds that the natural and only course for said water to flow is across the road in an easterly direction at the culvert, and thence in a northeasterly direction, across the lands of said Gans and Warne, and not in a northerly direction along the public road, and that the action of said Warne and of the said defendants in constructing and extending said ditch, and continuing and maintaining same so as to divert said water from its natural course and cast it into the public highway and upon the lands of plaintiff, was and is wrong and unlawful, and was not made and is not maintained for the purpose of properly and lawfully constructing and maintaining said public road, but was and is for the purpose of draining said waters from the lands east of said road, and that the money expended from the public funds of said county for said purpose is an improper and unlawful use of the public funds of said county and is unlawful. The court finds that, in the construction of said ditch as aforesaid, on the west of said road from said "Warne draw" north to a point about 25 rods south from the quarter section corner between said sections 32 and 33, which was the north terminus of said ditch, it was constructed through a ridge or slight elevation of land which is located at or about the northeast corner of the southeast quarter

of said section 5, and that, in order to permit said water to flow down said ditch, it was necessary to dig said ditch, at said last mentioned point, about 4 feet deep, and that, at said last mentioned point, the natural level of the land was about 3 feet higher than the natural level of the base of said "Warne draw" where it crossed said road, and from which point said ditch was constructed, and that from this northeast corner of the southeast quarter of said section 5 north on the line of said ditch the natural flow, drainage and flow of the water was in a northern direction toward Lake Creek draw, and that from this last mentioned point south the natural drainage and flow of the water was in a southern and southeastern direction toward said 'Warne draw.'

"The court finds that the plaintiff has sustained damage in the sum of $30, and that the injunction heretofore granted in this case should be and the same is hereby sustained, and the defendant, county of Howard, and the defendants, Frank Rork, George Irvine and S. M. Sonderup, county commissioners of said county, and their successors in office, and the defendant, Hans N. Lauritsen, road supervisor of Cleveland precinct in said county, and his successors in office, are each and all, individually and collectively, perpetually enjoined and restrained from allowing or permitting any water coming down said 'Warne draw' from above, or south of the culvert across said draw in the road between sections 4 and 5 in said township and range, to flow down said ditch north of said 'Warne draw' on the west side of said road between said sections or upon plaintiff's land in said sections 32 and 33 as aforesaid.

"It is further considered and ordered that the said defendants, and their successors in office, shall cause said ditch on the west side of the road running north between sections 4 and 5 to be filled up at such points or places north on said culvert over said 'Warne draw,' at or near to the northeast corner of the southeast quarter of said section 5, as shall effectively and permanently prevent any

water coming down said ditch, or from the road, from passing down said ditch to the north, and such filling shall be permanent and lasting, and of such character as to be effective, and the ground to be replaced therein in a natural and substantial condition, the same as it was before said ditch was first constructed, and such as will restore the water in this locality to its natural course, and that such excavations shall be made under said culvert constructed across the 'Warne draw' as shall make the bottom of said culvert as low as or lower than the base of the ditch located west thereof in said road, so as to permit the water flowing and accumulating in said ditch to pass through said culvert on the east thereof, and to make such other and further excavations at said point as will enable said water coming down said draw to pass to the eastward under said culvert, and out of the said road through the natural course of said 'Warne draw' onto the lands of the said Warne and Gans."

The appellants insist that the decree is not supported by the evidence, and from that fact alone it should be reversed. We concede the claim made by appellants that, under the statute and the holding of this court in *Faulkner v. Simms,* 68 Neb. 299, it is our duty to examine the evidence and arrive at an independent judgment relating to the facts established therefrom, but, as well stated in that case, the trial court has advantages denied to the appellate court in many particulars where the witnesses are orally examined upon the trial. Where the testimony of witnesses is taken in the form of depositions and consists wholly of written evidence, the appellate court is as well qualified to judge of the credit and force to be given the evidence as the trial court, but it cannot be disputed that the apparent candor, knowledge and intelligence of the witnesses are matters of which the trial court has a better opportunity to judge than can we from a reading of the cold written record brought before us. To that extent, but no further, there should be a presumption in favor of the findings of the trial court. These are matters which

we cannot overlook, and which to some extent should go to support the findings, unless a careful consideration of all the evidence convinces us that there is a preponderance against such findings. The matter is one of importance, not only to the parties, but to the state at large, and we have tried to give it the full consideration that it demands.

We are satisfied that what is known as the "Warne draw" is the outlet for the surface water received on quite an extent of country lying south of the bridge crossing that draw and where the ditch complained of commences. The rule relating to gathering surface water in a ditch and discharging it in a volume on the lands of another has been well settled in this state. While one may fight surface water and protect his premises against it by the use of reasonable means, he cannot collect it in a large body and flow it onto the land of a lower proprietor to his injury. *Todd v. York County*, 72 Neb. 207, and cases there cited. In *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380, it is said:

"It would be an unfortunate rule of law which would allow a railroad company, or any other proprietor of land, to erect an embankment across a ravine in which a large body of water is accustomed to run during the rainy seasons or upon the melting of snow without making the necessary provision for its flow in the usual manner. * * * We regard it as now settled by the former decisions of this court that a railway company, or other proprietor of land, cannot throw an embankment across a ravine or draw, into and through which the surface water of a large scope of country is accustomed to flow, without providing adequate means for the usual flowage of the water naturally seeking such an outlet."

This case was referred to and followed in *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610, and the law is now apparently well established that, when surface water flows by a well-defined and natural course upon lower lands, that flow cannot be interfered with by either the upper or

lower proprietor. *Wharton v. Stevens,* 84 Ia. 107. In that case it is said:

"But where surface water has a fixed and certain course as a swale, though it may be narrow or broad, its flow cannot be interrupted to the injury of an adjoining proprietor."

In this case the finding of the court, which we think well supported by the evidence, is as follows: "That the said draw or watercourse is deeper than the surrounding lands, and has well-defined banks and an open course in some places, and is fed by springs, and the surface and seepage waters from sections 8, 9, 16 and 17 aforesaid, and that said waters have constantly flowed in that draw and watercourse for many years, and that said draw and watercourse is the only natural course and outlet for said waters."

It is well settled that what would be illegal in the disposition of surface or other waters in a private individual, is likewise illegal when attempted by the public authorities, unless by agreement, or in the exercise of the power of eminent domain and by the payment of damages, the public authorities have acquired the right to collect and discharge the water upon the land of another. In *Young v. Commissioners of Highways,* 134 Ill. 569, 25 N. E. 689, it is said:

"The commissioners of highways, where they undertake to drain a public highway, possess the same rights, and are to be governed by the same rules, as adjoining landowners who may undertake to drain their own lands, except where they may be proceeding under the eminent domain laws of the state."

And *Patoka Township v. Hopkins,* 131 Ind. 142, 30 N. E. 896, is to the effect that the public authorities cannot collect in artificial ditches, along the side of the road, surface water which naturally flows away from the road, and by a culvert conduct it all on one side, thereby causing it to be thrown on the land of a proprietor on that side. In *Churchill v. Beethe,* 48 Neb. 88, the complaint was that

the authorities raised an embankment along the highway in such a manner as to change the course of surface water accumulating on the land west of the highway so as to cause it to flow upon the land of the plaintiff, whereas, before the embankment was constructed, such water flowed over the land north of plaintiff's; and second, that the defendants were about to build a culvert across the highway in such a manner as to turn the accumulated surface water from the land to the west in a body upon the plaintiff's land. Relating to the second cause of complaint the court said: "It is needless to say that such an act by a private proprietor would be unlawful, and that relief could be had against it." And it then proceeds to show that, under the circumstances of that case, it must be presumed that the plaintiff had received, or had an opportunity to receive, compensation for his damages when the highway was originally constructed; in other words, that the necessity for this work and the damages to plaintiff arising therefrom had been taken into account by the commissioners appointed to assess his damages when the road was opened. The case clearly recognizes the rule that the public authorities have no greater rights than a private proprietor to collect and discharge water upon the land of another, except in cases where the damages to that other have been ascertained and paid, or where the opportunity has been offered him to claim his damages on the construction of the improvement and he has neglected to do so.

In this state all section lines are made public highways, and, when opened, damages are assessed in favor of adjoining proprietors for any injury that may be done their premises from the proper construction and maintenance of the highway. It is undoubtedly true that the plaintiff in this case has been awarded the damages sustained for the opening of the highway across his land, or which might accrue to his premises in consequence of any necessary work done in the proper construction and maintenance thereof, but it cannot, we think, with any degree of reason, be claimed that the commissioners appointed to assess

the damages for the opening of this highway conceived it to be necessary to take the water from the "Warne draw," and conduct it north along the highway and discharge it into the road and upon the lands of the plaintiff, as has been done in this case. It would be unreasonable to suppose that any commission appointed to award damages could believe that such disposition of the water was either necessary, or would be attempted, in the proper construction of the highway, and the court has specially found that constructing and extending the ditch complained of was not done, and that the ditch is not maintained, for the purpose of properly and lawfully constructing and maintaining said public road, but was for the purpose of draining said waters from the lands east of said road.

The appellants' claim of an easement acquired to discharge water upon the plaintiff's land cannot be sustained. An easement by prescription can be acquired only by an adverse user for ten years (*Omaha & R. V. R. Co. v. Rickards,* 38 Neb. 847); and in cases of this character the prescriptive right will not commence to run until some act or fact exists giving the party against whom the right is claimed a cause of action. Where a right by prescription to maintain a railroad bridge, and change the current of a stream and injure the land of a riparian owner below, by causing it to wash away his land, is claimed, the commencement of the time required for the prescription to ripen is not from the erection of the bridge, but from the first actual damage to the land consequent on the erection of the bridge. *Eells v. Chesapeake & O. R. Co.,* 49 W. Va. 65.

There is no evidence in the record that the plaintiff or those from whom he acquired title to the land were damaged, or acquired any cause of action in consequence of water discharged upon their land from this ditch, and no evidence that water from the ditch reached the land, for a period of ten years prior to the commencement of the action. On the whole case we think that the finding of the district court is well sustained by the evidence, and

that the law entitles the plaintiff to the relief afforded by the decree, and we therefore recommend its affirmance.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

FRANK O. BURDICK V. SONS AND DAUGHTERS OF PROTECTION.

FILED JANUARY 3, 1906. No. 14,063.

1. **Beneficial Associations: OFFICERS: SALARIES.** A fraternal benefit society, whose governing power in relation to fees and salaries to be allowed the officers of the order is vested in an executive committee, is not bound by acts of the members of the society, nor can a proposition, made to the delegates of a convention of the organization by one who is a candidate for office, relating to his fees, if elected, be regarded as a contract, in the event of his election, in the absence of any agreement with the governing body after such election.
2. **Estoppel.** One cannot attack the validity of a delegate meeting of a society where he participates in the meeting and becomes a candidate for one of the offices to be filled.

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

L. D. Holmes, for plaintiff in error.

Frank J. Kelly, contra.

DUFFIE, C.

Sometime previous to January 16, 1901, the officers of the supreme lodge of the Sons and Daughters of Protection attempted to sell and transfer the membership of said order and all its property and records to the Bankers' Union of the World. Many of the members were dissatis-

fied with this attempted transfer, and delegates from about 40 of the subordinate lodges met in the city of Lincoln January 16, 1901, for the purpose of resisting said sale and to perpetuate their organization. At this meeting it was determined to reorganize the order and to elect a new set of supreme officers. The old officers of the supreme lodge sent in their resignations to this meeting and a new set of supreme officers were elected by the members present. Frank O. Burdick was elected medical director, and, as such, became a member of the executive committee, which, under the constitution, is made up of the supreme president, supreme vice-president, supreme secretary, supreme medical director and supreme counselor. Previous to his election he was nominated for supreme president of the order, and, in a speech declining that position, it is asserted that he proposed, if elected supreme medical director, to examine the first 1,000 applicants for admission or reinstatement free of charge. At a meeting of the executive committee held after his election, Dr. Lewis, who had also been a candidate for the office of medical director, offered to examine 500 of the first applicants free of charge, and this proposition was taken to Dr. Burdick, who was urged to accept it, the order then being without funds or means of any kind, and it was thought that by appointing Dr. Lewis assistant medical director his influence in building up the order would be a help to the society. Dr. Burdick promised to take the matter under consideration, but afterwards refused to appoint Dr. Lewis an assistant. At this meeting of the executive committee some donations were made to the society, and several members made loans of $25, which were to be repaid if the society grew in strength and was able to make repayment. O. C. Bell, who was elected secretary, gave up a position he was then holding in another organization with a salary of $100 a month, and agreed to serve as secretary of the society for $75 a month, $50 to be paid in cash, and $25 of each month's salary to run for six months or until the order accumulated sufficient funds to make payment. It was thoroughly understood, not only

by the delegates who attended the meeting, but by the executive committee, that the order was wholly without means, and that considerable sacrifice would have to be made by the different members of the order to get it again on its feet and make it a going concern; and we have no doubt from the evidence in the record that it was the understanding of the delegates who elected Dr. Burdick to his office, and of the executive committee, that he had assumed as his share in rebuilding the organization to examine free of charge the first 1,000 applicants for admission or reinstatement, but no contract to that effect was made with him by the executive committee who, under the constitution, have exclusive authority to fix and determine the salaries and compensation of the supreme officers. Under the constitution of the society as existing in 1901, the plaintiff's term of office would not expire until the second Tuesday of May, 1904, but at a subsequent meeting of the subordinate lodges the constitution was so changed as to make the plaintiff's term of office, and the term of all other supreme officers of the order, expire on the second Tuesday of October, 1902, on which date one Dr. Michael was elected to succeed him. During the time he held his office, the plaintiff examined 1,630 applicants, the fee in each case being 50 cents. He has been paid the sum of $315, and no more; and he brought this action, alleging in his petition, which is in two counts, the fact of his election to the office; that his term was to extend to the second Tuesday of May, 1904, and that the society, at a meeting illegally called and held, attempted to change the constitution so as to make his term of office expire on the second Tuesday of October, 1902, at which date a successor was elected, and he was ousted from his office, to his damage in the sum of $2,500. In the second count of his petition he alleges his election to the office, that he examined during the time he served 1,630 applicants, for which he was entitled to a fee of 50 cents each, that he has been paid the sum of $315 only, leaving the sum of $500 still due and unpaid, and he asks judgment in the sum of $2,500 and interest. A trial was had

to the court without a jury, and the plaintiff's petition was dismissed. His motion for a new trial being overruled, he has brought the case here for review.

The evidence is entirely satisfactory to our minds that, prior to his election, the plaintiff publicly stated to the delegates in attendance at the meeting that he would examine, free of charge, the first 1,000 applicants, provided he was elected to the office of supreme medical director. Not only is this testified to in positive terms by two or three witnesses who heard the statement and the applause which followed it, but the record discloses facts and circumstances corroborating this testimony. If his election by the delegates present could be regarded as an acceptance of the plaintiff's proposition, still it would not amount to a contract, because by the constitution of the society his compensation must be fixed by the executive committee. A corporation whose governing power is vested in a board of directors is not bound by the acts of its stockholders. *Columbus Co. v. Hurford,* 1 Neb. 146. There is no showing in the record of any facts or circumstances which can be claimed as forming a legal contract made between the plaintiff and the executive committee, to the effect that he should examine free of charge the first 1,000, or any number of, applicants. The other members of the executive committee undoubtedly thought that the plaintiff would live up to his proposition and that no contract was necessary, but the court cannot accept for a contract a proposition which has been made by one party, but which has not been accepted or acted upon by the other party. We are of the opinion, therefore, that the court erred in not allowing Dr. Burdick $500, the regular fee for his examination of 1,000 applications.

His claim for $2,500 damages is based upon the proposition that his regular term extended to the second Tuesday of May, 1904; that at a special meeting of the supreme lodge held in May, 1901, the constitution was so changed as to make his office expire in October, 1902; that this May meeting was irregular and illegal, in that it was called on

petition of two-thirds instead of three-fourths of the members, and his claim is that he was illegally ousted from office. We do not care to spend time in discussing this proposition. Suffice to say, that Dr. Burdick attended that meeting, participated therein and was a candidate for reelection to the office of supreme medical director. The law is clear that he cannot attack the validity of a meeting in which he participated, and to which he gave countenance by being a candidate for one of the offices filled by the meeting. We recommend that the cause be remanded to the district court, with directions to enter a judgment in favor of the plaintiff for $500 and for costs.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the cause is remanded to the district court, with directions to enter a judgment in favor of the plaintiff for $500 and for costs.

REVERSED.

UNION PACIFIC RAILROAD COMPANY V. SILAS THOMPSON ET AL.

FILED JANUARY 3, 1906. No. 14,078.

1. **Evidence** examined, and *held* sufficient to submit to the jury the question of negligent delay in the operation of a stock train.
2. **Depositions.** An action was pending in the county court, and the plaintiff served notice of taking depositions, but by mistake the notice referred to the action as pending in the district court. The depositions were returned by the notary to the clerk of the district court and filed in that court. On the trial of the case in the county court, the depositions were by agreement of the parties taken from the office of the clerk of the district court and read upon the trial. The defendant appealed the case to the district court and there moved to suppress the depositions because not properly certified, and because there was no action pending in the district court when the same were taken and returned to that court. *Held*, That the district court did not err in overruling the motion and allowing the depositions to be read.

3. A stock shipping contract contained a provision to the effect that, unless claims for loss, damage or detention are presented within ten days from the date of unloading the stock at destination and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability. *Held*, Upon the authority of *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222, that such provision was void and ineffective under the laws of this state.

4. Trial: ISSUES: EVIDENCE. Where evidence is taken without objection on a question not put in issue by the pleadings, the admission of the evidence makes it an issue, and the court cannot exclude it by an instruction after the parties have rested, nor can the party on appeal urge that it was not an issue in the case.

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

John N. Baldwin, Edson Rich, John A. Sheean and *A. R. Humphrey,* for plaintiff in error.

H. M. Sullivan, contra.

DUFFIE, C.

In their petition filed in the district court, Thompson and Tierney alleged that they delivered certain stock to the Union Pacific Railroad Company at Oconto, Custer county, Nebraska, for shipment to South Omaha; that the stock was delivered to the defendant company at 2 o'clock in the afternoon of March 24, 1903, and that it was careless and negligent in not transporting and delivering said stock at South Omaha by 2 o'clock in the morning of the 25th of March, 1903; that defendant carelessly and negligently kept the said stock in the cars and on the road until 6 o'clock in the evening of the 25th of March; that the stock did not reach South Omaha until after the market had closed on the 25th, and plaintiffs were compelled to keep the stock over and to sell the same on the 26th at 15 cents a hundred less than they would have brought on the 25th, in consequence of a decline in the market. A claim is also made for shrinkage of the stock, and for damages to one

cow that got down and was crippled from being trampled on by other stock, all of which, it is claimed, occurred in consequence of defendant's negligence. The answer was a general denial, an allegation that the train was run with all reasonable speed, and that such delays as occurred were in consequence of being laid out for other trains which had the right of way and of putting a new brass in a box which had become heated. It was further alleged that the shippers accompanied the stock for the purpose of caring for the same and were furnished with free transportation for that purpose. As a further defense it is alleged that at the time the contract of shipment was made, and in consideration of reduced freight charges and other considerations set forth in the contract, the following condition was expressly agreed to and incorporated therein, viz.: "Unless claims for loss, damage or detention are presented within ten days from the date of the unloading of said stock at destination and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability." No reply was filed to this answer, but a trial was had upon the theory that a reply in the form of a general denial had been interposed. The jury returned a verdict in favor of the plaintiffs for $100, upon which judgment was entered, and the company has taken error to this court.

A motion was made to suppress depositions taken by the plaintiffs upon the ground that they were taken before the action was pending in the district court, and that they were not addressed to the clerk of the court in which the action was pending, and that they did not remain under seal until opened by the clerk of the court to which they were addressed, and for the further reason that they were not properly certified. The case was originally tried in the county court, where the depositions of Walter E. Wood and Bruce McCulloch were offered in evidence and read. These depositions were taken in South Omaha on notice given by the plaintiffs, the notice stating that they were to be used on the trial of a case pending in the district court for Custer

county. It appears from the record that the depositions were returned and filed with the clerk of the district court for Custer county; that previous to the trial in the county court the attorney for the plaintiffs, on being informed of this fact, stated to counsel for the defendant that he would have to ask for a continuance unless he would consent to the use of the depositions in the county court, and that thereupon it was agreed that the depositions might be used, and they were used, in the county court, and upon appeal to the district court they were transferred with other papers in the case. Counsel who appeared for the defendant company in the county court, and who was also one of the counsel appearing in the district court, testified as follows: "I think in a general way I agreed that the depositions could be read in the county court." Upon this showing the motion to suppress was overruled and the depositions were used on the trial in the district court. The district court was clearly right in overruling the motion to suppress the depositions. While the case in which they were taken was pending in the county court and the notice served upon the defendant recited that they were to be filed and used in a case pending in the district court, no prejudice to the defendant resulted from such error. Defendant was represented by counsel who cross-examined the witnesses at the taking of the depositions. This might not, perhaps, have cured the error in the notice, or have given the plaintiffs a right to take depositions on file in the district court for use in the county court, in the absence of an agreement, but it clearly appears that such agreement was made, and the defendant company cannot now insist upon irregularities or objections to the depositions which might have been interposed in the absence of such agreement.

It is objected that there is not sufficient evidence to sustain a finding that the defendant company was negligent in operating the train upon which the plaintiff's stock was shipped, or in failing to use due diligence in avoiding delays in reaching South Omaha. We do not care to review the evidence on this question. Between Kearney and South

Omaha the train was sidetracked on numerous occasions, and delays extending from 25 minutes to 2 hours occurred on several occasions. The evidence of the conductor and engineer in charge was taken as to the causes of these delays. Several stops were occasioned by waiting for other regular trains which had the right of way over the train in question. As to these stops the engineer and conductor could properly testify, for the reason that the time card would show the time and place where such trains would pass, but numerous extra trains were upon the road, and many delays were occasioned by the passage of these extras. Orders from the train dispatcher would be necessary in such cases, and the evidence of the train dispatcher as to the necessity of these stops and their duration would be the best and most reliable evidence on the part of the company. His evidence was not offered, and no attempt to show the necessity of the delay, except by the train men, was made on behalf of the company. On the whole, we believe that there was sufficient evidence to submit to the jury the question of negligence on the part of the company in not operating its train with sufficient diligence. The evidence offered on behalf of the plaintiff tended to show that, because of the great length of time the cattle were on the road, they were in bad condition, some of them bruised and having the general appearance of cattle that had been in the cars a long time, and that on this account their selling price was depreciated about ten cents a hundred. This evidence came from Walter E. Wood, a salesman in the stock-yards. Objection is now made that the petition did not claim damages for the bruised or worn condition of the stock, and that that was not an issue in the case. It is sufficient to say in relation to this that no such objection to the evidence was made on the examination of the witness or at the time his deposition was offered in evidence. It is familiar law that, where evidence is taken without objection on a question not put in issue by the pleadings, the admission of the evidence makes it an issue, and the court cannot exclude it by an instruction, nor can the party

on appeal urge that it was not an issue in the case. *Collins v. Collins,* 46 Ia. 60; and *Wilson Sewing Machine Co. v. Bull,* 52 Ia. 554.

The defendant company tendered the following instruction based upon the clause of the shipping contract above referred to: "You are instructed that the evidence shows conclusively that no claim was made to the agents or officers of the defendant company prior to the mingling of the stock in question with other stock, and you will therefore find for the defendant." The court refused this instruction, and error is predicated thereon. We will again repeat the clause of the contract under which it is claimed this instruction was brought: "Unless claims for loss, damage or detention are presented within ten days from the time of the unloading of said stock at destination and before said stock has been mingled with other stock, such claims shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability." Section 4, article XI of our constitution provides that "the liability of railroad corporations as common carriers shall never be limited." The district court undoubtedly took the view that this clause of the contract was an attempt to limit the common law liability of the carrier. It is not an open question in this state that common carriers cannot, by contract, limit their common law liability. If the question had not been foreclosed by a prior decision, we would incline to the holding that the clause above quoted does not encroach upon this rule. There is no attempt, in our judgment, to limit the common law liability of the carrier for damage sustained in consequence of its negligence. The carrier, by this clause, attempts to protect itself from fraud and imposition by being notified of any claim for damages, which the shipper may have, before the stock is mingled with other stock, in order that it may be inspected and evidence of its condition secured. It recognizes the liability of the carrier, but provides for prompt notice. In *Sprague v. Missouri P. R. Co.,* 34 Kan. 347, a similar contract was enforced, and held not to be an attempt to relieve

the carrier of any of its common law obligations or liability, and, referring to the case of *Goggin v. Kansas P. R. Co.*, 12 Kan. 416, the court said:

"It was there, as here, urged in support of the reasonableness and justice of the regulation, that the defendant was, at the time of the alleged injury, engaged in transporting great numbers of cattle and horses over its line of road, and which were being shipped to different points thereon, and that it would have been impossible for it to have distinguished one carload from another, unless its attention was called immediately thereto, and that the object of the notice and demand mentioned in the contract was to relieve it from any false or fictitious claim, and to give it an opportunity to have an inspection of the stock before they were removed or mingled with others, and the company could thus have an opportunity to ascertain and allow the actual damages suffered. These reasons are said to be cogent and the agreement is there held to be reasonable, just and valid. The decision in that case governs the one at bar, and the view which we have taken of the validity of this limitation accords with the decisions of other courts, among which the following may be cited: *Rice v. Kansas P. R. Co.*, 63 Mo. 314; *Oxley v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 629; *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *Dawson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 514; *Texas C. R. Co. v. Morris*, 16 Am. & Eng. R. Cas. (o. s.) 259, and cases there cited."

To the same effect is *Wichita & W. R. Co. v. Koch*, 47 Kan. 575, and *Kalina v. Union P. R. Co.*, 69 Kan. 172, 76 Pac. 438. In the case last cited it was held: "Where the shipping contract contains a lawful provision requiring the shipper to do something as a condition precedent to recovery, the burden of showing the performance of such condition rests upon the shipper, and if he fail to show performance he cannot recover."

Our own court has apparently taken a different view of this class of contracts. In *Missouri P. R. Co. v. Vandeventer*, 26 Neb. 222, the following clause of a contract was

under consideration: "And for the consideration before mentioned, said party of the second part further agrees, that as a *condition precedent* to this right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before said stock is mingled with other stock." As we understand, from the reading of the case, the district court instructed the jury relating to said clause of the contract as follows: "2d. The jury are instructed that the contract in writing discloses that it is in consideration of a special rate, and if the jury believe from the evidence that the stock was not shipped on a special rate, but that plaintiff paid the full regular rate for such service, then the special reservations, exceptions or limitations sought to be availed of by defendant are without consideration, and the plaintiffs are not bound by the same, where they restrict or limit the liability of defendant as a common carrier." Relating to this instruction, the court said: "Number two, in my opinion, goes too far in favor of the plaintiff in error, as it seems to imply that, had the property been shipped on a special rate, below the regular rate, the plaintiff in error could have availed itself of the special contract to avoid its liability as a common carrier, which, as I understand the effect of the constitutional provision, it could not do." Speaking further of this contract, the court said: "As to the sixth clause of the shipping contract, set forth herein, and specially invoked by the plaintiff in error, if it were conceded that that clause was binding upon the defendants in error there is an entire want of evidence to bring the case within its provisions. Kansas City was the place of destination of the property within its meaning. The shipper agreed as a condition precedent to his right to recover damages for any loss or injury to stock, to give notice in writing of his claim therefor to some officer of the party of

the first part or its nearest station agent before said stock should be removed from its place of destination above mentioned, or from the place of delivery of the same to the party of the second part, and before such stock is mingled with other stock; and there is an entire lack of evidence, as shown by the bill of exceptions, of the removal of the stock from Kansas City, or of its having been mingled with other stock." This clearly indicates that the court regarded contracts of the kind under consideration as violative of our constitutional provision, and also that the burden was upon the defendant instead of the plaintiff to show that the notice provided was not given. We feel bound by this decision, which has been the rule in this state since 1889, and hold, therefore, that the court properly refused the instruction asked.

The court in its 14th instruction told the jury in plain terms that, where the shipper agrees, as in this case, to personally accompany and care for his live stock transported by the railway company and is given free transportation for that purpose, he cannot complain of any injury arising from his own fault in caring for the stock. The evidence is clear that no complaint was made to those in charge of the train that the cow above spoken of was down, nor was any request made of those in charge of the train to assist in helping her up. It is quite clear, therefore, that the jury could not have taken into consideration the damage to this cow in arriving at its verdict. The evidence relating to damages from shrinkage and from the generally bad condition of the stock fully justifies the amount of the verdict, and we recommend an affirmance of the judgment.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

ARTHUR H. AMES V. ABSALOM AMES ET AL.

FILED JANUARY 3, 1906. No. 14,046.

1. Petition: PRAYER. Where a petition filed in the district court states facts sufficient to entitle plaintiff to both legal and equitable relief, and prays relief, a part of which only can be had at law, but all of which can be had in equity, the pleader will be held to have intended thereby to invoke the chancery, and not the common law, powers of the court.
2. ———: ELECTION. After filing a petition of that character, the plaintiff may elect to proceed at law, but to do so he should manifest his election by some unequivocal act which commits him to the theory that he has abandoned his claim to equitable relief.
3. A mere demand for a jury to try the issues of fact is not such an act as would warrant the court in assuming that the plaintiff has abandoned his claim to equitable relief, because, where the relief sought is equitable, a court in its discretion may submit the issues of fact to a jury.
4. Deed: SANITY OF GRANTOR: EVIDENCE. In a suit by one of the representatives of a deceased person to set aside a conveyance made by the deceased on the ground that he was mentally incompetent to execute such conveyance, an answer filed by the deceased in a suit pending in his lifetime, in which he averred that at the time of executing the contract then in suit he was suffering from mental and physical prostration, and *non compos mentis*, is inadmissible in evidence on the question of the mental capacity of the grantor.
5. Evidence. On the trial of the cause, a nonexpert witness was asked to state whether the grantor was able to converse intelligently on any particular subject for any length of time. *Held*, That, the witness having given the conversations and described the conduct of the grantor, it was for the court to draw inferences therefrom as to his inability to converse intelligently.
6. ———. The fact that the attending physician prescribed certain drugs for a patient which are used in the treatment of mental disorders is not competent evidence tending to establish the insanity of the patient.
7. ———. The opinion of an expert witness on the question of insanity, which assumes the point in dispute, is valueless.

ERROR to the district court for Washington county: LEE S. ESTELLE, JUDGE. *Affirmed.*

Brome & Burnett and *E. B. Carrigan,* for plaintiff in error.

Francis A. Brogan and *Herman Aye, contra.*

ALBERT, C.

The questions raised in this court necessitate an examination of the petition at length. It is as follows: "Comes now the plaintiff, Arthur H. Ames, and for his cause of action against the defendants, Absalom Ames and George Ames, respectfully shows to the court: First. That Joseph P. Ames departed this life on the 14th day of April, 1901, in Washington county, Nebraska; that said Joseph P. Ames died intestate, leaving as his sole surviving heirs at law three sons, to wit, Arthur H. Ames, plaintiff herein, and Absalom Ames and George Ames, defendants herein. Second. That on and prior to the 8th day of March, in the year 1900, said Joseph P. Ames was, and for many years had been, the owner in fee simple of the following described lands and tenements, situated in said Washington county, Nebraska, to wit: (Here follows a description of the several parcels of land) all in Washington county, Nebraska. On said 8th day of March, 1900, said Joseph P. Ames made a pretended conveyance of said real estate to the defendants herein, Absalom Ames and George Ames, said conveyance being executed on the date aforesaid, but not delivered to the grantees therein named, the aforesaid defendants, during the lifetime of said Joseph P. Ames. That after the death of said Joseph P. Ames, and on or about the 1st day of May, 1901, the defendants herein obtained possession of said conveyance and caused the same to be recorded in the office of the county clerk of said Washington county, Nebraska, in book 34, p. 423, of the deed records of said county. Plaintiff further says that at the time said Joseph P. Ames signed said pretended deed he was wholly insane and incapable of executing or making any contract or conveyance of any nature or kind whatso-

ever; that said pretended conveyance was wholly without consideration, and the signature of said Joseph P. Ames thereto was procured by said defendants without anything of value being paid therefor, and with the intent and purpose on the part of said defendants to cheat and defraud this plaintiff out of his prospective interests in said real estate as the heir at law of said Joseph P. Ames. That said conveyance was not delivered to said defendants, or either thereof, and was not intended to become operative or to pass the title to said real estate at any time during the lifetime of said Joseph P. Ames; that said Joseph P. Ames was the owner of said real estate and in possession thereof at the time of his death; that immediately after the death of said Joseph P. Ames said defendants jointly took exclusive possession of said real estate, and ever since said date have, and now are, converting to their own use the rents and profits thereof; that said estate at the time of the death of said Joseph P. Ames, and at all times thereafter, has had, and now has, a rental value of $1,500 a year; that this plaintiff is the owner and entitled to possession of an undivided one-third of said real estate, and all thereof, as one of the heirs at law of said Joseph P. Ames; that plaintiff is the owner and entitled to recover of and from said defendants one-third of the value of the use of said real estate since the death of said Joseph P. Ames, amounting in the aggregate to the sum of $1,500; that the defendants have at all times, and do now, wrongfully keep this plaintiff out of the possession, use and enjoyment of said real estate, and the rents and profits thereof, and have refused, and do refuse, to account to this plaintiff for his share of such rents and profits and the value of the use of said property.

"Wherefore plaintiff prays that the aforesaid conveyance from said Joseph P. Ames to said defendants be canceled and held for naught; that plaintiff be adjudged to be the absolute owner of said undivided one-third of said real estate, and all thereof, and that plaintiff have and recover from defendants, in addition thereto, the sum of $1,500 on

account of rents and profits and the value of the use of said real estate now due from the defendants to the plaintiff, and such other and further relief as justice and equity may require."

An extended examination of the answers is not necessary to an understanding of the questions upon which the case now turns, and it will suffice to say that the principal issue raised is as to the mental capacity of Joseph P. Ames to execute the deed. After the answers were filed, the plaintiff asked leave to amend the prayer of his petition by adding thereto the following: "And that the plaintiff have and recover from the defendants the possession of an undivided one-third of said real estate." The court refused to permit the amendment. Afterwards, and before the cause was reached for trial, and again when it was reached, the plaintiff asked for a trial of the issues of fact to a jury, but the request was refused. A trial to the court without a jury resulted in a finding and decree for the defendants. The plaintiff brings the case here on error.

It is insisted on behalf of the plaintiff that the petition states a cause of action in ejectment, and that the court erred in refusing to submit the issues of fact to a jury. It may be conceded that the petition states facts sufficient to constitute a cause of action in ejectment. But it also states facts sufficient to entitle the plaintiff to a cancelation of the deed from Joseph P. Ames to the defendants, and other matters of equitable cognizance. The prayer shows that the plaintiff sought equitable relief, and that a part of the relief sought was such as the court could grant only in the exercise of its chancery powers. On the other hand, while a part of the relief sought might have been had in an action at law, no relief is prayed that the court, in the exercise of its plenary powers as a court of equity, might not have granted. And this would be true, even had the amendment to the prayer for relief been allowed, because, when a court of equity acquires jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all matters at issue in the case.

1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 181. It would seem reasonable to hold that, where a party files a petition in the district court which states facts sufficient to entitle him to both legal and equitable relief, and prays relief, a part of which only can be had at law, but all of which may be had in equity, he intends thereby to invoke the chancery, and not the common law, powers of the court. There is no doubt that, after filing a petition of that kind, the plaintiff might elect to proceed at law, but he should manifest his election by some unequivocal act which would commit him to the theory that he had abandoned his claim to equitable relief. Here the only acts relied on as showing such election are the two requests for the submission of the questions of fact to a jury. But it is not an uncommon practice for courts, in the trial of purely equitable issues, to submit such issues to a jury. But a jury cannot be demanded as a matter of right. *Sharmer v. McIntosh,* 43 Neb. 509; *Omaha Fire Ins. Co. v. Thompson,* 50 Neb. 580; *Alter v. Bank of Stockham,* 53 Neb. 223; *Hotaling v. Tecumseh Nat. Bank,* 55 Neb. 5. There was nothing, therefore, in the demand for a jury inconsistent with the theory that the plaintiff was prosecuting a suit in equity, and nothing on the face of the record which would have prevented him, had a jury trial been allowed which resulted in a judgment in his favor, from insisting that it was a suit for equitable relief, and not in ejectment, and that a second trial thereof as of course could not be had. It seems to us the court very properly regarded and tried the cause as a suit in equity.

The plaintiff, in support of his allegations as to the mental incapacity of Joseph P. Ames, offered in evidence a verified answer which Joseph P. Ames had filed in an action brought against him in his lifetime. The action was upon a contract, and as a defense thereto Joseph P. Ames alleged in his answer that in 1883, at the time of the execution of said contract, he "was suffering from mental and physical prostration, and was *non compos mentis.*" Complaint is now made of the exclusion of this evidence.

While the declarations of a person as to his present condition are frequently admitted in evidence, where it appears that such statements are undesigned and spontaneous, we know of no authority, and are satisfied that there is none, for admitting evidence of a person's declarations as to his past condition, or where, as it clearly appears in this case, the declarations were not spontaneous but studied.

The plaintiff produced a nonexpert witness, who testified fully as to his acquaintance with Joseph P. Ames, the defendants' grantor, and conversations had with him, his conduct, etc., and that from his conduct and conversations, as detailed by the witness, he believed that his mind was weak. He also testified that his reason for thinking his mind was weak was by his talk; that, "if you talked to him about any little thing, he would probably say a word or two, and then his mind would wander off on to something else." The plaintiff asked this witness these questions: "Was he able to converse intelligently on any particular subject for any length of time?" "You may state in what manner Mr. Ames carried on conversations with you while you were there." Objections were interposed and the answers to the questions excluded. We do not think the exclusion of these answers, or either of them, constitutes reversible error. The first would have been a mere opinion as to the ability of the party to converse intelligently. The witness gave the conversations and described the conduct of Mr. Ames, and it was for the court to draw the inferences therefrom as to his ability to converse intelligently. The second was substantially answered by the witness before he left the stand.

The deposition of a physician, who, in his professional capacity, had treated Joseph P. Ames, was taken. His evidence shows that he had prescribed for him, and that his prescription was in writing. He was then asked: "Will you now state what that prescription was?" Objections were interposed and the evidence excluded, and its exclusion is now assigned as error. We have not been shown, nor are we able to discover, the materiality of the

proffered evidence. Assuming that the prescription in some way indicated that the patient was under treatment for some disease which affected his mind, it would merely reflect the opinion entertained by the prescribing physician, at the time the prescription was given, that the patient was suffering from such disease. If, instead of such prescription directed to a pharmacist, the physician had written a letter, in which he expressed the opinion that the patient was insane, will it be claimed that such letter would be admissible in evidence on the question of the patient's sanity? The prescription certainly stands on no better footing. Besides, the prescription was in writing, and there was no attempt to lay the foundation for the introduction of secondary evidence as to its contents. Other reasons might be given for the exclusion of this evidence, but the foregoing appears sufficient.

It is urged that the only reasonable inference from the evidence is that Joseph P. Ames was mentally incompetent to execute the conveyance. We do not think so. The evidence shows that, at the date of the conveyance, he was about 65 years old and in failing health. That his mental faculties had been somewhat weakened may be conceded, but the evidence falls far short of showing that they were impaired to the extent that he did not understand in a reasonable manner the nature and effect of the conveyance, or that he did not execute it understandingly and with full knowledge of its purpose and effect.

Considerable stress is laid on the opinion of an expert witness to the effect that, on the facts assumed in the hypothetical question, the patient was insane. But an analysis of his testimony shows that one of the facts assumed by him, and upon which he based his opinion, was that the patient was mentally incompetent to transact his ordinary business. It is obvious that this renders the opinion valueless, because it is an assumption of the very point in dispute. The opinion of the expert reduced to its simplest form amounts to this, that if the patient was

insane he was insane—a deduction which the ordinary mind would readily make without the aid of an expert.

We are satisfied from a careful study of the evidence that, even were the case here on appeal and for trial *de novo,* we should be compelled to reach the same conclusion as that reached by the trial court. We discover no reversible error in the record, and therefore recommend that the decree 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.

STANDARD DISTILLING & DISTRIBUTING COMPANY ET AL. V. HENRY HARRIS.

FILED JANUARY 3, 1906. No. 14,054.

1. **Instructions.** An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established.
2. ———. Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party.
3. **Master and Servant:** UNSAFE APPLIANCES. The mere fact that a chain, upon which the plaintiff and other workmen were pulling, broke while being used for the purpose for which it was furnished, and had broken and been repaired on former occasions while being thus used, is not of itself sufficient to show conclusively that it was not reasonably adapted to, and safe for, the purpose for which it was furnished.
4. ———: USE OF APPLIANCES. Ordinarily, it is the duty of an employer to see that the tools and appliances which he furnishes his employees are reasonably fit and safe for the use for which they are furnished, but this does not relieve the employee from

the exercise of his own judgment in the use thereof, and if he puts them to a use for which they are not designed or furnished, or subjects them to a strain beyond their capacity to bear, and is injured in consequence, the employer, in the absence of special circumstances, is not liable.

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

I. R. Andrews, George B. Lake, H. C. Brome and *John C. Cowin,* for plaintiffs in error.

N. C. Pratt and *Wright & Stout, contra.*

ALBERT, C.

This is a proceeding in error, brought to reverse a judgment rendered in favor of the plaintiff in the district court for damages resulting from personal injuries alleged to have been sustained by him, while in the employ of the defendants, by reason of a defective chain which the defendants negligently furnished or supplied to be used by the plaintiff and other employees in the course of their employment. The charge of negligence is denied by the answers.

The defendant corporation owns and operates a distillery plant in Omaha; the other defendant, at the time of the injury complained of, was the general manager and in control of its business, and the plaintiff was in its employ. At that time the plant proper was not in operation. All of the employees were temporarily discharged, excepting the plaintiff and another man, who were retained about the plant during the temporary suspension. At the same time, certain wells were being put down for the defendant corporation for use in connection with its plant. This work had been let by contract to another corporation, and was being prosecuted under the supervision of a foreman employed by the latter company. The wells were being sunk by the process commonly known as sand pumping, which is done by means of pipe and a sand bucket.

According to the plaintiff's testimony, which is flatly contradicted by that of the defendant Iler, after the plant had been shut down, the defendant Iler, acting for the defendant corporation, said to the plaintiff: "I do not want you nor the night man to lay off. I want you to look after the plant generally during the shut down. They are putting in new pipe down at the river (referring to the wells) and I want you to go down and keep track of that and help those men out." Some days afterwards the plaintiff was passing where the men were at work on the wells. The sand bucket had stuck in the piping, and the men employed on the wells were attempting to get it out by means of a rope and pulleys. They were unable to raise the bucket, and called to the plaintiff to come and give them a "lift." It does not appear that the request came from the foreman in charge of the work, but from the men themselves. He at once responded, took hold of the rope, and begun to pull with the rest of the men. One of the chains, to which the tackle was attached, gave way, and, in consequence, plaintiff was thrown to the ground and thereby received serious injuries. The only evidence in the record supporting the charge that the chain was defective is that it broke at the time of the accident, and that it and other chains used for the same purpose at the work on the wells had broken and been repaired on several former occasions.

One of the instructions given by the court is as follows: "You are further instructed that if you find from a preponderance of the evidence in this case that Peter E. Iler, one of the defendants, directed the plaintiff to assist in handling certain water pipes and sand bucket at the plant of the above named defendant, and ordered said plaintiff to do whatever was necessary to assist them in handling said water pipe and sand bucket, and that it was necessary to so assist the said employees, and that plaintiff, in compliance with the directions of said Peter E. Iler, defendant, proceeded to and did assist in handling said water pipe and sand bucket, and that, in pursuance of and in com-

pliance with such directions, he received the injuries complained of in the petition, then your verdict will be for the plaintiff." The instruction is complete in itself. It sets out a state of facts, and authorizes a verdict for the plaintiff upon a finding of those facts. An instruction thus framed is clearly erroneous, unless it includes every fact, not conclusively established, necessary to sustain a verdict for the plaintiff. *Globe Oil Co. v. Powell,* 56 Neb. 463; *Cortelyou v. McCarthy,* 37 Neb. 742, s. c. 53 Neb. 479. Negligence is the gist of plaintiff's action, and one of the principal issues presented by the pleadings, but the instruction in question wholly ignores that issue. Neither can it be fairly claimed that negligence on the part of the defendants is conclusively established by the evidence. As before stated, the only evidence tending to show negligence is that the chain broke, and, in consequence, the plaintiff was thrown to the ground and injured, and that the chain had been broken and repaired on several former occasions. Assuming that, at the time of the accident, the plaintiff was acting within the scope of his contract of service with the defendants, or under their directions, the evidence falls far short of showing conclusively that the defendants were negligent, or lacking in due care for the safety of their employees. The mere fact that the chain broke, and had broken on former occasions, does not conclusively prove that it was not reasonably fit or safe for the purpose for which it was furnished to the workmen, but merely that it was too weak to stand the strain which they put upon it. It is obvious that, however fit and safe it might have been for the work, it might have been subjected to a strain that would break it. While it is the duty, ordinarily, of an employer to see that the tools and appliances which he furnishes his employes are reasonably safe, the employees are not relieved from the exercise of their own judgment in the use of such tools and appliances; and when they put such tools and appliances to a use for which they are not intended, or subject them to a strain beyond their capacity to bear, and are injured

in consequence, ordinarily, no liability attaches to the employer. A different question would arise, had the plaintiff responded to a command from some one having authority to command his services, to perform a service that had to be performed at once, if at all, and without opportunity for deliberation. See *Chicago, R. I. & P. R. Co. v. McCarty,* 49 Neb. 475. But that is not this case. The plaintiff responded to a proper call for assistance but there was no emergency calling for blind and unreasoning obedience, even were it his duty to obey, but the service admitted of all the time reasonably necessary for deliberation and inspection. Under such circumstances it was for the plaintiff and his fellow workmen to determine whether the chain would stand the additional strain put upon it by the plaintiff's assistance. Assuming, but not deciding, that the evidence would have warranted a finding of negligence, it will not be claimed that it is of such a character that negligence is the only reasonable inference therefrom. On the contrary, the most favorable view the plaintiff can claim for it is that it would have warranted a finding either way. That being true, the instruction, the practical effect of which is to direct a finding against the defendants on the question of negligence, is clearly erroneous, and, as it is complete in itself and undertakes to state all the facts essential to a recovery by the plaintiff, the error is not cured by any other portion of the charge. *Knapp v. Chicago, K. & N. R. Co.,* 57 Neb. 195; *Missouri P. R. Co. v. Fox,* 56 Neb. 746; *Sweenie v. State,* 59 Neb. 269; *Burlingim v. Baders,* 45 Neb. 673.

The plaintiff insists that the defendants cannot be heard to complain of the omission of the question of negligence from said instruction, because they asked the court to give certain instructions from which that element was also lacking. In support of this claim our attention is directed to two instructions tendered by the defendants. The first merely instructs the jury that the plaintiff cannot recover, unless he has established certain facts by a preponderance of the evidence. That is a very different mat-

ter from instructing the jury that he would be entitled to recover, in case he had established such facts by a preponderance of the evidence, as the jury were instructed by that portion of the charge which we have just considered. The other instruction tendered merely instructs the jury to find for the defendants in case they found certain facts, or failed to find certain facts. Like the former, it does not undertake, as was undertaken by the instruction given by the court, to state all the facts essential to a recovery on the part of the plaintiff; and neither of the instructions tendered estops the defendants from alleging error in the instruction given by the court on its own motion.

It is insisted that the verdict is not sustained by sufficient evidence, but, as we think the case must be remanded for a new trial, it would be unprofitable to go into that question at greater length.

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.

FRANK B. SHELDON ET AL. V. GAGE COUNTY SOCIETY OF AGRICULTURE ET AL.

FILED JANUARY 3, 1906. No. 14,089.

1. **County Board: APPEAL: PLEADINGS.** On an appeal to the district court by a taxpayer from an order of the county board allowing aid to an agricultural society under section 12, article I, chapter 2, Compiled Statutes 1903, the appellee is not required to plead that the county board included the amount allowed by it in its

annual estimate, nor that there were funds in the treasury, or taxes levied, against which a warrant could be drawn.

2. ———: AID TO AGRICULTURAL SOCIETIES. As a condition precedent to allowing aid to such societies, said section requires that there shall be paid into its treasury, in voluntary subscriptions or fees imposed upon its members, not less than $50 each year, and that the amount thus paid shall be certified by the president to the county clerk. The president certified that the amount thus paid each year prior to 1899 exceeded $50 and the exact amount for each subsequent year, the amount each subsequent year being more than $50. *Held*, That the certificate was a substantial compliance with the statute.

ERROR to the district court for Gage county: ALBERT H. BABCOCK, JUDGE. *Affirmed.*

E. O. Kretsinger, for plaintiffs in error.

L. W. Colby, S. D. Killen, H. E. Sackett and *Griggs, Rinaker & Bibb, contra.*

ALBERT, C.

In January, 1903, the county board of Gage county allowed a claim to the Gage County Society of Agriculture, acting, as is claimed, under the provisions of section 12, article I, chapter 2, Compiled Statutes 1903 (Ann. St. 3019), which we shall notice presently. The plaintiffs in error appealed from the order to the district court. The appeal was dismissed and the taxpayers brought the case here for review. The judgment of the district court was reversed and the cause remanded (71 Neb. 411). A new trial was then had in the district court, which resulted in a verdict and judgment for the society. The taxpayers present the case a second time for review in this court.

The section above referred to, so far as is material at present, is as follows: "Whenever twenty or more persons residents of any county in this state shall organize themselves into a society for the improvement of agriculture within said county, and shall have adopted a constitution and by-laws agreeable to the rules and regulations fur-

nished by the state board of agriculture, and shall have appointed the usual and proper officers, and when the said society shall have raised and paid into the treasury, by voluntary subscription or by fees imposed upon its members, any sum of money, in each year not less than fifty ($50) dollars, and whenever the president of said society shall certify to the county clerk the amount thus paid, the county board may, when they deem it for the best interests of said county, order a warrant to be drawn on the general fund of said county in favor of the president of said society for a sum not to exceed three cents on each inhabitant of said county upon a basis of the last vote for member of congress in said county, allowing five inhabitants for each vote, and said county board shall, in case it order said warrant to be drawn, include said sum in its annual estimate, and it shall be the duty of the treasurer of the county to pay the sum out of the general fund."

The contention now is that the judgment of the district court should be reversed, because it does not appear on the face of the petition that the county board included the amount allowed the society in its annual estimate. We think this contention is without merit. The requirement that the board shall "include said sum in its annual estimate" is not for the purpose of creating a special fund for the payment of the amount allowed, because the same sentence provides for payment out of the general fund. The section contemplates that the order for a warrant shall precede the allowance of the amount in the annual estimate, because such amount is to be thus included, "in case it (the board) order said warrant to be drawn." It is clear, therefore, that a compliance with the requirement to include the amount allowed in the annual estimate is not a condition precedent to ordering a warrant to be drawn, but rather a resulting duty devolving upon the board, the performance or nonperformance of which would in nowise affect the validity of its order for a warrant. That being true, the society was not required to show affirmatively that the board had included the sum allowed in its annual esti-

mate. If it failed to perform its duty, the remedy is by another form of action.

It is also contended that the petition is fatally defective, because of "its entire failure to allege that at the time its (the society's) claim was audited by the county board, and the warrant ordered drawn, there were funds in the treasury, or taxes levied, upon which a warrant could be drawn." While this court has held that a writ of mandamus will not lie to compel a county board to act upon claims against the county when it appears that there are no funds in the treasury, and sufficient taxes have not been levied for the payment of such claims, it has never held that a party prosecuting a claim against a county payable out of the general fund, is required to plead and prove that there are sufficient funds in the treasury or taxes levied to authorize the board to allow the claim. Section 34, article I, chapter 18, Compiled Statutes 1903 (Ann. St. 4452), makes it unlawful for a county board to issue warrants in excess of 85 per cent. of the levy for the current year, or to incur any indebtedness against the county in excess of the tax levied for county expense during the current year. It is not to be presumed that the county board allowed the claim in violation of this section, but rather that it acted lawfully, and such presumption will be indulged until the contrary is shown as a matter of defense.

Another contention is that the petition, instead of showing that the president of the society certified the exact amount paid to the society by voluntary subscription, or by fees imposed on its members each year, to the county clerk, merely certified that for the years prior to 1899 the amount thus paid exceeded $200 a year, and that for 1899 it was $800, for 1900, $500, and for 1901, $300. This contention seems to lack substantial merit. The section, hereinbefore set out at length, makes the payment into the treasury of the society by voluntary subscriptions, or fees imposed on its members, of at least $50 each year one of the conditions precedent to the allowance of aid by the county board. It

also requires the president to "certify to the county clerk the amount thus paid." While the certificate of the president does not show the exact amount paid each year prior to 1899, it does show that it exceeded the minimum amount fixed by the section and amounts, we think, to a substantial compliance with the statute.

We discover no error in the record, and 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.

FRED K. HERMAN ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED JANUARY 3, 1906. No. 14,060.

1. **Taxation**: EXEMPTIONS. Public parks belonging to a city of the metropolitan class are not taxable property within the meaning of subdivision III, section 110, chapter 12*a*, Compiled Statutes 1903.
2. **Cities**: IMPROVEMENTS: PETITION. It is not competent for a city of the metropolitan class to petition itself for improvements in a street improvement district within such city.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed in part.*

C. C. Wright and *W. H. Herdman,* for appellants.

H. W. Pennock, contra.

JACKSON, C.

Fred K. Herman and others obtained a decree in the district court for Douglas county against the city of Omaha and its treasurer, holding special assessments in

street improvement districts Nos. 598, 653 and 677 invalid, because of the fact that certain of the proceedings relating to such assessments were had at special sessions of the city council, without proper notice of the business to be transacted at such special sessions. The city of Omaha and its treasurer appeal as to paving districts Nos. 653 and 677. The correctness of the decree as to district No. 598 is not complained of. Other questions were involved in the hearing before the trial court, all of which were determined favorably to the contention of the city.

It is now conceded that, owing to the rule in *National Life Ins. Co. v. Omaha,* 73 Neb. 44, and *Richardson v. City of Omaha,* 74 Neb. 297, the decree as to district No. 653 was wrong, and that the decree must be reversed as to that district. The appellees, however, seek to sustain the decree as to district No. 677, upon the ground that the petition of property owners, upon which action was taken by the city council, contained an insufficient number of signatures to give the council jurisdiction. The provision of the Omaha charter relative to petitions for improvements, such as are involved, is as follows: "The mayor and city council shall have power to order any of the improvements hereinbefore mentioned in any improvement district outside the said three thousand feet limit, and also repaving in any improvement district within said limit, and cause the same to be made upon any street or alley, but only upon petition of the record owners of a majority of the foot frontage of taxable property in said district." Comp. St. 1903, ch. 12*a*, sec. 110, subd. III (Ann. St. 7562). District No. 677 contains a total frontage on Cuming street, within the district, of 6,331.6 feet. This includes 885 feet of frontage in Bemis Park, the title to which is in the city. The total of frontage represented in the petition is 2,746.71 feet, so that, if the frontage along Bemis Park is properly excluded in determining the sufficiency of the petition, the petition was sufficient. On the other hand, if it should have been included, the petition is insufficient, and the decree should still be for the appellees.

A determination of this question involves an inquiry as to whether Bemis Park is taxable property within the meaning of the statute. The tax involved being a special assessment, the provisions of section 2, article IX of the constitution, which applies to taxes for general purposes only, do not determine the question. It is rather one to be determined by provisions of the city charter and general principles of law. Cities, counties and other political subdivisions are mere instrumentalities of the state through which it exercises its governmental functions, and it would be perfectly competent for a sovereign state to impose the burden of taxation not only upon the public property of such municipalities, but upon the property of the state as well, if it were deemed expedient to do so. Concerning this right, the court of errors in *Trustees of Public Schools v. City of Trenton,* 30 N. J. Eq. 667, 681, said:

"The immunity of the property of the state, and of its political subdivision, from taxation does not result from a want of power in the legislature to subject such property to taxation. The state may, if it sees fit, subject its property, and the property owned by its municipal divisions, to taxation, in common with other property within its territory. But inasmuch as taxation of public property would necessarily involve other taxation for the payment of the taxes so laid, and thus the public would be taxing itself in order to raise money to pay over to itself, the inference of law is that the general language of statutes prescribing the property which shall be taxable is not applicable to the property of the state or its municipalities. Such property is, therefore, by implication, excluded from the operation of laws imposing taxation, unless there is a clear expression of intent to include it."

This doctrine, of course, applies to general taxation, but has been applied to special assessments as well.

Numerous authorities are cited by appellees in support of their contention that public property belonging to the city of Omaha is taxable within the meaning of the charter provisions for the purpose of special assessments imposed

by the city itself, and these authorities are worthy of more than passing notice. *County of McLean v. City of Bloomington,* 106 Ill. 209, a leading case on the subject, cited and followed by courts of other jurisdictions, involved the levying of a special assessment by the city of Bloomington on property belonging to the county of McLean within the city, for a public improvement, and it was held that, "while the state may not authorize corporate authorities to levy special assessments upon the property of the United States, as it would be an invasion of the rights of a distinct sovereignty, no such reason exists as between the several agencies of the state government, which are subject to its control and direction. It may authorize a burthen to be imposed on one of its agencies to the extent it is benefited by another agency, for the benefit of the entire public."

In *New Orleans v. Warner,* 175 U. S. 120, 20 Sup. Ct. Rep. 44, there was involved the right of the legisture to impose a special assessment upon the city of New Orleans, to pay its proportion of the expense for the drainage of property within a drainage district, of which the city was a part, and within the rule already noticed it was held competent for the state to impose this burden. In *Edwards & Walsh Construction Co. v. Jasper County,* 117 Ia. 365, it was held to be competent for the city of Newton to impose a special assessment upon the property of the county used for county purposes, to pay a proportionate share of the cost of paving the streets of the city, including those on the four sides of the courthouse square. The conclusion reached from an examination of these authorities, as well as others cited, is that it is competent for one political subdivision of a state to impose upon another subdivision the burden of special assessments for public improvements, where the property of the subdivision so burdened is especially benefited thereby, and this upon the theory that the general public is benefited by such improvements. No case, however, has come under our observation where it is held that the city, or other municipality, should be

required to assess its own property to pay the cost of public improvements within its corporate limits.

The legislature, under the provision of section 6, article IX of the constitution, is given authority to vest cities and villages with power to make local improvements by special assessments, or by special taxation, of property benefited. Within the authority so granted, section 161, chapter 12*a*, Compiled Statutes 1903 (Ann. St. 7629), provides: "All special taxes to cover the cost of any public improvements herein authorized shall be levied and assessed on all lots, parts of lots, lands and real estate bounding, abutting or adjacent to such improvement, or within the district created for the purpose of making such improvement, to the extent of the benefits to such lots, parts of lots, lands and real estate by reason of such improvements." This provision of the charter, unaided by other charter provisions, gives color to the claim of appellees that within the terms, "all lots, parts of lots, lands and real estate bounding, abutting or adjacent to such improvement" is included the public property belonging to the city; but the charter must be construed as a whole, and whether these terms are to be construed as including public property belonging to the city must be determined in the light of other charter provisions. It is provided by section 125 (Ann. St. 7593) that, "whenever the mayor and council deem it expedient, they shall have power for the purpose of paying the cost of paving, repaving, macadamizing the intersection of streets and spaces apposite alleys in the city, to issue bonds of the city," and by section 152 (Ann. St. 7620) it is provided: "If there shall be any real estate not subject to assessment of special taxes for paving purposes, the mayor and council shall have power to pave in front of the same, and to pay the cost thereof that would otherwise be chargeable on such real estate, in the same manner as herein provided for the paving of intersection of streets and paying therefor." Section 101*b* (Ann. St. 7552) provides for a board of park commissioners who shall have charge of all the parks and public grounds belonging to the city, and also provides the

method of creating a fund for the purchase of park grounds and contains this provision: "When improvements are made upon or in streets, or sidewalks adjacent to, and abutting upon, parks, parkways or boulevards and similar grounds in the charge and control of said board of park commissioners, the cost or expense of which would otherwise be chargeable to the city, the same shall be paid from the park fund tax herein provided; and said commissioners are hereby directed to pay the cost of such improvements."

There are two methods provided for the creation of the fund out of which the payment is to be made: First, by special assessment of such real estate as may be specifically benefited; and second, by issuing bonds of the city. It seems plain from these charter provisions that the legislature has provided a specific method of creating a fund to pay the cost of improving the street along the public parks belonging to the city, and that the method so provided is exclusive of all others. It has interposed a barrier to the right of the city to tax its own property for the purpose of creating a fund with which to pay the cost of public improvements undertaken by the city. This rule is in entire harmony with all the authorities to which our attention has been called. In the case of *Edwards & Walsh Construction Co. v. Jasper County, supra,* it was expressly pointed out that the county was not raising the money assessed against its property to pay over to itself. The same consideration which causes the state to refrain from assessing its own property is as potent when applied to any of its political subdivisions; besides there is considerable force in the contention of appellants that public policy should deny the city the right to petition itself to carry on the work of public improvement; that the right to petition should be confined to the individual taxpayer who bears the greater part of the burden imposed by the special assessment. In *Armstrong v. Ogden City,* 12 Utah, 476, it is said:

"So far as proceeding with the improvement or assisting

in acquiring jurisdiction are concerned, we have been unable to find any case where public property situated within the confines of a local improvement district has been permitted to affect the result, either one way or the other, and we think that the establishment of such a rule would not only be wrong in principle and wrong in theory, but it would also be contrary to the spirit and intention of the statutes providing for special improvement assessments."

We hold that Bemis Park is not taxable property within the meaning of the statute quoted, and it was properly excluded by the city authorities in determining the sufficiency of the petition, and that the petition was sufficient to justify the action of the council.

We recommend that the decree of the district court be reversed as to districts No. 653 and No. 677, and that as to those districts the petition be dismissed, and that the decree be affirmed as to district No. 598.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is affirmed as to street improvement district No. 598, and is reversed and the case dismissed as to street improvement districts No. 653 and No. 677.

JUDGMENT ACCORDINGLY.

HUBERT BASCOMBE, APPELLEE, V. ALICE BASCOMBE, APPELLANT.

FILED JANUARY 3, 1906. No. 14,070.

Divorce: EVIDENCE. The evidence examined and *held* to sustain the decree of the district court granting a divorce on the ground of desertion.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Cooper & Dunn, for appellant.

E. F. Morearty and *Edward A. Smith, contra.*

JACKSON, C.

The defendant has appealed from a decree of divorce rendered in the district court in favor of the plaintiff, and insists that the decree is not sustained by the evidence. The petition alleges desertion as a cause of action, and the decree is based upon that allegation. The parties were married in 1879, and it appears that each had children by a former marriage. The plaintiff is advanced in age, and for a number of years prior to the separation was incapacitated by blindness and disease from performing manual labor, and had no means of supporting his family other than a pension of $12 a month. Their married life was an unhappy one; the children of the wife seem to have been a source of irritation. There is a sharp conflict in the evidence, but the testimony of the plaintiff is direct and has sufficient support in other evidence to sustain the decree. The circumstances testified to by the defendant, including her statement that she does not desire to live with the plaintiff, because of the fact that they have had so much trouble, tends to strengthen the allegation of desertion.

There seems to be no reason to disturb the finding of the trial court, and we recommend that the decree be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND; W. K. POTTER, RECEIVER, APPELLANT.

FILED JANUARY 3, 1906. No. 14,373.

Judicial Sale: APPRAISEMENT: LIENS: ESTOPPEL. The deduction of an apparent prior lien in the appraisement of real estate for the purpose of a judicial sale is not conclusive as to the validity of such lien or the priority thereof, but where such appraisement, as returned by the sheriff, shows a lien apparently prior to the lien under which the premises are to be sold and that such lien was, in fact, treated as prior and valid by the appraisers in determining the interest of the defendant in the premises, and where the status of such apparent lien has not been judicially determined, one who purchases at the sale, without questioning the validity or priority of such apparent lien, is thereafter estopped from so doing.

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

H. W. Pennock, for appellant.

John P. Breen and *W. H. Herdman, contra.*

JACKSON, C.

The state, as plaintiff, proceeding under the provisions of the law commonly known as the "Scavenger Act," instituted an action to enforce the collection of delinquent taxes and special assessments alleged to have been levied and assessed against property situated in the city of Omaha. William K. Potter, as receiver of the Omaha Loan & Trust Company, answered the petition, setting out title in the Omaha Loan & Trust Company, and alleging certain facts showing irregularities in the special assessments involved, by reason of which it is claimed that such special assessments are void. The state replied, alleging that the title of the Omaha Loan & Trust Company was acquired and held through a chain of conveyances beginning with a sheriff's deed, issued pursuant to a judicial sale had in a

foreclosure proceeding, wherein, for the purpose of the sale, the sheriff conducting the same, in the appraisal of the real estate, secured from the county and city treasurer certificates of taxes and special assessments upon the real estate, showing the taxes and special assessments involved in this controversy to be a prior incumbrance, and that the amount so certified was deducted by the appraisers from the gross value of the real estate as found by them, and that the purchaser, by reason thereof, acquired title subject to such taxes and special assessments, and that such purchaser and his grantees, including the defendant, are estopped from now denying the validity of such taxes and assessments. The trial court found the issues in favor of the state and entered a decree establishing the validity of the taxes and assessments. The defendant appeals, and, while tacitly conceding the correctness of the rule that a purchaser at a judicial sale, under an appraisal where liens were actually deducted from the gross value, may not afterwards question the liens so deducted, claims that the taxes in controversy were not deducted in the appraisal.

The decree entered in the foreclosure proceeding, through which the defendant's title was acquired, established the validity of a prior mortgage of $1,200, not foreclosed in that action, and directed that the real estate should be sold subject to that mortgage. The appraisal of the real estate, as originally returned by the sheriff, omitting the formal parts, fixed the value of the premises at $1,100 and found the prior incumbrances to be: "Taxes as per city and county treasurers' certificates—city, $152.68; county, $15.51; total, $168.19." The total amount was deducted from the sum of $1,100, and the interest of the defendants in the premises was found to be $931.81. Upon the return of the appraisal, counsel for the plaintiff in that proceeding moved that the appraisal be corrected by deducting the amount of the prior mortgage, as established by the decree under which the sale was to be made. Upon this motion the court made the following order: "This cause came on to be heard upon the motion of the plaintiff

for an order instructing the sheriff to correct and amend the appraisal heretofore made in this cause and to amend a copy thereof filed therein, and was submitted to the court, on consideration whereof, the court sustains said motion. It is therefore ordered that the sheriff be, and he is, hereby instructed to amend the appraisal and copy thereof of said real estate, by deducting from the gross appraised value the amount of the prior mortgage, as provided in the decree in which the sale is to be made." And thereupon the sheriff amended both the original appraisement and the copy, by adding under the head of prior incumbrances, mortgage as per decree, $1,200, and changing the total of the prior incumbrance from $168.19 to $1,368.19, and changing also the finding of the value of the interest of the defendants in the premises, which in the original return read, "the interest of defendants we value at $931.81," so that the corrected return reads, "the interest of the defendants we value at nothing," at the same time making a memorandum, both on the appraisement and the copy, as follows: "Correction made by order of court." The premises were sold to a grantor of the appellant and the sale confirmed.

As we understand the claim of the appellant it is that, the court having ordered the appraisement to be corrected by deducting $1,200, the amount of the prior mortgage, from the appraised value, which was fixed at $1,100, first, after such deduction was made nothing remained from which the taxes could be deducted; and second, that the order correcting the appraisal amounted to a direction that nothing but the $1,200 prior mortgage should be deducted, and that therefore, in the corrected appraisement, the taxes were not deducted, and no estoppel arises. We cannot agree with this contention. The statute requiring the appraisement of real estate about to be sold upon execution provides: "That for the purpose of the appraisement mentioned, * * * the officer and the freeholders therein named shall deduct from the real value of the lands and tenements levied on the amount of all liens and incum-

brances for taxes or otherwise, prior to the lien of the judgment under which execution is levied." Code, sec. 491*b*. To enable the appraisers to do so it is provided: "It shall be the duty of the county clerk, the clerk of the district court, and the county treasurer of the county and the treasurer of the village, town or city, wherein such levy is made, for the purpose of ascertaining the amount of the liens and incumbrances upon the lands and tenements so levied upon, on application of the sheriff in writing, holding such execution, to certify to said sheriff, under their respective hands and official seals, the amount and character of all liens existing against the lands and tenements levied on, which are prior to the lien of such levy, as the said liens appear of record in their respective offices." Code, sec. 491*c*. It is evident that the course contemplated by the statute to be followed by the appraisers is to add together all the prior liens as shown by the certificates, and deduct the sum of such liens from the total value of the premises by them appraised, for the purpose of ascertaining the interest of the defendants. The appraisement returned by the sheriff, as amended by him under the direction of the court, conforms to the provisions of the statute, and leaves no doubt about the deduction of the lien in dispute as a prior incumbrance. One purpose of the appraisement is to advise the purchaser at the judicial sale of the amount of the prior incumbrance, so that he may not unwittingly bid for it more than it is worth. *Omaha Loan & Trust Co. v. City of Omaha*, 71 Neb. 781. The procedure contemplated by the statute accomplished that purpose. We do not think that the order of the court is susceptible to the narrow construction placed upon it by counsel for appellant. The appraisement, as originally returned by the sheriff, omitted the item of prior incumbrance fixed by the decree of foreclosure, but contained those items not involved by the decree or in the foreclosure proceedings, until that stage of the proceeding was reached which required the appraisement to be made. The sheriff doubtless proceeded upon the erroneous theory that it was unnecessary to consider

the item of prior incumbrance fixed by the decree, and the attention of the court having been called to that fact, it was adjudged that the sheriff correct the error and deduct the omitted item. The language of the order correcting the error in the appraisement is not susceptible of a construction prohibiting the deduction of the items already appearing in the return.

The rights of purchasers at judicial sales with reference to apparent prior liens have been repeatedly litigated in this jurisdiction. The cases are compiled in the concurring opinion of HOLCOMB, C. J., in *Hart v. Beardsley,* 67 Neb. 145, and *Omaha Loan & Trust Co. v. City of Omaha, supra,* and in the determination of this case have again been considered in consultation, and the following rule deduced as being in perfect harmony with our former holding. The deduction of an apparent prior lien in the appraisement of real estate for the purpose of a judicial sale is not conclusive as to the validity of such lien or the priority thereof, but where such appraisement, as returned by the sheriff, shows a lien apparently prior to the lien under which the premises are to be sold, and that such lien was in fact treated as prior and valid by the appraisers in determining the interest of the defendant in the premises, and where the status of such apparent lien has not been judicially determined, one who purchases at the sale, without questioning the validity or priority of such apparent lien, is thereafter estopped from so doing.

The record does not disclose that the validity of the lien in suit was ever questioned prior to the institution of this action, and we conclude that within the rule announced the appellant is now estopped from questioning its validity, and we recommend that the decree of the court be affirmed.

DUFFIE and ALBERT, CC., concur.

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

AFFIRMED.

GEORGE O. W. FARNHAM, APPELLEE, V. CITY OF LINCOLN ET AL., APPELLANTS.

FILED JANUARY 18, 1906. No. 11,049.

1. Cities: COMPROMISE OF SUITS. The power conferred by statute upon cities of the first class to sue and be sued carries with it the power to compromise and settle such suits; and the city council may, when it acts in good faith, accept a less sum in settlement of a litigated case than is claimed to be due the city therein.
2. ———: ———. The provisions of section 4, article IX of the constitution, do not apply to special assessments to pay for local improvements levied upon the property benefited thereby; and municipal authorities have power to settle and compromise suits involving the validity of such special assessments, notwithstanding that section.

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

J. R. Webster, John P. Maule, E. C. Strode and *Clark & Allen,* for appellants.

Burr & Burr, contra.

BARNES, J.

This action was commenced in the district court for Lancaster county by George O. W. Farnham, as a taxpayer of the city of Lincoln, to enjoin the mayor and city council from settling a pending suit between the Lincoln Street Railway Company and the city, which involved the validity of certain paving assessments levied against the property of the street railway company. The district court found for the plaintiff and awarded him a permanent injunction, and the defendants brought the case here by appeal.

An examination of the petition discloses that it contains no averment of facts constituting fraud, collusion, or unfair dealing on the part of any of the defendants, but after stating the situation of the parties, the levy of the

paving assessments, the pendency of the action to establish the lien alleged to have been obtained thereby and to foreclose the same, the decree of the district court therein, amounting to upwards of $111,000, and the appeal by the defendants to this court, it concludes with an averment substantially as follows: "The defendants are about to settle and compromise the said paving taxes and the decree thereon for the sum of $65,000; and the said council has passed a resolution authorizing such settlement, and the defendant, the mayor of the city, is about to, and will, officially sign and approve of the resolution, unless prevented from so doing by the order of the court; and the said defendants will dismiss the action out of the supreme court, and will commute and release and discharge the said paving taxes and tax lien, and have stipulated to settle and dismiss the action and decree, and give away, donate and discount to the said street railway company the sum of $54,767, without payment thereof, notwithstanding the premises and the fundamental law of the state, which forbids any sum of money for taxes due to any municipal corporation being commuted in any form whatever; and the said city council and said defendants have usurped the functions of the courts of this state in the premises, and the said scheme, if carried out, would be, and is, a fraud, wrong and irreparable injury to the plaintiff and all taxpayers of the city of Lincoln." So it may be said that the plaintiff relied, for the relief prayed for in his petition, solely on the alleged lack of power on the part of the mayor and city council to compromise the suit, and accept a less sum than was claimed by the city, and found due by the district court, on account of the paving assessments in question.

Section 9, article I, chapter 13, Compiled Statutes 1903 (Ann. St. 7708) provides, among other things, that the city may sue and be sued, and the counsel shall have power to make contracts, and to do the acts relative to the property and concerns of the city, necessary and incident to the exercise of its corporate powers. This would seem to au-

thorize the defendants to make the settlement complained of. But we are not without authority on this question. In *Fuller v. Martin*, 27 Neb. 441, which was an action to compel the mayor of the city of Friend to carry out a contract of settlement made by the city council with a waterworks company, by signing a warrant to pay the consideration named in such settlement, it was said:

"The power to compromise and settle claims of the nature and character of that involved in the case at bar, *held* to exist in the mayor and city council of cities in their legislative capacity growing out of their general corporate powers, and the necessities of such cases."

In the body of the opinion we find the following:

"While I am not aware that express authority is given to cities, or to the mayor and council, as legislators, to settle claims of this nature by compromise, yet the power of settlement and adjustment must be held to exist, and to grow out of their general corporate powers and the absolute necessities of the case."

The power to compromise grows out of, and is incident to, the power to sue and be sued. The power to sue and be sued is conferred on the city in express terms by its charter. This power would indeed be a snare, or its utility much impaired, if, having entered upon litigation, the city could not make an accord as to controverted matters, but must pursue the controversy to its ultimate result in the court.

In the case at bar, there was a controversy as to the validity of the assessments, and we may take judicial notice of the fact that the matter is still in litigation in an action now pending in this court. The case being pending and undetermined, the agreement to dismiss the appeal and terminate the litigation was a sufficient consideration for the settlement in question. 2 Freeman, Judgments (4th ed.), sec. 463, says: "If the debtor has the right to appeal, so that the judgment is not a finality, and its correctness is not conceded, an agreement between him and his creditor that the latter will accept a sum less than the

amount of the judgment if the former will not prosecute an appeal is valid and enforceable." It would seem clear from the foregoing that the power to sue and be sued carries with it the power on the part of the mayor and city council to compromise a suit, if such compromise is made in good faith; and, unless restrained by some statute or express constitutional provision, the city of Lincoln possessed the power to make the compromise in question.

The plaintiff contends, however, that by force of section 4, article IX of the constitution, such power is denied the city in cases like the one at bar. That section reads as follows: "The legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever." The city insists that the provisions of this section do not apply to cases like the one at bar, and cites *Collins v. Welch,* 58 Ia. 720. There, the supervisors, acting in good faith, compromised and adjusted a claim of the county for taxes which had already become enforceable by execution. The court said:

"There is no pretense that the claim for taxes was not properly put in judgment, and no question is raised in regard to the validity of the judgment. It has now become a claim to be enforced by execution, and in our opinion stands on the footing of any other judgment. The question, then, arises as to whether the board of supervisors has power to compromise a judgment. In our opinion it has. It is provided by section 303 of the code, subdivision 11, that county supervisors are 'to represent their respective counties, and to have the care and management of the property, and business of the county, in all cases where no other provision shall be made.'"

Counsel for the plaintiff vigorously assail the opinion quoted from, and contend that the rendition of the decree of foreclosure did not change the nature of the claim in

controversy. The city, while not conceding this point (a point which we do not decide), contends that the constitutional provision above quoted does not apply to special assessments. To determine this question section 4 should be read and construed with sections 3 and 6 of article IX of the constitution, in which it is found. Section 3 reads as follows: "The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof." It will be observed that the section just quoted provides for the right of redemption from sales for the non-payment of taxes *or local assessments* of any character whatever. It seems reasonable that, if it was intended to include such assessments in section 4, the same language would have been used. The omission of the term *assessments* in that section is significant. Again, section 6 provides: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment, or by special taxation of property, benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." This section seems to make a clear distinction between special assessments and taxes levied and collected for general revenue purposes.

Again, the authorities lay down a clear line of distinction between taxes, in the ordinary sense of the word, and special assessments. Judge Cooley, in his work on Taxation (1st ed.), ch. 20, p. 416, says:

"Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing

to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it."

The courts of other states, having constitutional provisions similar to our own, have recognized this distinction. In *Hill v. Higdon,* 5 Ohio St. 243, the court said:

"It is our duty to give such a construction to the constitution as will make it consistent with itself, and will harmonize and give effect to all its provisions. To do this, we have only to suppose, that the convention used language with reference to its popular and received signification; and applied it as it had been practically applied for a long series of years. That where taxation is spoken of in the second section of the twelfth article reference is made to the general burdens imposed for the purpose of supporting the government, and the revenue raised expended for the equal benefit of the public at large; while the power of *assessment,* referred to in the sixth section of the thirteenth article, although resting upon the taxing power, was intended to describe a distinct and well known mode of laying a local burden upon particular property, with reference to the *peculiar* and *special* benefit derived to such property from the expenditure of the money."

Distinguishing the words "taxes" and "assessments," the South Dakota supreme court in *Winona & St. P. R. Co. v. City of Watertown,* 1 S. Dak. 46, 44 N. W. 1,072, said: "Notwithstanding the fact that both are derived from the same power, yet the terms 'tax' and 'taxation' and the terms 'special assessments' have a well understood meaning by courts and the public generally. Taxes and taxation are understood to mean the taxes imposed by the govern-

ment * * * to provide funds for general expenses of the particular community or district for which the taxes are levied. Special assessments are understood to refer to money raised or levied for some local municipal purpose to which the funds so collected are to be specifically applied. * * * Assessments are presumed to be made on account of special benefits to the property assessed."

Lastly, this court, in *City of Beatrice v. Brethren Church*, 41 Neb. 358, has followed the weight of authority on this question. It was there said:

"The consensus of these authorities is that an assessment to reimburse a municipal corporation for such benefit as it has conferred upon an adjacent lot by reason of pavements or sidewalks laid alongside it is not an exercise of power to tax in the generally accepted meaning of that term."

It is apparent on the face of the constitution that the framers of that instrument did not use the word taxes and the term special assessments as equivalents of each other, or that either included the other. Section 1, article IX, provides that taxes shall be levied by valuation and proportionate value, except special taxes on the kinds of business therein enumerated. Section 6 of the same article provides that the ordinary revenues of municipalities shall be uniform in respect to persons and property, and contains a special provision that the legislature may authorize corporate authorities of towns and villages to make local improvements by special assessments. Construing these provisions in the case last above cited, we said:

"The exemptions provided by section 2, article IX of the constitution, are solely with reference to taxes assessed by valuation for general purposes, and have no applicability to special assessments, or special taxation of property benefited by local improvements under authority of section 6 of the same article."

This distinction was again recognized in *Scott v. Society of Russian Israelites*, 59 Neb. 571. So we are of opinion that the section of the constitution first above quoted does

not apply to the special assessments in question in this case, and that the city council had the power to make the settlement complained of.

Therefore the judgment of the district court is reversed and the action is dismissed.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting.

JAMES J. REED V. STATE OF NEBRASKA.

FILED JANUARY 18, 1906. No. 14,206.

1. **Criminal Law: INFORMATION: NAMES OF WITNESSES.** The main purpose of the requirement that the names of the witnesses be indorsed on the information in a criminal action is to convey to the accused the information or knowledge of the identity of the witnesses to be produced on behalf of the state; and, although a witness is designated on the information by the wrong christian name, if the accused is not misled thereby, and is aware of the identity of the witness, such mistake affords no ground for the exclusion of his evidence.
2. **Trial: HARMLESS ERROR.** Where an objection to a question propounded to a witness is sustained, and the testimony sought to be elicited by such question is brought out by the one succeeding it, such ruling, if erroneous, is error without prejudice.
3. **Insanity** cannot be proved by hearsay or reputation, and it is proper to exclude such evidence.
4. **Nonexpert Evidence.** The rule permitting nonexpert witnesses to testify as to the sanity or insanity of one whose legal accountability is the sole matter in issue does not allow such witnesses to testify that at a certain date such party knew the difference between the right and wrong of the act at that time committed by him. *Shults v. State*, 37 Neb. 481.
5. **Instructions.** It is not the true method of construing instructions to select detached portions thereof and consider them as independent of the whole of the charge to the jury. The correct rule of construction is that all that is said in the entire charge upon any one question shall be construed together, and if, when so construed, it is not inconsistent as a whole, and states the law correctly, no valid assignment of error can be predicated thereon.

6. **Self-Defense:** INSTRUCTION. Self-defense is extended to the defense of the person and of the domicile, and an instruction which correctly defines the elements of such defense is a sufficient charge on that subject.

7. **The** opinions of nonexpert witnesses on the question of the insanity of one charged with a criminal offense are entitled to little or no regard, unless supported by good reasons founded on facts which warrant them. From such opinions and the facts stated to support them, it is the province of the jury to draw their conclusions as to the sanity or insanity of the defendant.

8. **Homicide:** SELF-DEFENSE: INSTRUCTION. An instruction in this case, by which the jury were told that if they believed from the evidence that the deceased and the accused were engaged in a scuffle, and while so engaged the revolver was accidently discharged and thus inflicted the wounds which caused her death, they should find the defendant not guilty, *held* to be as favorable to the defendant, on that question, as the evidence warranted.

9. **Instructions.** Where the court on his own motion has correctly instructed the jury on all the issues presented by the record and evidence in a criminal case, it is not error to refuse to give the instructions requested by the defendant.

10. **New Trial:** JUROR: COMPETENCY. Where, by a supplemental motion for a new trial, the competency of a juror, on account of an alleged bodily infirmity, amounting to a disability, is put in issue, and is determined as a matter of fact upon competent evidence introduced before the trial court, the finding of the fact on that question will not be set aside by a court of review, unless it is unsupported by the evidence and is clearly wrong.

11. **Juror:** COMPETENCY: WAIVER. In a criminal action where, after trial and conviction, the competency of a juror is challenged for the first time, on the ground that he has been convicted of a felony and served a term in the state penitentiary, the fact that counsel for the accused failed to examine the juror and ascertain his incompetency in that respect, full opportunity therefor having been accorded him, will amount to a waiver of such objection.

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

Cunningham R. Scott and *E. H. Scott,* for plaintiff in error.

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

BARNES, J.

James J. Reed, on a trial in the district court for Douglas county, was convicted of the crime of murder in the first degree for the killing of one Glenna Hynes, and was sentenced to the penitentiary for life. From that judgment and sentence he prosecutes error to this court, and will hereafter be called the accused.

His first contention is that the trial court erred in admitting the evidence of Darwin P. Baldwin, a witness for the state, because the name of said witness was not indorsed on the information. It appears that the real name of the witness was Darwin P. Baldwin instead of Daniel P. Baldwin, the name by which he was designated on the information. It further appears that this witness had been a police officer in the city of Omaha for something like 14 years before the information herein was filed; that he was known among his brother police officers, and his associates and acquaintances, as "Dan. P. Baldwin," and this was the reason why his name was thus indorsed on the information. There was no mistake as to the identity of the witness, and the accused in speaking of him during the trial invariably called him "Dan Baldwin." It is apparent that the mistake in the name of the witness did not mislead the accused, or prevent him from knowing who the witness was that would testify against him. Section 579 of the criminal code provides that the prosecuting attorney shall indorse on the information the names of the witnesses known to him at the time of filing the same; and, at such time before the trial of any case as the court may by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him. The reason for the rule requiring the names of the witnesses to be indorsed on the information in a criminal action is to advise the accused of the identity of the witnesses who will be called to testify against him, and to enable him to intelligently prepare for his defense. It is apparent from the record that the accused was not misled

in any way by the indorsement of the name "Daniel P. Baldwin" on the information, in lieu of the name of "Darwin P. Baldwin." In the case of *Carrall v. State*, 53 Neb. 431, the name "Mrs. Fred Steinburg" was indorsed on the information. It appeared that the name of her husband was not "Fred Steinburg," but was in fact "Paul Fred Steenburg." It was objected that the true name of the witness was not indorsed on the information. The court said:

"The evidence disclosed that the husband was known as 'Fred Steenburg' and the wife, in her testimony, when being interrogated directly on this point, stated that her name was 'Mrs. Fred Steenburg,' from which it appears that the indorsement on the information was of her a sufficient identification, one which met the purpose of the statute, notwithstanding the law does not recognize a second or other than first christian name This appellation 'Fred' was that by which the husband was known and identified, and it indicated the wife when applied to her in the manner of its indorsement with the other name and term on the information."

So we conclude that, where the name indorsed on the information fairly identifies the witness, and the accused is not misled or taken by surprise on account of a mistake in the christian name, it is not error to receive the evidence of such witness.

Counsel for the accused also contends that the court erred in sustaining the objection to a question put to witness Oliver Cowing. It appears from the record that this witness was being examined by counsel as a nonexpert witness on the question of insanity. The question asked was as follows: "How was it about his conversation being connected or otherwise?" This question was objected to by the state on the ground that it was leading, and the objection was sustained. If this ruling was incorrect, the error was cured by the question and answer which followed. The witness was next asked: "Now, I will ask you to go on in your own way and state everything that you ever saw

about the man during the time you knew him before the homicide and up to the homicide that attracted your attention, and tell why it attracted your attention." This question was answered at length by the witness without objection. We quote a part of the answer as follows: "He generally talked with some of the employees of the shop that boarded there, and he always appeared to me like he was irritated and quick, and gave quick answers, and his brow would contract, and have a peculiar expression on his face, and would probably leave off the conversation abruptly and turn round and walk out of doors. I noticed that several times." It thus appears that counsel obtained the evidence he sought to elicit by the question objected to. Therefore the ruling in no way prejudiced the rights of the accused.

It is next urged that the court erred in sustaining the objection to the following question which was propounded to the witness Peter Goos: "Now, I will ask you to state what you know, if anything, about the subject of his derangement being the subject of common conversation among the people at the hotel." We think the objection was properly sustained. This witness was also called by the defendant as a nonexpert on the question of insanity. By the question asked counsel attempted to prove insanity by hearsay, or reputation. Insanity cannot be proved in this manner. "Hearsay or reputation of being insane is not admissible." 2 Bishop, New Criminal Procedure (4th ed.), sec. 687*a*; *Aschraft v. De Armond,* 44 Ia. 229; *Yanke v. State,* 51 Wis. 464.

The accused further contends that the court erred in sustaining the state's objection to the evidence of the witness W. H. Anderson. This assignment presents the question just discussed in relation to the testimony of Peter Goos, and therefore will receive no further consideration. It is claimed that the witness B. B. Smalley should have been permitted to answer the following question: "Now, then, I will repeat my question: Taking that into account, and his manner, and what you have seen of other insane per-

sons, what would be your opinion as to his condition as to his being able, of his own will, and his own mind, to determine right from wrong?" This question was before this court in *Shults v. State*, 37 Neb. 481, where the rule was stated as follows:

"The rule permitting a nonexpert witness to testify as to the sanity or insanity of a party whose legal accountability is the sole matter in issue does not allow such witness to testify that at a certain date such party knew the difference between the right and wrong of an act at that time committed by him."

So it would seem that the court correctly excluded the testimony sought to be elicited by the question quoted above.

The foregoing necessarily disposes of all of the other assignments of error relating to the admission and exclusion of evidence, and therefore they will be given no further attention.

This brings us to the assignments of error relating to the giving of instructions. The sixth paragraph of the instructions, given by the court on his own motion, reads as follows: "To constitute murder in the first degree there must have been an unlawful killing done, purposely and with deliberate and premeditated malice. If the person has actually formed the purpose maliciously to kill, and has deliberated and premeditated upon it before he performs the act, and then performs it, he is guilty of murder in the first degree, however short the time may have been between the purpose and its execution. It is not time that constitutes the distinctive difference between murder in the first degree and murder in the second degree. An unlawful killing with malice, deliberation and premeditation, constitutes the crime of murder in the first degree. It matters not how short the time, if the party has turned it over in his mind and weighed and deliberated upon it." This instruction is vigorously assailed by counsel for the accused, who claims that it contains an incorrect definition of murder in the first degree. At

first blush it would seem as though the point was well taken; but after a careful reading of the whole thereof, in connection with the other parts of the court's charge to the jury, we are constrained to hold the instruction good. Counsel, in order to establish his contention, segregates a part of the paragraph complained of, and, reading it without reference to the rest of the instruction, claims that it is erroneous. It is not the true method of construing instructions to select detached portions thereof and consider them as independent of the whole of the charge to the jury. The correct rule of construction, and the one universally followed by this court, is that all that is said in the entire charge upon any one question shall be construed together, and if, when so construed, it is not inconsistent as a whole, and states the law correctly, no valid assignment of error can be predicated thereon. *St. Louis v. State,* 8 Neb. 405; *Parrish v. State,* 14 Neb. 60; *Murphy v. State,* 15 Neb. 383; *Carleton v. State,* 43 Neb. 373. In the case last above cited, in one of the paragraphs of the instructions, the court said: "It is sufficient if there was such design and determination to kill distinctly formed in the mind at any moment before or at the time the blow is struck or the fatal shot is fired." It was contended that this was not a correct statement of the law. But we held that while the language quoted, if it stood alone, might be ambiguous and objectionable, yet, when construed with the rest of the charge, it was not erroneous. It was said: "We do not think the jury could have been misled or confused thereby." The precise point contended for by counsel for the accused is that the instruction eliminates the element of purpose. In other words, that it does not inform the jury that the killing must be purposely done. An examination of the paragraph discloses that the word "purposely" is contained in the first sentence thereof; and after stating, in the second sentence, that if a person "has actually formed a purpose maliciously to kill," the court proceeded to define deliberation and premeditation, and in giving such definition the part

of the charge excepted to appears. We take it that the jury could not have been misled by the language of this instruction, even when considered by itself. But an examination of the record discloses that the court had previously given an instruction correctly defining the crime of murder in the first degree, and specifically setting forth every element thereof. It further appears that, in the paragraph immediately following the one complained of, the court told the jury what was meant by the word "purposely." We quote from the instruction, as follows: "To do an act purposely is to do it designedly, intentionally, with a will. * * * A design or purpose must be formed to kill willfully, that is, with the intention that the act to be done shall have the effect of taking the life of a human being, and some space of time, it matters not how short, must intervene between the formation of the purpose or design to kill and its execution." So it would seem that the jury must have understood what facts constitute murder in the first degree.

The correctness of the seventh paragraph of the instructions is also challenged by counsel, for the reason that it does not inform the jury that a person attacked has a right to use such force as is necessary to prevent an attempted robbery, or great personal injury. This paragraph of the instructions does not undertake to cover the entire case, but only a portion thereof, and it appears that the question of self-defense was properly covered by a separate paragraph of the instructions. Again, it is contended that the instruction is erroneous because it ignores the right of the accused to form an intention to take the life of the deceased in defense of his property. Self-defense is extended to the defense of the person and of the domicile. Intentional homicide may not be justified completely beyond this scope. 1 Bishop, New Criminal Law, sec. 867. The foregoing discussion practically covers all of the objections to paragraph seven.

Counsel also challenges the correctness of paragraph 14 of the instructions, which defines the elements of self-de-

fense. It is sufficient to say, in answer to this contention, that the instruction complained of correctly states the law on that subject as laid down by the text-writers, and approved by many decisions of this court. To quote the instruction and comment further on it would render this opinion much too long.

Counsel complains of paragraph 16 of the instructions which defines the law relating to the defense of insanity. His contention is that the court erred in informing the jury that, in determining what weight should be given the opinions of the witnesses on that question, they should consider the nature and character of the acts, the circumstances surrounding the transactions and the conduct of the defendant, as described by the witnesses, and whether or not they indicated a sane or insane condition of the mind, or whether they gave no indication either way; that in determining that question the jury should consider all the acts and conduct of the defendant and the circumstances concerning the same, as detailed by the witnesses, together with all of the other evidence in the case, and, from such testimony, give to the opinions of the nonexpert witnesses such weight as they should think they were justly entitled to. It is said that this was error, because the court, in the first instance, was required to determine the admissibility of the nonexpert evidence, and the consequent right of the witnesses to express an opinion on the question of the insanity of the accused, as a matter of law; and that the jury had no right to consider the basis of such opinions. We conceive the true rule to be that the opinions of nonexpert witnesses on the question of insanity are entitled to little or no regard, unless supported by good reasons founded on facts which warrant them. From the facts stated in support of such opinions, the jury must draw their conclusions as to the sanity or insanity of the defendant.

Lastly, paragraph 17 of the instructions is complained of. By this instruction the jury were told that if they believed from the evidence that the deceased and the ac-

cused were engaged in a scuffle, and while so engaged the revolver was accidentally discharged and thus inflicted the wounds which caused her death, they should find the defendant not guilty. We believe that this instruction was as favorable to the defendant as the evidence warranted.

On the trial in the district court counsel for the accused requested the court to give certain instructions to the jury comprising paragraphs one to eleven, inclusive. The court declined to give them, for the apparent reason that he had covered all of the questions at issue by his own instructions. While it is true that the language contained in the instructions given by the court is not as fervid or emphatic as that contained in the instructions asked for, yet we are satisfied from an examination of the record that every legal proposition involved in the case was covered by the instructions of the court. Therefore, it was not error to refuse those requested by counsel for the accused.

This brings us to the questions presented by the supplemental motion for a new trial, to wit, the competency of the jurors Blake and Baker. It was alleged in the supplemental motion that the juror Blake was blind, and was therefore not qualified, under the statute, to act in that capacity. The statute reads as follows: "All free white males residing in any of the counties of this state * * * and not being subject to any bodily infirmity amounting to a disability, are competent jurors." (Code, sec. 657.) The question thus raised was one of fact, and was determined adversely to the accused on the hearing in the district court. An examination of the evidence discloses that while the juror's eye-sight was somewhat impaired, yet he was able to go about the city of Omaha unattended, without stumbling or falling, and without danger of injury to himself; that he was able to distinguish persons at a considerable distance, to recognize his acquaintances and friends; in fact, could see well enough across an ordinary sized room to see an uplifted hand and

determine the number of fingers that were shut or that remained open. The court found the juror competent, as a question of fact, and we are not at liberty to determine otherwise. This finding by the court must be treated the same as any other finding of fact, and a court of review will not set it aside unless it is unsupported by the evidence and is clearly wrong. Again, counsel on the examination of the juror, as to his competency, had an opportunity to observe his physical condition, and a failure to examine him and ascertain whether or not he was suffering from any bodily ailment or unsoundness amounts to a waiver of his present objection, and he should not be permitted to urge it, especially after trial and conviction.

Lastly, it is contended that Frederick Baker was an incompetent juror because he had previously been convicted of a felony, and had been sentenced to, and served a term in, the state penitentiary therefor. It appears from the record that this fact was not known until after the conclusion of the trial and the return of the verdict against the accused. This identical question was before us in the recent case of *Turley v. State,* 74 Neb. 471. We held in that case that, counsel for the accused having failed to ascertain the incompetency of the juror, in that respect, such failure amounted to a waiver of the objection.

Other points are raised by counsel for the accused and argued somewhat at length in his brief. We have not discussed them in this opinion because they are so well settled by our former decisions as not to require specific mention.

After a careful review of the record in this case, we are of the opinion that it contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

SEDGWICK, C. J., dissenting.

The defendant was found guilty of murder in the first degree, and sentenced to imprisonment for life. In the

sixth instruction given by the court to the jury the following sentence occurs: "An unlawful killing with malice, deliberation and premeditation, constitutes the crime of murder in the first degree." It is a complete and positive statement and is incorrect. The statute is: "If any person shall purposely, and of deliberate and premeditated malice * * * kill * * * every person so offending shall be deemed guilty of murder in the first degree." Under the instruction above quoted the jury might have found the defendant guilty of murder in the first degree, although they had a reasonable doubt that the killing was purposely done on his part. It is true that in the same instruction the jury were plainly told that "to constitute murder in the first degree there must have been an unlawful killing done, purposely and with deliberate and premeditated malice." The one statement in the instruction is as complete and positive as the other, and we cannot with certainty say that the jury disregarded the incorrect statement. In *Beck v. State,* 51 Neb. 106, the court in a somewhat lengthy instruction to the jury included this language: "The defendant offers evidence of an alibi, the burden is upon the defendant to prove this defense by a preponderance of the evidence." In the same instruction the court said:

"And when the proof is in, the question for you to determine from all the evidence, both that given for the state and for the defendant, is, is the defendant guilty beyond a reasonable doubt, as charged in the information? And if from all the evidence on the part of the state, and upon the part of the defendant, touching the question of an alibi, then if you have any reasonable doubt of the guilt of the defendant in this case as he stands charged in the information, your verdict should be not guilty."

The last part of this instruction is undoubtedly correct and states the proper rule of law in regard to the consideration that should be given to evidence tending to prove an alibi. But the fact that the jury were properly instructed upon this point in this instruction was not

thought to free the instruction from prejudicial error arising from an incorrect statement contained therein. The reason was because both statements were direct and positive and were inconsistent with each other. The court said:

"It is suggested that the instruction as a whole states the law correctly. It is true that in another part of the instruction it is said that if from all the evidence, including that relating to the alibi, there is any reasonable doubt of the guilt of the defendant, he should be acquitted; but the most that can be said is that the instruction in its different parts is conflicting. An inaccurate or incomplete instruction may be cured if by reference to the rest of the charge the defect is supplied or the law accurately stated; but an absolute misstatement of the law is not cured by a correct statement elsewhere in the charge."

I think this view of the law is correct, and we are undoubtedly committed to the proposition that if the court in its charge makes two contradictory and inconsistent statements upon an important proposition of law directly involved in the case, one of which statements would be itself prejudicially erroneous, the fact that this erroneous statement is contradicted in another part of the charge will not correct the error, since it is impossible to say how much reliance the jury may have placed upon the incorrect statement of law. *Wasson v. Palmer,* 13 Neb. 376; *Ballard v. State,* 19 Neb. 609; *Barr v. State,* 45 Neb. 458; *Henry v. State,* 51 Neb. 149, 66 Am. St. Rep. 450; *Bergeron v. State,* 53 Neb. 752; *Chicago, B. & Q. R. Co. v. Oyster,* 58 Neb. 1; *Williams v. McConaughey,* 58 Neb. 656. In *Bergeron v. State, supra,* the court said:

"The attorney general has suggested that instructions should be construed as a whole. This is undoubtedly the rule, and if when so considered they state the law correctly, they will be upheld. But this principle is not applicable here, since a good instruction will not cure one which attempts to cover the entire case, but which is palpably bad."

In that case there was no positive and erroneous statement in the instruction condemned. It simply, while attempting to cover the whole case, omitted some essential elements, and it was held that another instruction supplying those omitted elements did not cure the error, and several decisions of this court are cited supporting that doctrine. In *Missouri P. R. Co. v. Fox,* 56 Neb. 746, the court said:

"An inaccuracy or incomplete statement in a charge may be cured by further correct and supplementary statements; but an absolute misstatement of the law cannot be cured by a subsequent correct statement conflicting therewith. The doctrine is familiar."

This language was used of an instruction which contained a mistatement of law, and afterwards in the same instruction a contradictory and correct statement was made.

That the killing must be purposely done in order to constitute murder in the first degree is several times stated in these instructions. By the doctrine of chances, it is much more probable that the jury acted upon one or all of those statements than upon the one statement to the contrary. This does not help the matter. After all, it is impossible to say which view the jury took; whether they found that the killing was purposely done, or, relying upon that part of the instruction under consideration, supposed they ought to find the defendant guilty in the first degree, although there was no intention or purpose to kill. Under such circumstances the conviction may be based upon the erroneous statement of the law given to the jury, and the judgment should be reversed.

CITY OF LINCOLN, APPELLANT, V. LINCOLN STREET RAILWAY COMPANY ET AL., APPELLEES.

FILED JANUARY 18, 1906. No. 14,436.

1. **Continuance.** A motion for a continuance is directed to the sound legal discretion of the trial court, and its decision thereon will not be reversed unless there has been an abuse of such discretion.
2. **The purchaser under a decree of foreclosure** acquires by his deed all of the interest of the mortgagor in and to the mortgaged property; and the grantee of such purchaser, who is in possession of the property as owner in fee, is not liable to a junior incumbrancer for rents and profits, where such junior incumbrancer does not seek to redeem the prior incumbrances.
3. **Decree: DESCRIPTION OF PROPERTY.** The rule, "That is certain which can be made certain," applies to the description of property ordered sold by a decree of foreclosure; and where the property is described as it is commonly known and designated, and its identity can be readily ascertained, the decree will not be vacated for uncertainty.
4. **Tax Sale: REDEMPTION.** Section 3, article IX of the constitution, grants the owner of real estate sold for the nonpayment of taxes or special assessments of any character whatever the right of redemption for a period of two years from the date of the sale. This provision is self-executing, and a junior lienholder is not entitled to a decree ordering the sale of such property, without the right of redemption.
5. **Res Judicata.** A proceeding cannot be maintained to set aside or vacate a decree of foreclosure, based on an allegation of fact which was in issue and was determined in the trial which resulted in such decree.

APPEAL from the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *Affirmed in part.*

E. C. Strode and *D. J. Flaherty,* for appellant.

Clark & Allen, contra.

BARNES, J.

This proceeding was instituted by the city of Lincoln to vacate or modify a decree of foreclosure of the district

court for Lancaster county rendered March 12, 1902. The original action was instituted to foreclose a lien for paving assessments, and on appeal the decree therein was affirmed by this court. *City of Lincoln v. Lincoln Street R. Co.*, 67 Neb. 469. The application was dimissed on its merits, and the city appeals. The propositions contended for by the appellant will be taken up and disposed of in the order of their presentation.

1. It is alleged in the petition that the decree of March 12, 1902, was based on a stipulation of facts which was not the stipulation made by the parties, nor was it a true or correct copy thereof. This allegation was made the basis of a prayer to vacate and set aside the decree. It is strenuously insisted that the district court erred in overruling the appellant's application for a continuance to obtain testimony to support that allegation. An application for a continuance is addressed to the sound legal discretion of the trial court, and, unless it clearly appears that there has been an abuse of such discretion, the ruling on that question will be affirmed. *Burris v. Court*, 48 Neb. 179.

It appears from the record that this proceeding was commenced on the 2d day of April, 1904; that on the 1st day of the January term, 1905, the court assigned it for trial on the 13th day of February, following; that thereafter, and seven days before the day fixed for the trial, the appellant, by leave of the court, amended its petition, and the defendant, the Lincoln Traction Company, immediately filed its answer thereto; that on the day of trial appellant filed its motion for a continuance, supported by certain affidavits of counsel, in which it was stated, in substance, that the stipulation on which the decree complained of was rendered was not, as they were informed and believed, the stipulation of facts as made by the parties, nor was it a correct copy thereof; that the stipulation contained many erasures and interlineations; that they were informed and believed that the stipulation actually made between the parties was a clean copy without any such interlineations and erasures; that they desired the con-

tinuance to obtain the testimony of N. C. Abbott and J. R. Webster, former city attorneys of the city of Lincoln, to establish that fact; that paragraphs 15 and 16 of the stipulation fixed the date when the bonds secured by the New York Security & Trust Company's mortgage were executed, and the statement contained therein was untrue. It was also stated in the affidavits that these facts were not known to counsel until about ten days before the date fixed for the trial of the cause. The affidavits do not show any diligence on the part of the city or its attorneys; the statements contained therein are not positive, but are of such an equivocal character as to afford no basis for a prosecution for perjury, if untrue. It is admitted that the signatures appended to the stipulation are the genuine signatures of the former city attorneys, and that document was used by the present city attorneys on the trial, which resulted in the decree of March 12, 1902; so counsel must have known of its condition as early as that date. That such a showing was not sufficient to require the trial court to grant a continuance is apparent, and his ruling on that point should be affirmed.

2. The city next contends that it was entitled to an accounting. The basis of that claim is that the city with its third lien is in the position of a junior mortgagee; that it was not made a party to the foreclosure proceedings in the federal court, under which the title of the Traction Company to the Street Railway property was obtained, and its rights were not affected by that decree; that the Traction Company has only the rights of a senior mortgagee in possession, and must account for the rents and profits of the property. It is contended that this is not the proper proceeding in which to determine that question, because the power of the district court to vacate or modify its own judgments is limited to the grounds enumerated in section 602 of the code. It is unnecessary to discuss that question, because the application must be denied on its merits. It is true that counsel for the city cite a number of cases, some of which appear, at first blush, to sus-

tain their contention, but a careful examination discloses that they do not apply to the facts here under consideration. The petition discloses that certain persons purchased the Street Railway property at a judicial sale, under a decree of foreclosure rendered by the federal court, which was in all respects legal and valid, that they received a deed therefor, and thereafter conveyed the property in fee to the Lincoln Traction Company, which went into possession thereof as owner; that the city was not made a party to the proceeding, and its rights were not affected thereby. So it may be said that the city as a junior lienholder has a right to redeem the prior incumbrances, and may do so by paying the amount of prior liens, with interest and cost. But the city does not ask or offer to redeem in this proceeding. The right of an accounting is an incident to an action to redeem. Pomeroy, speaking of that matter says: "This accounting belongs exclusively to the equitable jurisdiction, and can be enforced only in a suit to redeem, brought by the mortgagor or subsequent incumbrancer." 3 Pomeroy, Equity Jurisprudence (3d ed.), sec. 1,218. And that is the rule adopted by this court. In *Renard v. Brown*, 7 Neb. 449, the same situation was presented as in this case. A senior mortgage was foreclosed without making a junior incumbrancer a party to the foreclosure suit. The senior mortgagee purchased the property and went into possession; subsequently the junior mortgagee sought to compel him to account for the rents and profits and apply them on the senior lien. On this state of facts it was said:

"After a sale has been made and confirmed and a deed executed and delivered to the purchaser he takes all the interest of the mortgagor in the property. Our statute provides that such deed 'shall vest in the purchaser the same estate that would have vested in the mortgagees if the equity of redemption had been foreclosed, and no other or greater; and such deeds shall be as valid as if executed by the mortgagor or mortgagee, and shall be an entire bar against each of them and all parties to the suit in which

the decree for such sale was made, and against the heirs respectively and all persons claiming under such heirs.' * * * In this case the plaintiff was not in possession of the premises as mortgagee, but as owner of the fee, and as such is not liable to account to a junior mortgagee."

This rule was approved and followed in *Higginbottom v. Benson,* 24 Neb. 461; *Huston v. Canfield,* 57 Neb. 345; *Orr v. Broad,* 52 Neb. 490; *and Clark v. Missouri, K. & T. Trust Co.,* 59 Neb. 53. It is also cited in 2 Jones, Mortgages (6th ed.), sec. 1,118, where it is said: "But if it (the foreclosure) operates not only as an assignment of the prior mortgage, but as a foreclosure of the equity of redemption subject to the junior mortgage, the purchaser standing in the place of the mortgagor or owner of the premises is not liable to account for the rents and profits." It has also been cited with approval by the supreme court of Indiana in *Catterlin v. Armstrong,* 79 Ind. 514; *Gaskell v. Viquesney,* 122 Ind. 244, and by the supreme court of Minnesota in *Rogers v. Benton,* 39 Minn., 39; 38 N. W. 765. We are satisfied with this rule, and it may be said that it has been so long established in this state that it has become a rule of property, and we see no good reason to depart from it at this time. We are therefore of opinion that in the present proceeding the city is not entitled to an accounting.

3. The city also insists that the decree in question should be made more definite and certain in the description of the property ordered sold to satisfy its lien. No authorities are cited in support of this contention, and the main complaint is that the numbers of the lots and block on which the power house mentioned therein is situated, are not given. It appears that the city did not complain of the description at the time the decree was rendered, and that question was not presented to us on its appeal to this court. So it is doubtful if it can be heard to complain of that matter at this time. But we are of opinion that the decree should more specifically describe the property in question. The record discloses that it is a matter of com-

mon knowledge that there is but one street railway power house on Ninth street in the city of Lincoln, and that is situated on the south half of block 102 in said city. There is no hard and fast rule which applies to the description of property, either in a deed of conveyance or a decree; and parol evidence is admissible, if necessary, to identify the land, if it be only described by name. In *Coleman v. Manhattan Beach Improvement Co.*, 94 N. Y. 229, the description "Pelican Beach near Barren Island" was held good. In *Hurley v. Brown*, 98 Mass. 545, "a house and lot of land on Amity street" was held sufficient, and parol evidence was admitted to correct the latent ambiguity. Keeping in mind the rule, "That is certain which can be made certain." it seems clear that the description contained in the decree, to wit, "The power house on Ninth street," is a sufficient description of that property to sustain the decree, and the defect furnishes no ground to vacate it or for the appointment of a receiver.

4. The city further contends that it was entitled to have the decree modified, or a supplemental decree entered, declaring that the sale thereunder should be made without the right of redemption. The decree gives the city a lien on the real estate belonging to the Street Railway Company, and specifically denies its right to a lien on personal property. Section 3, article IX of the constitution, grants the owner of real estate sold for the nonpayment of taxes or *special assessments of any character whatever*, the right of redemption for a period of two years from the date of sale, and in one of the former appeals in this case it was held that this provision applied to the assessments in question, and was self-executing. *Lincoln Street R. Co. v. City of Lincoln*, 61 Neb. 109, 142. That holding is decisive of this question, and the judgment of the district court on that point must be affirmed.

5. Counsel for the city have not argued the question of setting aside or vacating the decree of March 12, 1902, in their brief, and we have the right to treat it as waived; but it may be said, in passing, that the facts on which the

prayer for that relief is based were challenged and attacked at the trial resulting in that decree. Counsel not only refused to offer in evidence paragraphs 15 and 16 of the stipulation in question on that trial, but were permitted to and did go behind that document and introduced all the proof at their command to show that the bonds secured by the New York Security & Trust Company's mortgage were not issued and delivered in the manner and at the time recited therein. The issue thus litigated was decided against the city, and it is conclusively bound by that decree. Its correctness cannot now be questioned in a proceeding of this kind.

When this proceeding was commenced, the city made an application for the appointment of a receiver, but the application was withdrawn, by leave of the court, and made the basis of another action before another judge of the district. So that matter is not presented for our determination in this case. Neither have we decided the questions presented by the defendants relating to matters of practice or procedure in like cases, because we have deemed it best to decide this case on its merits.

After having carefully examined the record and considered all of the questions presented by counsel, we are of opinion that the judgment of the district court was substantially right, and it is therefore affirmed in all things except as to description of the property; that as to said matter the judgment of the district court be reversed, and the cause is remanded, with directions to the trial court to so correct the decree as to more specifically describe said property; and that the appellee recover its costs in this court.

JUDGMENT ACCORDINGLY.

LETTON, J., not sitting.

JAMES D. PARROTT ET AL., APPELLEES, V. LETTIE M. WOLCOTT, APPELLANT.

FILED JANUARY 18, 1906. No. 14,016.

Judgment Lien. Where a district judge by written order in vacation adjourned the "October term" of the district court, which was set for October 21, to the 11th day of November, which order was entered upon the journal, but no other proceedings had, the day to which the court was adjourned, being the first day upon which the judge was present and the court ready to transact business, was "the first day of the term" as applicable to the lien of judgments rendered during the term.

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

John N. Dryden and *Lewis P. Main,* for appellant.

N. P. McDonald and *Edwin E. Squires, contra.*

LETTON, C.

On the 18th day of November, 1895, a confirmation of sale was had in a foreclosure proceeding in Buffalo county, and a deficiency judgment rendered. The terms of the district court for that county had been fixed by the district judge upon the 1st day of January, in accordance with the statute, and the 21st day of October, 1895, had been designated as the day upon which the fall term of court should convene. On the 14th day of October, 1895, the judge of said court in chambers made the following order: "Pursuant to the annexed request, the October term of the district court of Buffalo county, Nebraska, is adjourned until the 11th day of November, 1895, at 9 o'clock, A. M." This order was recorded in the journal of the district court, but no adjournment was made by the clerk. The first day of the sitting of the court at the term at which the judgment was rendered was upon November 11, the day to which the term was adjourned.

The controversy in this case is as to whether or not the lien of the judgment, which was rendered on November 18, 1895, related back to October 21, the day originally fixed as the "first day of the term," or to November 11, the day to which the term was adjourned, and upon which the first session of the court was had.

From a consideration of sections 25, 29, 30, 31, 33 and 42, chapter 19, Compiled Statutes 1903 (Ann. St. 4735, 4739, 4740, 4741, 4743, 4753), which are the sections governing the matter, it will be observed that the exercise of the power to fix the times at which court shall be held in the respective counties of his district is within the discretion of the district judge. At the beginning of the year he fixes the dates for the regular terms. If he is sick, or for any other cause which seems to him sufficient he is unable to attend court at the regularly appointed time, he may by written order direct an adjournment to a particular day therein specified, and it is directed that the clerk shall on the first day of the term, or as soon thereafter as he receives the order, adjourn the court as therein directed. If the judge does not appear on the day originally appointed for holding court, the clerk may adjourn the court until the next day, and so on until the fourth day, and if he does not appear upon the fourth day the court stands adjourned until the next regular term.

At the common law, judgments between subjects related back to the first day of the term in which they were rendered as respected the lands of the debtor, and the statute of this state (code, sec. 477), providing that lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered, is declaratory of the common law. In *Skipwith v. Cunningham,* 8 Leigh (Va.), 271, the facts were that the date fixed by law for the beginning of the October term of the superior court at Petersburgh was October 15, but the judge did not actually attend the court before the 17th. A trust deed had been executed on the 15th day of October, and the

question presented was whether or not the lien of a judgment rendered during the term took priority of the trust deed. The court of appeals of Virginia held that the judgment only related back to the 17th day of October, being the date on which the judge actually opened court, and that this was the first day of the term. Another case in point is *Wilson v. Lott,* 5 Fla. 302, where the facts were that a term of court appointed by law for the 3d Monday in March was, by an order made on the 18th day of February preceding, adjourned to the 11th day of July. The court said:

"The term, then, which was appointed to be held the 3d Monday of March having been put off until another time, namely, the 2d Monday of July thereafter, it would seem to result as a necessary consequence that the things which were to have been done, and which would have been done at the first mentioned time, must necessarily be postponed with the term to the deferred time. Writs of error, citations and other process, which had been issued returnable to the first named day, would be returnable at the time specified in and by the adjournment, because the return day was adjourned and postponed"—citing "Comyn Ab., tit. Adjournment (A. 3)." See also *Smith v. State,* 4 Neb. 285.

The supreme court of Ohio, however, in *Davis v. Messenger,* 17 Ohio St. 231, in passing upon the question as to whether the lien of a judgment which attached from 10 o'clock A. M. on the first day of the term of a court was prior to that of a mortgage delivered for record at 11 o'clock A. M. on the same day, say *arguendo:* "There may be no session of the court on the first day of the term, by reason of the absence of the judge, * * * still, a judgment rendered on a subsequent day of the term would become a lien on the judgment debtor's land from the first day of the term, in virtue of the positive provisions of the statute."

And in a case where the question arose as to the proper time to file a transcript in an appeal from a justice of the

peace, the supreme court of Kansas held that the time fixed by law for the commencement of a term of the district court was the first day of the term, even if the judge was not present on that day. *Bush v. Doy,* 1 Kan. 86. So also, in North Carolina, where the judge failed to appear during the first week of the term but appeared upon Monday of the second week, he having directed an adjournment to that day, the term was held to begin at the original date fixed, but this was because, as said in the opinion, "the constitution fixes a term two weeks and ordains what shall be the first day of the term."

There is a clear distinction between "the adjournment of the court" and "the adjournment of the term." A court is defined by Webster as, "The persons officially assembled under authority of law, at the appropriate time and place, for the administration of justice; an official assembly, legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes." While the word "term" is defined as, "The time in which a court is held or is open for the trial of causes." This is Bouvier's definition also. In Black, Law Dictionary, it is said: "The word 'term' when used with reference to a court, signifies the space of time during which the court holds a session. A *session* signifies the time during the term when the court sits for the transaction of business"—citing *Lipari v. State,* 19 Tex. App. 433. The case is different from one wherein, after a term of court had been begun by the sitting of the court, the sessions are adjourned until some future time. In such case the term begins when the court sits at the appointed time, and any adjournment or postponement of the court is merely a continuation of the original term. *Green v. Morse,* 57 Neb. 391.

Where, as in this case, before the arrival of the day set upon which the term is to begin, the whole term is postponed to a future date, and upon the day originally fixed as the first day of the term no judicial business is transacted, and if any adjournment is made it is made by the

clerk in a merely ministerial capacity, the term does not actually begin, and, while the adjourned term is the same term of court, the first day of the term is the day when the judge is present and ready to transact the business of the term. So with persons recognized to appear before the court, if they appear upon the first day that court is actually in session, even though it is not the first day of the term as originally fixed, could it be said that they were in default, so that their recognizance would be forfeited? This has been decided to the contrary in *Bartling v. State,* 67 Neb. 637, 643. This is consistent with the case of *Smith v. State,* 4 Neb. 285, wherein it is held that, where the judge before the day the term was fixed to begin adjourned the court until a day several months later, it was still the same term. To hold that the "first day of the term," as applying to the lien of judgments rendered during the term upon lands of the debtor, means the first day of the term as originally fixed, regardless of the length of time to which the original term might be adjourned or postponed, and during which intervening period the property might pass through the hands of a number of unsuspecting purchasers, might easily be productive of great wrong and injustice, and we do not feel compelled to adopt such a construction. Even as the law now stands, cases of great hardship, such as that of *Hoagland v. Green,* 54 Neb. 164, may arise, and the fact that such conditions may occur is no doubt what impelled the English parliament to modify the common law rule by the adoption of the statute of 29 Charles II, c. 3, which provides that the judgment does not bind lands in the hands of *bona fide* purchasers from the first day of the term, but only from the day of actually signing the same.

The judgment of the district court should 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.

THOMAS E. PARMELE ET AL. V. HEENAN & FINLEN.

FILED JANUARY 18, 1906. No. 14,106.

Specific Performance: EVIDENCE. Where it is sought to enforce specific performance of a contract to sell real estate which it is claimed was entered into upon behalf of a corporation by certain of its officers in their individual names, it is incumbent upon the plaintiff to show either that the corporation authorized the contract or that the execution of the same had been ratified by it.

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

Byron Clark, for plaintiffs in error.

J. R. Dean, contra.

LETTON, C.

This action was brought by Heenan & Finlen, a copartnership, against Thomas E. Parmele, Charles C. Parmele, Samuel H. Atwood, Guy Sievers and the Plattsmouth Live Stock Company, to enforce the specific performance of a contract to convey a half section of land in Custer county to the plaintiffs by the defendant, the Plattsmouth Live Stock Company. A decree was rendered by the trial court, finding for the plaintiff and directing the Plattsmouth Live Stock Company to convey the real estate in controversy to the plaintiff, enjoining each and all of the defendants from setting up any title to the land and quieting the title of the same in the plaintiff. Separate motions for a new trial were filed by the defendants, which were overruled, and separate petitions in error have been filed in this court. A number of assignments of error are set forth in the motions for a new trial and in the petition in error, but, in our view, it will only be necessary to consider the first ground set forth, which is that the decision is not sustained by sufficient evidence.

A number of letters from Mr. Heenan, a member of the

partnership, to the defendants Thomas E. Parmele and to Charles C. Parmele are in evidence, the contents of which are relied upon as creating a contract for the sale of the land. The contents of these letters, so far as material, are in substance as follows: A letter of April 3, 1901, from Mr. Heenan to Mr. Thomas E. Parmele, says: "If you will accept $1,000 cash, I will try and raise the money for the land." Under date of April 6, 1901, Parmele replies to this letter, accepting $1,000 for "the land as per your offer." The next letter in the series is from Charles C. Parmele to Mr. Heenan under date of May 25, 1901, to the effect that Parmele had made a draft on him for $1,000, and sent the same to a bank in Chicago, and attached an abstract and deed to a "half section of land in Custer county." On June 15, 1901, Charles C. Parmele wrote Heenan to the effect that he had written the Chicago bank to return the deed, abstract and draft, in order that a release of mortgage might be shown upon the abstract. These papers were returned to Parmele by the bank before June 18, 1901, and nothing further was done by Parmele. On July 30, 1901, Heenan wrote Parmele, asking him to send the deed to Dwight, Illinois, and in April and May, 1902, Heenan again wrote to Parmele, offering to pay the $1,000 for the land. Parmele in April and May, 1902, wrote to Heenan in reply, to the effect that in May, 1901, he had forwarded the papers to the Chicago bank where they lay for a long time, and that after waiting more than a reasonable time to hear from them, he had ordered them returned, and considered the matter closed. This ended the correspondence, and thereafter this action was begun to enforce specific performance.

These letters, while containing no description of any specific tract of land, show negotiations between Daniel Heenan, as an individual, and Charles C. Parmele and Thomas E. Parmele, as individuals, with reference to the sale of a tract of land in Custer county. There is no language contained in any of the letters which even implies that the Plattsmouth Live stock Company has any connec-

tion with the negotiations or that the partnership firm of Heenan & Finlen was the party for whom Heenan was acting. The trial court found that Thomas E. Parmele is the president, and Charles C. Parmele is the secretary of said company, but there is no evidence that they, as such officers, were in any way authorized by the corporation to enter into any such contract, or that any such contract was ever ratified by the company. As a general rule, a corporation acts through its board of directors. The directors may authorize the president and secretary to enter into a contract which will bind the corporation, but such officers, merely by virtue of their office, have no right to contract to sell the real estate of the corporation. Moreover, there is nothing to show that the directors ever authorized the making of any such contract by any person, or that any contract was made by the Parmeles, or either of them, purporting to act as officers of the company. The most that can be claimed for the language of the letters is that the Parmeles, as individuals, accepted an offer of Daniel Heenan, as an individual, to buy a "half section of land in Custer county," and, upon delay in performance by Heenan, refused to make the conveyance. This evidence is insufficient to support the decree.

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

AMES and OLDHAM, CC., concur.

By the Court: For the reasons given 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.

STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF LAND; ANNIE B. HOMER, APPELLANT.

FILED JANUARY 18, 1906. No. 14,129.

1. **Tax Suit: DECREE, VACATION OF.** A person against whose property a default decree upon constructive service has been rendered in a tax suit under the "Scavenger Law" (Comp. St., ch. 77, art. IX, secs. 1-48) is not entitled, as a matter of right, to have the same opened up after the term, either under the provisions of section 82 of the code, or under the general equity powers of the court.
2. **Sale: CONFIRMATION: OBJECTIONS.** The provisions of the statute granting the landowner the right to object to the confirmation of sale, and defining the grounds of objection, afford him an opportunity to have the question of the validity of the tax determined before he is deprived of his property; but he may be required to wait until confirmation is applied for to litigate that question.

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

Charles Battelle and *William Baird & Sons*, for appellant.

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

LETTON, J.

Under the provision of sections 1-48, article IX, chapter 77, Compiled Statutes 1903 (Ann. St. 10644-10691), commonly known as the "Scavenger Act," a petition was filed in the district court for Douglas county, Nebraska, upon the first day of July, 1904, for the foreclosure of delinquent taxes. The appellant Annie B. Homer is the owner of a certain tract, described in the petition, against which certain taxes and special assessments were levied. Notice was published as required by law, and, default having been made by her, a decree was entered foreclosing the tax lien. Before this tract was offered for sale by the county treasurer, the appellant filed in the district court a motion to vacate the default decree, and for per-

mission to defend the action. This motion was supported by an affidavit showing that she was a nonresident of Nebraska, and that she had not had actual notice of the commencement of the action, did not know of the same, and had not had an opportunity to make her defense. She further tendered an answer, alleging that the special assessments were void, but admitted the validity of the regular taxes and offered to pay the same. At the hearing upon this motion, the court overruled the same and refused to permit her to open up the decree and defend the action, from which order she has appealed.

The appellant's first contention is that section 82 of the code applies to the opening of judgments upon constructive service rendered under the provisions of this act. She further contends that, irrespective of section 82 of the code, a court of equity has power to set aside a default decree after the term at which it was rendered, and to permit a defense to be made. An inspection of the provisions of the law discloses, among other things, that it is made the duty of every property owner to examine the petition; that the petition is to be taken as *prima facie* evidence of the legality of the taxes and of the amounts levied, and that such taxes and assessments are unpaid and deliquent; and the court is directed to enter a decree, where no answer has been filed, that the taxes are valid liens against the real estate, and that the amounts charged in the tax record are justly due to the plaintiff and chargeable against said parcels respectively. Further, it is made the duty of the clerk of the district court immediately after the first of September of each year to enter default by writing or stamping the word "defaulted" in the tax record, in the column marked defaulted, against each parcel of land upon which the taxes and assessments shown in the petition have not been fully paid, and on behalf of which no answer has been filed. It is further provided that the decree shall be taken and held to be several decrees against the several parcels of land set forth in the petition.

An examination of the provisions of the act shows that the proceeding required to be taken by the clerk of the district court in entering the word "default" opposite each tract is merely clerical or administrative in its nature. This act is not a judicial act in any sense of the word. The clerk has no power to adjudge that the owner of the tract is in default for answer or plea. Such owner has the undoubted right to file his answer and present an issue as to the validity of the tax, or any part of it, and have it judicially determined at any time before the court enters a default and renders the decree provided for by the statute. After that stage of the proceeding is passed, the owner of the tract is not entitled, as a matter of absolute right, to have the decree set aside and be let in to defend, either under section 82 of the code, or under the general equity powers of the court. If the landowner desires to question the validity of the tax or the proceedings in the same suit, he can be required to wait until the time fixed for the confirmation of sale, when he may then present this issue for determination as we shall presently see. The act provides for the sale, by the county treasurer, of each parcel of land, the issuance of a certificate of tax sale, and a period of two years is provided for redemption.

The act further provides for the service of a notice upon the owner by personal service, if a resident, and by publication, if a nonresident, as well as upon every person in actual occupancy of the lands purchased, before confirmation may be had, and provides for the keeping of a "confirmation record" by the clerk of the district court, which shall describe the lands and notify the owner of the time and place for confirmation. It also provides for an examination of the proceedings by the court, and an order of confirmation if the purchaser is entitled thereto. Any person having an interest in the real estate may, at any time before confirmation, file objections thereto and enter notice thereof in the confirmation record.

Section 39 is as follows: "Confirmation of sale shall

not be withheld, nor shall the sale be set aside except on one or more of the following grounds: First: That the court was without jurisdiction to enter the decree. Second: That the taxes or assessments on which the decree was based had been paid prior to the decree, or sale. Third: That redemption had been made from the decree or treasurer's sale thereunder. Fourth: That the land was not subject to taxation or to special assessment. Fifth: That the taxes and assessments, or a part thereof, were based upon proceedings wherein there had been fraud, gross injustice or mistake." (Comp. St., ch. 77, art. IX). An appeal to this court from the order of confirmation is provided for.

It will be observed that the fifth ground upon which confirmation may be refused is "that the taxes and assessments, or a part thereof, were based upon proceedings wherein there had been fraud, gross injustice or mistake." This is a very broad and far-reaching provision. We have already considered and construed the force and effect of a like provision with regard to special assessments, and have held in *Wead v. Omaha,* 73 Neb. 321, that a proceeding which deprives a person of his property by means of a void tax is "gross injustice." If the proceedings by which it was sought to impose a special assessment upon the appellant's property were void, they were certainly grossly unjust, and the appellant has the right at a subsequent stage of the proceedings to raise an issue as to the validity of such assessment, and to have the same tried and determined. While there is no provision in the law for setting aside or modifying the default decree, section 48 of the act under consideration provides: "This act shall be deemed to be cumulative," etc. Plaintiff, then, still has the right reserved to her, which is provided under the general revenue law, of paying the taxes assessed against the property, under protest, and bringing an action to recover the same by legal proceedings in the ordinary method. Not only are these rights preserved to her, but if the tax she complains of is

absolutely void she may restrain the collection of the same by injunction. *Touzalin v. City of Omaha,* 25 Neb. 817; *Bellevue Improvement Co. v. Village of Bellevue,* 39 Neb. 876; *Chicago, B. & Q. R. Co. v. City of Nebraska City,* 53 Neb. 453; *Rothwell v. Knox County,* 62 Neb. 50. A direct proceeding is therefore open to her to attack the validity of the tax and the default decree based thereupon. If she has these rights, why should the orderly administration of this law be hampered and the courts be harrassed by allowing proceedings of the nature of the one at bar, and thus burden the courts with the trial of the unnecessary issue as to notice? Each owner of property is charged with the knowledge that his property is held subject to the burden of providing its due proportion of funds for public purposes. It is a matter of common knowledge that there are times and seasons fixed in the administration of all tax laws, within which certain acts must be performed, or certain consequences follow. While the appellant is entitled not to be deprived of her property without due process of law, the fact that the decree has been rendered does not operate to deprive her of that right. It is still preserved to her, and she may have her day in court before she is divested of her title. If the appellant has the right to open up this decree, we may as well set aside the legislative provision restricting the time within which the general decree upon the tax suit is to be rendered, and thus leave the time of making up an issue as to the validity of the tax to the whim of any nonresident landowner who did not receive actual notice of the filing of the tax petition. This we deem inadvisable and not justified by the terms of the statute. See *County of Washington v. German-American Bank,* 28 Minn. 360; *State v. Faribault Waterworks Co.,* 65 Minn. 345, 68 N. W. 35.

We do not wish to be understood as deciding that, if the district court in its discretion had permitted the filing of the answer and had litigated the questions at issue, its decree would not have been valid, but, the court having

refused to do this, we hold that it was not compelled to reopen the decree, either under the provisions of section 82 of the code, nor as a part of its general power as a court of equity. There has been no abuse of discretion, and therefore no right of reversal.

The judgment of the district court is therefore

AFFIRMED.

MATHIAS BARBER V. STATE OF NEBRASKA.

FILED JANUARY 18, 1906. No. 14,193.

1. **Criminal Law. JURY.** Where the regular panel of the petit jury has been discharged, it is not error, in a criminal case, to summon a new jury under the provisions of section 664 of the code. *Barney v. State*, 49 Neb. 515, followed.
2. **Instruction.** Under the circumstances of this case, an instruction to the effect that, "if any witness for the state has wilfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony of such witness, unless corroborated by other evidence," was proper, and it was error to refuse the same at defendant's request. *Titterington v. State, ante*, p. 153, followed.
3. **An instruction** to the effect that the disagreement of witnesses in minor points "does not necessarily militate against the candor of any of them," approved in *Davis v. State*, 51 Neb. 301, criticised.

ERROR to the district court for Lincoln county: HANSON M. GRIMES, JUDGE. *Reversed.*

Hoagland & Hoagland, for plaintiff in error.

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

LETTON, J.

Mathias Barber was convicted of receiving, with intent to defraud the owner, a certain cow, knowing the same to have been stolen.

1. He complains that the district court erred in overruling his motion to quash the panel of the petit jury summoned by the sheriff. It appears that the regular jury impaneled for the term had been engaged in the trial of another case, in which some of the same witnesses testified and like facts were in controversy as in this case, and that for this reason it had been discharged by the court and a new venire ordered in accordance with section 664 of the code. It is contended that the new venire should have been summoned under the provisions of section 465*a* of the criminal code. This contention has been considered and passed upon by this court adversely to the position of the defendant in the cases of *Barney v. State,* 49 Neb. 515, and *Fanton v. State,* 50 Neb. 351. With the rule established in these cases we are satisfied, and see no reason for disturbing the same.

2. It is urged that it was error to allow the witnesses Vie Morgan and Maude Morgan to testify as to conversations between them and one Markee, whom the state claimed had stolen the cow. The testimony set forth in the record was immaterial, and could not aid the jury in determining whether the cow was in fact stolen. It might have properly been stricken out if the defendant had requested it, but this was not done. We think the defendant suffered no prejudice by this evidence, but that it should not be received upon another trial, since it throws no light upon the issue.

3. The following question was asked of the witness Jepson on cross-examination by the state: "You had been a witness for Barber before, when he was charged with stealing Collins' cow?" The question was objected to by the defendant and the objection was sustained. This question was evidently improper, since it suggested to the jury that the defendant had formerly been charged with stealing a cow. It is now charged that the putting of the question was such misconduct of counsel as to prejudice the defendant. The defendant, however, rested content with making the objection, and did not ask the court to

admonish counsel or instruct the jury to disregard the inference suggested, and is not entitled now to urge that the court should have gone further, when he failed to request it.

4. Complaint is made of the instructions given and refused. Instruction No. 4 given by the court is, in substance, to the effect that the state claims that the cow was stolen by one Markee, and that the defendant received the cow with the intent to defraud the owner thereof, knowing that she was stolen; that, if the evidence satisfies the jury beyond a reasonable doubt that Markee stole the cow and that the defendant received the same knowingly, with the felonious intent to defraud the owner thereof, then they should find the defendant guilty; while the fifth instruction is to the effect that, if the evidence was insufficient to satisfy the jury that the cow was stolen by Markee, yet, if it satisfied the jury that the cow was stolen and that the defendant received it, knowing it to have been stolen, and with the intent to defraud the owner, then they should convict the defendant. It is contended that these instructions are contradictory; that, if there was a failure of proof as to the stealing of the cow by Markee, there was a failure of proof that any one stole her, and, consequently, there could be no conviction upon the offense charged. The theory of the state was that the defendant received a cow which had been stolen by Markee, and the only evidence of the theft was positive testimony that the cow was taken by Markee. While the fifth instruction may be correct as an abstract proposition of law, we think it inapplicable to the issue in the case, tended to confuse the jury, and should not have been given. While, perhaps, not prejudicially erroneous, upon a new trial it should not be repeated.

As to the refusal to give instructions 9 and 10 requested by the defendant, the proposition embodied in instruction No. 9 is given in the eighth instruction given by the court on its own motion, and hence it was not error to refuse the same. The portion of instruction No. 10 which tells the

jury that, if they believe from the evidence that either the witness William Morgan or Vie Morgan is a person of bad reputation for truth and veracity, this fact goes to discredit his or her testimony, and the jury may entirely disregard it, except as corroborated, is also given in the eighth instruction given upon the court's own motion, except that these witnesses are not pointed out specifically by name. We have heretofore held that it was not error to give an instruction of this character which pointed out witnesses specifically by name, where evidence had been given for the purpose of impeachment by showing the bad reputation for truth and veracity of these witnesses in the neighborhood in which they live. *Watson v. Roode,* 30 Neb. 264. The reason for this departure from the general rule is discussed in the case of *Argabright v. State,* 49 Neb. 760, and the ground for the rule set forth.

That portion, however, of instruction 10, which is as follows: "And, if the jury believe from the evidence that any witness for the state in this case has wilfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony of such witness, unless his testimony be corroborated by other evidence," is not found in any part of the charge to the jury, and it is urged that this was error of such prejudice to the defendant that he is entitled to a new trial on account of the refusal thereof. The question of whether it is prejudicial error to refuse such an instruction as this has been recently passed upon by this court in *Titterington v. State, ante,* p. 153. This was a cattle stealing case, in which there was a direct conflict in the testimony. An instruction upon this point requested by the defendant was refused, and the court failed to instruct the jury upon the point involved upon its own motion. It appeared that in that case the court refused to give the instruction requested because it did not contain the qualifying words, "unless corroborated by other competent proof." In the instruction requested in this case these qualifying words are contained. In the case at bar there is a direct and ir-

reconcilable conflict between a part of the testimony of some of the witnesses of the state and that of some of the witnesses for the defendant, and, if the jury believed that any witness wilfully testified falsely, the defendant was entitled to have it instructed that it might reject the testimony of such witnesses, unless corroborated. There is a further resemblance between this case and the Titterington case, in this, that the trial court, in both cases, instructed the jury upon its own motion "that the disagreement of witnesses in minor points does not necessarily militate against the candor of any of them." The giving of this instruction is criticised in the opinion in that case. The instruction is copied from *Davis v. State,* 51 Neb. 301, where it was held that the defendant had no reason to complain of it. We think, however, it comes very close to infringing upon the province of the jury as to the weight to be given to the testimony, and seriously doubt the propriety of giving it. The refusal to instruct upon the theory, *falsus in uno, falsus in omnibus,* was erroneous, and of such prejudice to the defendant that a new trial should be granted.

We think it proper to state that the substance of the propositions embraced in a number of the instructions requested by the defendant should have been given, since they cover points upon which it was proper that the jury should be instructed, if so requested, and which were not given in the charge of the court.

The judgment of the district court is reversed and a new trial ordered.

REVERSED.

JOHN A. ORR ET AL., APPELLANTS, V. JOHN H. HALL ET AL., APPELLEES.

FILED JANUARY 18, 1906. No. 14,094.

Sales: STATUTE OF FRAUDS. An oral contract for the sale of goods, chattels, or things in action, for a price exceeding $50, is void, unless some of the goods, or evidences of some of the things, have been delivered to and accepted by the buyer, unless he shall have paid the whole or some part of the purchase price. Comp. St., ch. 32, sec. 9.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Wright & Wright, C. F. Manderson, W. A Dilworth, E. R. Duffie and J. E. Kelby, for appellants.

Kirkpatrick & Hager and *J. H. Castleman, contra.*

AMES, C.

On or about December 1, 1903, appellant Orr, as the agent of appellant Leavitt, applied to appellee Hall to purchase from the latter ten shares of the capital stock of the Winters Creek Irrigation Company, a corporation of this state. At that time Hall was the owner of but seven shares of such stock, but had contracted and partly paid for the three additional shares desired. There was an oral agreement then made between Orr and Hall that the latter should complete his purchase within a week from that date, and should then execute a transfer of the whole ten shares to Leavitt, and deposit them in the First National Bank of Scott's Bluff, subject to the demand of Orr, who agreed that on or before that time he would deposit in it the sum of $900 to the use of Hall upon, and in consideration of, the delivery of the shares as aforesaid. Within the week Orr delivered to the bank a check on the "Irrigators Bank" payable to the order of the First National Bank and signed by the partnership of Wright,

Orr & Howard, of which Orr was a member. At the time of the delivery of the check to the bank, Orr also delivered to it a memorandum on a separate piece of paper as follows: "This amount to be paid on ten shares of Winters Creek stock of J. H. Hall, am to pay ninety cents on the dollar for same, are to be left at your bank for me with transfer. J. A. Orr." The check and memorandum were put in an envelope together, and were received and retained by the bank. Shortly afterwards certificates of ten shares of the stock were deposited by Hall with the bank, but without any transfer or assignment of them to Orr or Leavitt, and without any instruction or direction to deliver the same to either of them. On the contrary, he directed that they were to be kept, and they were kept, among the private papers of Hall in the bank, until some time later, when he transferred them to the bank as collateral security for a loan of money which he procured from it. In the meantime he explicitly refused, and still refuses, to transfer or deliver them to the plaintiffs or either of them. This is an action to compel a specific performance of the agreement, and resulted in the district court in a judgment of dismissal and for costs. The plaintiffs appealed.

We are unable to see how the decision could have been different. The agreement is made out with sufficient certainty and clearness. It rests wholly in parol, except the memorandum delivered to the bank by Orr which, if obligatory upon either of the parties, binds Orr, or Orr and his principal alone. The statute (Comp. St. 1903, ch. 32, sec. 9, Ann. St. 5958), expressly provides: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless, *first,* a note or memorandum of such contract be made in writing, and be subscribed by the party to be charged thereby; or, *second,* unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action; or *third,* unless the buyer shall, at the time, pay some part of the purchase

money." Now, no memorandum subscribed by the party sought to be charged has ever been made, and such memorandum as was made was not made at the time of entering into the agreement, nor at any time in the presence, or with the concurrence, of the defendant. Nor were the shares, or any of them, or any evidences of them at any time delivered, or the purchase price or any of it at any time paid. Nor do we think that for any of these purposes the bank can be considered as the agent of either party, although it was proposed to make it the agent of both parties in the capacity of stakeholder, and it did become such agent for the plaintiff Orr, but it did not have, and it was not contemplated that it ever should have, any authority as contracting agent for either party.

The check on the Irrigation Bank did not satisfy the requirement of the statute. It was not made or mentioned at the time of entering into the oral agreement, and it was not money, nor accepted as such or in lieu thereof, nor accepted at all, and it was not payable to the vendor nor delivered even to the First National Bank, except conditionally. 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.

IN RE ESTATE OF POPE.
LYDIA E. POPE V. CHARLES C. MCENDREE.

FILED JANUARY 18, 1906. No. 14,100.

Special Administrator, Removal of: FINAL ORDER. An order by a county court, made in a probate proceeding, removing a special administrator for cause and appointing another to serve in his place and stead, is a final order and appealable within the terms of section 42, chapter 20 of the Compiled Statutes.

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

Patterson & Patterson and *J. J. Sullivan,* for plaintiff in error.

George W. Ayres, contra.

AMES, C.

The plaintiff in error is the widow of James H. Pope, deceased, who died leaving a will in which she is named as sole residuary legatee and nominated as sole executrix. Pending the probate of the will, which was contested, and the issuance of letters testamentary thereon, she was appointed special administratrix of the estate pursuant to section 180, chapter 23, Compiled Statutes 1903 (Ann. St. 5045), and duly qualified as such. Afterwards the court removed her for alleged negligence or misconduct in office and appointed another to serve as special administrator in her place and stead. From the order of removal she appealed to the district court, where an appeal from an order admitting the will to probate was also pending. The former appeal was dismissed on motion, on the ground that the order of removal was not appealable. From the judgment of dismissal she prosecutes error.

The order of removal is evidently final as to Mrs. Pope, who is directly and perhaps seriously affected thereby, and is clearly appealable under section 42, chapter 20, Compiled Statutes 1903 (Ann. St. 4823), which provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment, or decree may be made or who may be affected thereby."

It is therefore recommended that the judgment of the district court be reversed and the cause remanded, with instructions to proceed upon the appeal as provided by law.

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 proceed upon the appeal as provided by law.

REVERSED.

BELLZORA PRICE, APPELLANT, V. DANIEL E. PRICE, APPELLEE.

FILED JANUARY 18, 1906. No. 14,099.

1. **Husband and Wife.** It is the right and privilege of a husband to fix in good faith a domicile for himself and wife, and, when he does so, it is the duty of the wife to follow her husband to such domicile and live with him there as his wife.
2. ———: MAINTENANCE. It is the duty of the husband to provide for the reasonable support and maintenance of his wife during the continuance of the marriage relation; and, when the husband without just cause fails to provide for the support and maintenance of the wife, she may maintain an action against him for reasonable maintenance, unless by her own act of abandonment of the husband's domicile, or some other act wholly inconsistent with her duty as his wife, she has forfeited her right to such maintenance.
3. **Abandonment:** EVIDENCE. To defeat a wife's claim for support and maintenance on the ground of voluntary abandonment of the husband's domicile, the fact of such abandonment must be established by cogent proof.
4. **Evidence** examined, and *held* not sufficient to establish a voluntary abandonment of the husband by the wife.

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

O. A. Abbott, for appellant.

Stark & Grosvenor, contra.

OLDHAM, C.

This was an action for support and maintenance instituted by the plaintiff wife against the defendant husband. The petition alleges the marriage between plaintiff and

defendant in the city of Grand Island, Nebraska, April 12, 1900; that after the marriage plaintiff and defendant lived together as husband and wife in the village of Phillips, Hamilton county, Nebraska, until the latter part of August, 1900, when, by mutual agreement, plaintiff removed to the city of Grand Island with her children by a former marriage; that after plaintiff's removal to Grand Island defendant continued to visit and cohabit with her as her husband until the month of June, 1901, when defendant abandoned the plaintiff, and refused and neglected to further provide for her support and maintenance. The petition prayed for a reasonable allowance from defendant's income for plaintiff's support. The answer admitted the marriage, and denied each and every other allegation contained in the plaintiff's petition, and by way of cross-bill asked for a divorce from the plaintiff on the grounds of wilful abandonment without just cause for more than two years. On issues thus joined, there was a trial to the court and a judgment dismissing both the petition of the plaintiff and the defendant's cross-bill, and taxing each of the parties with their own costs. To reverse this judgment plaintiff has appealed to this court.

There is very little conflicting testimony in the record, the contest mainly depending upon the presumptions arising from undisputed or clearly established facts, which may be briefly summarized as follows: At the time of the marriage, plaintiff was a widow and the mother of four children by her former marriage, the oldest one being a son about 18 years of age, and the younger ones being daughters, ranging in age from 9 to 16 years. Defendant was a middle-aged man, a widower, who was the father of 3 children, all girls, ranging in age from 7 to 13 years. Each of the parties were of high moral and social standing. The defendant husband resided in the village of Phillips, about 9 miles distant from the city of Grand Island, where the plaintiff wife resided at and before the marriage. After the marriage plaintiff and her 3 younger children resided with defendant and his children in the

village of Phillips until the latter part of August, 1900. Plaintiff, at the time of the marriage, was the owner of a home in Grand Island of the value of about $800, and also had $1,000 loaned at interest, which she had received from her first husband. It fairly appears from the record that, by mutual agreement between the husband and wife, the wife returned with her children to her home in Grand Island for the purpose of sending them to school there during the years 1900 and 1901. While there is some suggestion in the record that this arrangement was without the approval of the husband, yet his conduct toward plaintiff after her removal to Grand Island shows that he acquiesced in her conduct, for he testifies that he visited her from time to time at her home in Grand Island, and cohabited with her at the time of such visits, and contributed small sums of money for her support during the school year of 1900 and 1901. It is fairly suggested by the evidence that there existed some dissatisfaction between plaintiff and defendant during their residence in Phillips, on account of the interference of relatives of the two families of children in the management and government of the children.

When the school year had ended, defendant wrote to plaintiff, stating his inability to maintain the two families in the two places, and inquired her intention as to returning to live with him at Phillips. While the oral testimony shows that plaintiff had objected to going back to Phillips to live with defendant, yet she answered his letter, saying that she would return to live with defendant at Phillips when he provided a home there for her. Defendant owned no real estate and very little personal property at that time, and relied on renting property to provide a home. He answered her letter, telling plaintiff, in substance, to inform him when she intended to come to Phillips, that he might prepare for her, and suggested that she should help furnish the home and contribute to the support of her own children, if she should bring them with her. Here follows the only material conflict in the

testimony. Plaintiff claims that she answered this letter by a note, asking him to come to see her to arrange for her return to Phillips, and that in response to this note defendant came to Grand Island and suggested to her that they could just as well continue to live apart, as they were, for the next three or four years, but that, if in the meantime she wanted to come to Phillips to live, he might rent a house there. Defendant denies receiving this note, and denies the visit and conversation testified to by the wife. After this defendant ceased corresponding with his wife, and has never provided anything for her support and maintenance. In the following December defendant went to the city of Washington as a temporary secretary of Congressman Stark, and remained there in that capacity until the following April. During this time plaintiff wrote several communications to defendant, offering to go and live with him at Washington, and later, when he had returned, she offered to live with him at Aurora, Nebraska; but defendant made no response to any of these communications, and never again went to visit his wife.

We think there are certain elementary principles that should govern the judgment and finding in this case. The first is that it is the right and privilege of the husband to fix in good faith a domicile for himself and his wife. Second, it is the duty of the wife to follow her husband to such domicile as he may provide in good faith, and there to live and cohabit with him as his wife. It is also the primary duty of the husband to provide for the reasonable support and maintenance of his wife according to his rank, standing, and financial ability, when she accompanies him to the domicile which he has selected. The right of the wife to such reasonable support and maintenance can be defeated only when she wilfully and without just cause, either abandons the domicile of the husband, or commits some overt act inconsistent with her duty as a wife. The law presumes that a man does not intend to abandon his family, in the absence of cogent

proof to the contrary (*Jennison v. Hapgood,* 10 Pick. (Mass.), 77, 99), and the same rule applies with reference to the wife.

Now, the only way that plaintiff could be defeated in her claim for reasonable support and maintenance would be by a finding of fact that she had voluntarily and intentionally, and without good cause, abandoned the domicile of her husband, which he had provided for her. From the evidence in this case, we are unable to find this fact. Plaintiff went to Grand Island with the consent and acquiescence of her husband. In every communication from her to the husband she has expressed a willingness to live with him whenever and wherever he might provide a home, although it does appear in the testimony that she had expressed a desire that the home should be at some other place than the village of Phillips. While defendant suggested in his communication to his wife an intention to procure a home for her, yet the evidence fails to show that he ever did so. We are therefore impressed with the conclusion that plaintiff has never done anything to defeat her right to a claim on the defendant for reasonable support and maintenance according to his earning capacity and financial holdings. The evidence shows that defendant's earning capacity is about $50 a month, and that he has three minor children dependent on him for support. The evidence shows that he is the owner of property of the value of about $500, to which nothing has been contributed from the joint earnings of plaintiff and defendant, or from her separate estate. We think under this showing that only a reasonable contribution from defendant's income be awarded the plaintiff for her support. It seems to us that $100 a year, paid in quarterly instalments, after judgment has been rendered on this mandate, would be just and equitable in view of the condition of each of the parties, and that these contributions should continue until the defendant provides a suitable home for plaintiff.

We therefore recommend that the judgment of the dis-

trict court be reversed and the cause be remanded, with directions to the court below to enter a judgment for the plaintiff for the sum of $100 a year for her support and maintenance from June 18, 1901, to the date of the entry of this judgment in the district court, and that a further decree be entered awarding plaintiff support and maintenance at the rate of $100 a year, to be paid in quarterly instalments until defendant has provided a home for plaintiff in which she may live with him as his wife.

AMES and LETTON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with directions to the court below to enter a judgment for the plaintiff for the sum of $100 for her support and maintenance from June 18, 1901, to the date of the entry of this judgment in the district court, and that a further decree be entered awarding plaintiff support and maintenance at the rate of $100 a year, to be paid in quarterly instalments until defendant has provided a home for plaintiff in which she may live with him as his wife.

JUDGMENT ACCORDINGLY.

ARTHUR P. HARVEY ET AL. V. CECILE ROSS HARVEY.

FILED JANUARY 18, 1906. No. 14,101.

1. **New Trial:** JOINT MOTION. Where all the codefendants join in a motion for a new trial, which is not good as to all, the motion should be overruled.

2. **Conspiracy:** SEVERAL JUDGMENTS. Where several defendants are proceeded against as conspirators in the commission of a tort, which would be actionable if committed by one alone, a judgment against one or more of such defendants may be sustained without proof of a conspiracy among all of them,

3. **Husband and Wife: ALIENATION OF AFFECTIONS: EVIDENCE.** In an action by a wife for the alienation of the affections of her husband, evidence of the earning capacity and the financial condition of the husband is admissible as affecting the quantum of damages, if any, that the wife may recover for the loss of her husband's support.

4. **Instructions.** It is not error to refuse an instruction not based on either the pleadings or the evidence.

5. **Quantum of damages** examined, and *held* not so clearly excessive as to suggest prejudice and passion in the award.

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

W. C. Brown, A. L. Tingle and *L. T. Genung,* for plaintiffs in error.

Lear & Wilhite, contra.

OLDHAM, C.

This was an action for the alienation of affections, in which the plaintiff, Cecile Ross Harvey, wife of George D. Harvey, alleged that William H. Harvey, Mary B. Harvey, and Arthur P. Harvey, who are respectively the father, mother and brother of George D. Harvey, conspired together, for the purpose of estranging and alienating the affections of George D. Harvey from the plaintiff, his wife, and causing him to abandon plaintiff, and refuse to live with her as her husband and to provide for her support and maintenance. The defendants answered jointly, admitting the marriage of plaintiff to George D. Harvey, and denying each and every other allegation in the petition. On issues thus joined, there was a trial to the court and jury, a verdict for the plaintiff for $3,000 damages, judgment on the verdict, and to reverse this judgment defendants bring error to this court.

The facts underlying this controversy are that for several years the defendants in this cause of action and George D. Harvey, husband of the plaintiff, have resided

together on a cattle ranch in Keya Paha county, Nebraska, known as the "Harvey Ranch." The two sons and the father were engaged in cattle raising, and all lived together in a large house on a quarter section of the ranch, which had been homesteaded by George D. Harvey. In 1901 the plaintiff was employed as a domestic in the Harvey household, and during the time of her service an intimacy sprang up between her and George D. Harvey, which resulted in furnishing plaintiff with "a child for her cradle before she had a husband for her bed." Some time after the birth of the child, plaintiff instituted a bastardy proceeding against George D. Harvey, and in compromise of this proceeding George D. Harvey agreed to and did marry plaintiff, and took her and the child to live with the family on the Harvey Ranch. . Plaintiff, prior to her marriage, had made a homestead entry on a quarter section of land about three miles from the Harvey Ranch, on which a sod house had been erected, containing little or no furniture or other conveniences of life. The evidence shows that immediately on the arrival of the plaintiff at the Harvey Ranch, defendant Arthur P. Harvey, her brother-in-law, began a well-directed effort to drive plaintiff from the household and to separate her from his brother. On numerous occasions he applied all kinds of vile epithets to her in the presence of the family, and told neighbors that they intended "to make it so hot for her that she would have to leave." There was also evidence tending to show that the mother-in-law, Mrs. Harvey, cooperated to some extent in the design of her codefendant, Arthur P. Harvey, but there is practically no evidence in the record that the father, William H. Harvey, concerted with the other defendants in the matter of bringing about the separation of plaintiff and her husband. After about three weeks of her residence on the Harvey Ranch plaintiff, as she alleges, because of her ill treatment, agreed to leave the ranch and go back and live on her homestead, if her husband would come and stay with her there at nights. With this understanding, she went to the sod house on

her homestead with her husband, who left her a very scanty provision of food, and took her to a neighbor's and got permission for her to stay all night, and promised to come the next night to stay with her on the homestead. She returned to her homestead next morning, but the husband remained at home, and abandoned his wife and child, and left her with her offspring in much the same condition as Abraham of old is said to have left his handmaiden Hagar and her child, when he parted from them in the wilderness. At the close of the testimony, defendants all joined in a motion to direct a verdict. This motion was overruled, and this ruling is complained against in the brief of the defendants.

The contention seems to be that, because the plaintiff had alleged conspiracy between the three defendants and the testimony was not sufficient to show that all the defendants had conspired together, therefore the entire cause of action failed. In some jurisdictions the allegation of conspiracy to commit a tort is treated as mere surplusage in a petition, and the defendants named are all proceeded against as joint tortfeasors. This rule, however, is subject to the following qualifications: Where the act, if committed by any one of the parties charged, would constitute an actionable wrong, then the allegation of conspiracy is surplusage, except as to the rule of admission of evidence making admissions and statements of one of the conspirators binding on the rest. On the contrary, if the tort be actionable only when committed by a conspiracy, no recovery can be had without proof of the conspiracy. 1 Jaggard, Torts, ch. 9, p. 639; *Parker v. Huntington,* 2 Gray (Mass.), 124; *Garing v. Fraser,* 76 Me. 37; *Brinkley v. Platt,* 40 Md. 529. Now, in the case at bar, the tort alleged was actionable, if committed by any one of the defendants, whether the others confederated to bring about the result or not. Consequently, when the three defendants joined in a motion to direct a verdict, the court was justified in overruling the motion, although the evidence may not have been sufficient to establish a

tort against William H. Harvey, had he moved separately for a directed verdict in his favor. The same condition exists with reference to the motion for a new trial, all three of the defendants having joined in this motion, and, according to the rules of procedure in this state, the motion, not being good as to all, was properly overruled.

Complaint is next urged against the action of the trial court in admitting evidence offered by plaintiff to show the financial ability and business thrift of her husband. We think this evidence is clearly admissible. If plaintiff had suffered the loss of the association and support of her husband through the agency of the defendants, or any of them, her measure of damages would be her actual loss of support, and also the loss of affections and the humiliation and disgrace, if any, which she might suffer as a logical result thereof. In estimating the amount of her loss of support, it was proper for the jury to take into consideration the earning capacity and the financial standing of the husband.

It is urged that the court erred in not instructing the jury as to the privilege of the defendants father and mother in advising in good faith with their son with reference to his domestic relations, even if such advice had led to a separation from the plaintiff. With reference to this contention, it is well to suggest that no such instruction was requested by the defendants, or any of them, and again, as both defendants father and mother denied that they had ever advised their son to abandon his wife, there was no testimony on which to base the instruction. *Rath v. Rath,* 2 Neb. (Unof.) 600.

It is finally claimed generally that the court should have given more specific instructions to the jury, but no instruction given by the court is pointed out as inherently wrong. While it is true the instructions were very general in their nature, yet no instruction of any kind was requested by the defense, and, consequently, under the well-established rule of this court, defendants are not in shape to avail themselves of this complaint.

Complaint is also made that the damages awarded are excessive, but a careful review of the entire record fails to convince us that the damages are so disproportionate to the loss sustained as to suggest passion and prejudice in the award.

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 foregoing opinion, the judgment of the district court is

AFFIRMED.

C. F. BLANKE TEA & COFFEE COMPANY V. FRANK D. EAGER.

FILED JANUARY 18, 1906. No. 13,999.

Evidence examined, and *held* not to support the verdict of the jury.

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

Mockett & Polk, for plaintiff in error.

J. C. McNerney, contra.

DUFFIE, C.

Frank D. Eager sued the C. F. Blanke Tea & Coffee Company to recover for certain advertising and for stationery furnished one J. W. Johnston, the alleged agent of said company. It is claimed that Johnston was employed in advertising and selling goods of the Blanke company, and that the account sued on was made in their interest. The case was first tried in the county court, and upon appeal to the district court Eager filed an amended petition, which, it is alleged, contained new matter by way of an estoppel; and a motion was made to strike the petition

from the files on the ground that it presented other and different issues than those tried in the county court. The motion was overruled, and this constitutes one of the errors assigned. If the petition filed in the district court presented issues not tried in the county court, the remedy was to strike them out, not to strike the whole petition.

The jury returned a verdict in favor of the plaintiff below, and it is urged that this verdict is not supported by the evidence. The undisputed evidence shows that the Blanke company are wholesale dealers in teas, coffees and spices, with their principal place of business in the city of St. Louis. Charles Spies & Co. have a house at Kansas City, Missouri, with the exclusive right of handling the Blanke company's coffees in certain specified territory, including the state of Nebraska. Eager offered in evidence the testimony of a stenographer employed by Johnston to the effect that Johnston received circular letters from the St. Louis house of the Blanke company containing directions and advice to their agents. It was also shown that Johnston made an arrangement with Tucker Bros. of Lincoln to handle a large amount of coffee, nearly a carload, agreeing to take back what was not disposed of within a certain time. Tucker Bros., from the great amount involved in the deal, were somewhat fearful of Johnston's authority to carry out his agreement and telegraphed the Blanke company at St. Louis relating thereto. No copy of this telegram, or of any reply, is contained in the record, but on July 15, 1901, Johnston wired the Blanke company as follows: "Your wire to Tucker Bros. shown me. Rush this order. Ship every pound. No consignment, simply agreed to relieve them of any goods not sellers, as I selected goods myself. Will sell them as much more within twenty days. Have written fully. Answer." It is further shown that some of the unsold coffee was taken back by Johnston. It is further in evidence that Eager gave directions to have five copies of his paper containing the advertisement of the Blanke company's goods, and which represented

Johnston as the agent for Nebraska, mailed to said company during the time the advertisement was running, and that orders for goods taken by Johnston were sometimes filled by the Blanke company from St. Louis, and at other times by Charles Spies & Co. of Kansas City. This is the only evidence we find in the record tending to show that Johnston was an agent of the Blanke company, or that they had knowledge that he was representing himself to be their agent. On the other hand, Mr. Seiter of the firm of Charles Spies & Co. testified that his firm had no interest in the business of the Blanke company, and the latter firm had no interest in the business of Charles Spies & Co. Johnston was employed by Charles Spies & Co. as a salesman on a commission basis, his only compensation being a percentage on such orders as he sent in and that were filled by the company. C. F. Blanke, president, and R. H. Blanke, secretary and treasurer, of the Blanke Company, testified that Johnston was never in the employ of that company; that the company had no interest in the business of Charles Spies & Co. of Kansas City; that Charles Spies & Co. handled their coffee, buying the same as any other customer, but having the exclusive sale thereof in certain territory; that sometimes in order to save time, freight and rehandling of the goods, the Blanke company shipped goods direct to the customers of Charles Spies & Co.; that this was done at the request of Charles Spies & Co. and for their convenience, but that the goods were billed to them and they made the collection thereof; that they never saw the papers containing the advertisement of their goods which Eager directed sent to them, and had no knowledge that Johnston was representing himself as their agent. They have no recollection of the telegram from Johnston above set out, but, if the same was received, it was referred to Charles Spies & Co.

We might here remark that the telegram was produced by Mr. Seiter, who found it among the papers of Charles Spies & Co., a fact indicating that the Blanke company

sent it to them as relating to their business. We think that sending circular letters of instructions to salesmen of Charles Spies & Co., who had the exclusive right to sell their coffees in Nebraska, or shipping, direct to the customers, goods, orders for which were taken by Charles Spies & Co. or their salesmen, has little weight as evidence tending to show that the parties to whom such letters were sent or on whose order goods were shipped, were agents of the Blanke company and authorized to contract bills on their behalf.

The evidence in this case lacks many of the evidential facts disclosed in *Blanke Tea & Coffee Co. v. Graham,* 5 Neb. (Unof.) 534, and the *Blanke Tea & Coffee Co. v. Trade Exhibit Co.,* 5 Neb. Unof.) 358. In these cases there was direct evidence that Johnston was the agent of the company, and circumstances making it beyond dispute that that company knew that Johnston was professing to act as its general agent.

The evidence in this case does not, in our judgment, support the verdict of the jury, 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.

LOTTIE G. NORTON, APPELLANT, V. JAY H. BRINK, APPELLEE.*

FILED JANUARY 18, 1906. No. 14,093.

1. **Executory Contract: STATUTE OF FRAUDS.** The law is well settled that a contract within the statute of frauds, while executory, is not objectionable to the statute, but will be enforced when completely executed.

2. **Executed Contract: ACCOUNTING.** While not determining whether a parol contract for the formation of a partnership to deal in land is within the staututе of frauds and enforceable to the extent of allowing one of the parties to assert an interest in the land which was purchased under the agreement and the title taken in the individual name of one of the partners, it is *held* that, when the agreement is fully performed by a sale of the land, an action may be maintained against the partner who held title for an accounting for the profits realized.

3. The evidence of partnership in such case must be clear and satisfactory, and of such character as to convince the court of the existence of the partnership.

APPEAL from the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

John N. Dryden, E. C. Calkins and *Lewis P. Main,* for appellant.

F. E. Beeman and *H. M. Sinclair, contra.*

DUFFIE, C.

The petition in this case alleges that the plaintiff, who was engaged in the real estate business, and one C. D. Brink, father of the defendant, and who deceased prior to the commencement of this action, entered into a parol agreement of partnership for the purpose of purchasing a certain half section of land in Buffalo county; that Brink was to pay the purchase money and take title in his own name, the plaintiff to reimburse him for one-half the

*Rehearing allowed. See opinion, p. 575, *post.*

purchase price and 6 per cent. interest thereon upon demand; that the purpose of said partnership was to purchase said land and share in the profits arising from the use and subsequent sale thereof; that soon after purchasing it Brink died, and the defendant, as his sole heir, sold said premises and refused to account for her share of the profits due her under said partnership agreement. The defense is, in substance, the statute of frauds, and the further plea of former adjudication arising out of the filing by the plaintiff of a claim against the estate of C. D. Brink, said claim being based on her alleged right to a share of the profits.

The plea of former adjudication may be briefly disposed of. After the death of C. D. Brink the plaintiff filed a claim against his estate for her alleged share of profits on the sale of this land. Before any action was taken upon the claim, the probate judge was orally notified that plaintiff did not desire to press the claim in the probate court, and to dismiss it. Judge Hollowell, on his examination, testified as follows relating to the disposition made of the claim: "I would say there never was any hearing on the merits upon it in any way. Mr. Dryden, as attorney, filed it, and later he said he would withdraw it or it could be dismissed. I don't just know the language he used, but there having been a demurrer or objection filed to it, why, to make it consistent, I thought I would make some order upon it, as the claim and the order is labeled there 'Order on Claims,' I just made that order dismissing or disallowing the claim. There never was any hearing." It is quite evident from this testimony that no hearing upon the merits was had, and that what was done does not amount to an adjudication and does not constitute a bar to this action. The evidence is undisputed that C. D. Brink, deceased, purchased the east half of section 30, township 10 of range 15, for $4,000 from one Tomlison, through Warren Pratt, a land agent at Kearney. Pratt dealt with C. D. Brink alone. Mrs. Norton had no part in the negotiations for the purchase. She was not mentioned

in connection with the deal. Deceased paid for the land out of his own funds by a check drawn on the City National Bank, and obtained a deed from the owner. He died seized of the land, and the defendant, Jay H. Brink, as his sole heir at law, subsequently sold it for $6,400, less commission. There is no contract in writing, no memoranda or agreement of any kind relating to a partnership between them or to the purchase of this land on partnership account. It is true that this action being against the representative of a deceased person, Mrs. Norton was, under the provisions of section 329 of the code, incompetent as a witness to give full evidence in the case, and the court, upon the trial, rigidly enforced the provisions of the statute against her testifying to any transaction or conversation had between her and the deceased. To the extent that she was disqualified from relating what occurred between her and the deceased regarding any agreement between them, she was placed at a disadvantage, and had to rely entirely upon the evidence of third parties having no direct interest in the controversy. This is a disadvantage which the court cannot remedy or relieve, and her case must stand or fall, judged alone by the evidence which the law makes competent. If this evidence can be said to fairly and fully establish a partnership between the plaintiff and the decedent with reference to the purchase of this land, we have little doubt of her right to recover in this action, as the plea of the statute of frauds, as against an action brought, not for an interest in the land itself, but for her share of the profits arising from its purchase and sale, would have little force under the law, as we understand it. Even those courts which have held most strictly to the rule that a partnership agreement for dealing in lands must be evidenced by writing, when one of the partners seeks to assert an interest in land, the title to which rests in the other partner, have practically all agreed that a verbal contract, contemplating dealing in lands and within the statute of frauds, while executory, will be enforced where the terms under the agreement have

been completely executed before the commencement of the action. In the application of the statute of frauds the courts are now practically unanimous in recognizing a distinction in cases where a contract, void by the statute, has been fully executed, and one party seeks to retain the fruits of the dealing in defiance of his promise, and an action to enforce the agreement before full execution. Such an action is declared not to be within the purpose of the statute and not sheltered by its terms, and it has been held in a large number of decided cases that, where the parties have fully executed all parts of their agreement relating to or affecting interests in land, so that the courts are not asked to enforce anything with reference to the land itself, the rights and duties of the parties resulting from their dealings may be enforced, and each of them prevented from using that statute, not as a protection against, but as an effective means of, fraud. *Rice v. Roberts,* 24 Wis. 461; *Niland v. Murphy,* 73 Wis. 326; *Pireaux v. Simon,* 79 Wis. 392; *Trowbridge v. Wetherbee,* 11 Allen (Mass.), 361; *Bowen v. Bell,* 20 Johns. (N. Y.), *338; *Negley v. Jeffers,* 28 Ohio St. 90; *Bibb v. Allen,* 149 U. S. 481; *Smith v. Putnam,* 107 Wis. 155. The author of the notes to *Bates v. Babcock,* 16 L. R. A. 745 (95 Cal. 479), says in relation to the subject under discussion: "There is very little real conflict in the decisions upon this question. There are two lines of authorities each fairly consistent with itself and radically opposed to the other, which fact is caused, not by any conflict in principle, but by the different ends sought by the litigants. As a rule parol contracts for such partnerships are held valid, and all suits recognizing the existence of the partnership and seeking relief which may be legitimately sought by a partner are upheld, while on the other hand parol contracts for an interest in land are ignored, and suits brought to enforce them dismissed, although they may constitute a part of a partnership agreement."

As we view the case, the plaintiff's right of recovery depends entirely upon whether a partnership existed between

her and the decedent relating to this land. That no general partnership existed between them is conceded, and, if a partnership did exist, it went no further than a joint adventure in the purchase of this particular tract. The universal rule is that, where the question of partnership arises in a contest between partners and the interests of no third persons are involved, much stronger proof is required to establish it than when the question arises between the alleged partners and third persons. *Field v. Tenney,* 47 N. H. 513; *Smith v. Walker,* 57 Mich. 456; *Breckenridge's Appeal,* 127 Pa. St. 81. In a case of this character, where the alleged partner is dead and cannot speak for himself, and where it is sought to establish a partnership in land, the title to which stood in the name of the deceased and for which it is conceded he paid the whole consideration, it is quite evident that the proof required to establish the relation should be so clear and convincing as to fully satisfy the court that the relation existed. As we have heretofore intimated, there are many cases holding that parol evidence is incompetent to show that land standing in the individual name of one partner is partnership property in which the others have an interest, even though the partnership relation is wholly undisputed. "What safety would there be," say the courts holding this doctrine, "if the proposition were once established that, by alleging a partnership, the statute of frauds is entirely avoided, and the parties may then prove whatever interest in land they please by parol, against the absolute title of the deeds? What would hinder the separate real estate of any partner from being converted into partnership property, by proof of a mere verbal agreement? What would hinder the absolute title of any man, whether partner or not, from being changed into a trust estate in the same way? Nothing whatever. For the statute assumed that there were those ready, as the vice-chancellor said, to invade the rights of others by fraud and perjury. Let it be known, then, that a partnership avoids the statute, and all that would be necessary would be for the fraud and perjury to establish

that also, and then every title would be open to attack." *Bird v. Morrison,* 12 Wis. 153.

We recognize the full force of this reasoning, but still it cannot be denied that, where a partnership is conceded to exist, and where lands have been purchased with partnership funds, or where they are carried on the partnership books as part of the firm assets, all courts have recognized the interest of all partners in such lands, though the title may have stood in the name of one of the individual partners. As before stated, we incline to the view announced in *Smith v. Putnam,* 107 Wis. 155, that in cases of this character, where the agreement relating to the land has been fully completed and nothing remains to be done but to distribute the profits of a sale made, then the partnership relation may be established by parol, but we think that the parol evidence offered to prove that relation should be of the most convincing character.

With this statement of our views, we will now examine the evidence offered by the plaintiff on the question of her partnership relation with Brink, the decedent. This evidence is almost wholly in the form of admissions and declarations made by Brink previous to his death. G. S. Jones testified that about the last of August or the first of September, 1902, he spoke to the deceased about renting the Rice place (the name by which this farm was known), and spoke to him about fixing up the pasture and asked him what he was going to do with it; that Brink replied that he could not tell just how much he would put into the pasture, that he had a partner in the deal, and that after some further talk, when something about the house came up, Brink said: "Well, I don't know yet; my partner ain't here, but when she comes back here we will talk the matter over"; and finally he mentioned Mrs. Norton's name as his partner. "I spoke to him and said I understood Mrs. Norton and him owned it together, and he said: 'We do.' "

Philip Aultmeyer testified that Brink and Mrs. Norton drove to his place one Saturday morning about the last

of June, and they made several inquiries about the Rice farm—what kind of crops were on the place, and what rent was being paid; that Mrs. Norton and Brink were out to the place together two or three times; that on another occasion, when trying to rent part of the place, Brink told him that he could not act at that time, as another party was interested with him who was out of town; and that Mrs. Norton was out of town at this particular time.

R. M. Pruner, a carpenter, testified to a conversation in Mrs. Norton's office, while Mr. Brink was present. This conversation occurred sometime in the fall of 1902, and the witness says that "Mrs. Norton referred him (Brink) to me to do the work out on that place as a good man, and he said they was not just ready for it, or something to that effect; that was about all th .t was said in the office at that time." By the court: "Go back and tell us just what they stated? I didn't understand. A. Mrs. Norton and Mr. Brink? Q. Just what did they say? A. Mrs. Norton referred him to me as a good man to do their work. Q. What did she say? How did she say it? A. She said: 'That is a good man to do our work out there on the farm.'" On being further questioned, he stated that Mr. Brink afterwards asked him if he could do the work. "I told him I was busy at that time and couldn't tell him just when I could do it. I did not do any work out there."

E. B. Finch testified as follows: "I met Mr. Brink up by W. A. Downing's, and he asked me if I had heard from Oliver Norton, whether he was better. He was sick up in Dakota. I told him I had not directly, but I had just been down to the house, and the girl had a letter, and he was better. He said to me that he was very sorry that Mrs. Norton was not at home, as there were things they were interested in together, and that some of the things he was afraid she would not be pleased with; and one thing led to another, and I said I was trying my best to get some building done out on the ranch, and he says: 'That is just my trouble, the carpenter we expected to have

out on the Rice farm to do that work we didn't get, and some of the bridges are not in up there, and he knew it would worry Mrs. Norton to death.' Then I said to him: 'You and Mrs. Norton are partners interested together in that farm?' 'Oh, yes.' And our conversation drifted on to building and what an awful time we were both having." On another occasion this witness heard a conversation between Mrs. Norton and Brink of which he testified in the following language: "Well, I don't believe that I could give it in detail, only in a general way. They were talking of the Rice farm, and of the necessary repairs that had to be made on the place. I know on one occasion when they were going out to the Rice farm together the next day, and they talked over the fact of the repairs that had to be done, and they had to go out and see about it. I think that is all I remember of it."

The deposition of Josiah L. Keck was read in evidence on the part of the plaintiff, and he testified to several conversations with Mr. Brink. The substance of his testimony is the following: "I had learned in some way of a purchase of his of a large farm there formerly owned by Hubbell and known as the 'Hubbell' farm east of Kearney, and he told me that he had purchased that farm, as well as another farm known as the 'Frank Rice' farm. This latter farm he said he had purchased for himself and Mrs. C. O. Norton in partnership. He stated that he was confident that farm lands would be better in Nebraska generally, and particularly in Buffalo county, because they were lower in price there, and that he had bought these farm lands believing that values would very materially increase, and the Rice farm, as I have said, was purchased by him for himself and Mrs. Norton, as he told me. I cannot recall anything particular beyond what I have stated, except that Mr. Brink said to me that he had advanced all the money in the purchase of the Rice farm, and Mrs. Norton was to pay him her half when she had sold the crops off of her other farms."

One other circumstance ought to be stated. Mrs. Nor-

ton detailed a conversation she had with the defendant in her office after the decease of his father. She said: "In a conversation in my office, Mr. Brink told me that his father left a complete list of all the land he owned, which he had sent to him, I think to Vermont or New Hampshire, wherever he lived; that the list included the Hubbell property, which he bought after he bought the Rice land, and that the Rice land was not in the list that his father had sent him." She detailed a later conversation with Brink in the presence of Mr. Beeman and Mr. Calkins in the following language: "I said that I thought that from the fact that the Rice land not being in the list of land that his father had furnished him, would be evidence of the fact alone that it was a separate matter, and would establish my claim to the partnership in the land or my interest in the land. I then said to Mr. Calkins that Mr. Brink had assured me that the Rice land was not included in any list he had, and that his father, when he bought the Hubbell land in the latter part of July, had sent him a memorandum of the farm. I turned to Mr. Brink and asked him if that was not true, and he said it was. Mr. Beeman then interposed an objection, and said he didn't know what he was talking about. Mr. Brink said he did know what he was talking about, because it was true that he had no list of the Rice land; that the list that his father had sent him east, where he lived, did not include the Rice land."

Whatever may have been the agreement between Mrs. Norton and the deceased, it is quite evident from the above evidence, which is wholly undisputed, that he recognized her partnership interest in the land in question. The witnesses, so far as we are able to judge from a reading of the bill of exceptions, were entirely disinterested and honest in the statements made. While recognizing the danger of establishing a rule which allows a partnership interest in land to be established by parol evidence, and wishing it understood that such evidence must be of the most satisfactory character, we do not see how, in this case, we can

come to any other conclusion than that the plaintiff has established her case by the quantum of evidence which the circumstances demand. It is not disputed that she and her husband were in the real estate business for many years prior to her husband's death; that on account of his infirmities she attended to outside matters, and had a thorough knowledge of the values of land in Buffalo county; that she was a woman of means and had an extensive credit at the banks, circumstances which explain what may be the unusual character of a woman dealing in real estate.

We recommend that the judgment of the district court be reversed and the cause remanded for an accounting between the parties.

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 an accounting between the parties.

REVERSED.

The following opinion on rehearing was filed December 7, 1906. *Former judgment vacated. Judgment of district court affirmed.*

1. **Partnership: EVIDENCE.** A parol agreement between two persons to purchase a single tract of land together, or "in partnership," where the purchase is finally made by one of them, who pays the whole of the purchase price, and takes the title to himself, the other simply agreeing to pay him one-half thereof on demand, does not create a partnership between such persons.
2. **Statute of Frauds.** Such a contract is within the inhibition of section 3, chapter 32, Compiled Statutes 1905, commonly called the statute of frauds, and is void.
3. **Trusts.** In such a case, no resulting trust arises in favor of one who contributes nothing to the payment of the purchase price.
4. **Reversal.** Former opinion herein, *ante*, p. 566, overruled.

BARNES, J.

This case was originally submitted to department No. 2 of the commission, and an opinion was written, filed and

announced, reversing the judgment below. See *ante*, p. 566. A rehearing has been allowed, the case has been reargued and submitted to the court, and the question now is, shall we adhere to our former decision? In order to determine that question, it is proper to set forth the contract sued on, which the appellant claims has been established by the evidence. The action was commenced by the appellant against Jay H. Brink, the son, and only heir at law, of one C. D. Brink, deceased, and the petition recites, in substance: "That the said plaintiff and said Brink, the deceased, entered into a verbal contract, wherein and whereby it was mutually agreed that the west half of section 30, township 10, range 15 west in Buffalo county, should be purchased in partnership, each party to pay one-half of the purchase money, expense of operating the same, and, upon sale, divide the profits or loss, as the case might be; that it was further agreed that said Brink should advance the entire purchase money, take the legal title in his name, and that plaintiff should, upon demand, reimburse the said Brink for half of the purchase price so advanced, with interest at 6 per cent. per annum." The petition further alleges: "That said premises were purchased for the sum of $4,000, said Brink paying the entire purchase price, the legal title being vested in the said C. D. Brink, as aforesaid. * * * That on the 30th day of November, 1902, and before any demand had been made for the repayment of the purchase money, and before any settlement had been had between the plaintiff and the said C. D. Brink in respect to said partnership, as aforesaid, the said C. D. Brink departed this life, leaving his son his sole heir at law, the defendant herein; that since the death of the said C. D. Brink, the plaintiff has at all times been ready and willing to pay her share of the said purchase money, and interest upon the same, but that the defendant refused, and continues to refuse, to accept the same; that on or about the 15th day of May, 1903, said defendant sold said premises for the sum of $6,400, and refused to recognize said partnership agreement, and refuses to pay the

plaintiff any portion of the profits realized upon the said land, as aforesaid." The petition concludes with a prayer for an accounting of the purchase money, for the rents and profits, and that the defendant be required to pay her the sum of $1,200 with interest from May 15, 1903, as her share of the profits realized from the sale of said lands. Upon the contract thus set forth the right of the appellant to maintain this action must stand or fall.

Her first contention, briefly stated, is that the contract established a partnership between herself and the deceased, and comes within the rule announced in *Dale v. Hamilton,* 5 Hare (Eng.), *369; *Richards v. Grinnell,* 63 Ia. 44; *Pennybacker v. Leary,* 65 Ia. 220, and other cases, which hold that a contract entered into for the purpose of speculating in lands is not within the statute of frauds and need not be in writing; that where the parties have contracted to engage in the venture of buying lands which are to be held in trust for both of them, and they are to have equal interests and shares in the common speculation, such agreement constitutes a partnership, and an action by one partner against the other for an accounting as to the partnership transactions may be maintained, although the partnership funds may be invested in land. While the authorities are divided on this question, we deem it unnecessary to express any opinion as to the soundness of this rule, because it seems clear to us that the agreement here in question is not embraced therein. It will be observed that nothing is said in this contract about entering into a general or special partnership, or that the purpose thereof was to sell the land for profit. Its language is: "It was mutually agreed" that said land "should be purchased in partnership." Buying land together does not make the purchasers partners, nor does the transaction constitute a partnership, with its rights, duties and obligations, as defined by law. "A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals, for the purpose of joint profit." 1

Bates, Law of Partnership, sec. 1. To constitute a partnership there must be a mutual agency, and a communion of profit and loss, and the parties must assume the partnership relation. It seems clear to us that the contract to purchase the land in question as partners, conceding for the purpose of this opinion that such contract was established by the evidence, together with the purchase of the land by Brink, the deceased, and payment therefor with his own money, did not establish a partnership between the appellant and the deceased. Again, the appellant did nothing upon her part, contributed nothing, risked nothing, and there was no consideration to support the contract. It will be observed that, under the agreement, a sale of the land was not obligatory upon anyone. In short, there is nothing in the contract that distinguishes it from the ordinary agreement of two or more persons to purchase land together, not for the profits of speculation on resale, but for the profits arising out of the ownership of the land itself, and this must be held to be the true meaning of the contract. But, however this may be, there was no sale of the land by the alleged partnership; neither was there any sale of it by the deceased who, it is claimed, was one of the partners, and by his death the partnership, if one ever existed, was terminated. The petition discloses that Brink died on the 30th day of November, 1902, and within five months after he purchased the land in question. After his death the partnership could not sell the land, because, if there ever was a partnership, it had then ceased to exist. The appellant could not sell the land as a surviving partner, because, according to the theory advanced by counsel to support her case, she had no interest or estate therein. At any rate, she had no title to convey. Again, counsel has not pointed out to us any rule of law or equity that authorizes the appellant to maintain a suit for an accounting against the heir of her alleged deceased partner. It seems to us that this case falls within the rule announced in 1 Bates, Law of Partnership, sec. 302, where it is said: "A parol agreement by the buyer of lands to

admit another into partnership with him is void under the statutes of frauds, as not different from the contract of buyer and seller."

There is a clear distinction between the case at bar and those cases where a partnership was formed to deal or speculate in lands, and lands are bought with partnership funds, in pursuance of such an agreement. In *Levy v. Brush,* 45 N. Y. 589, it was held that a verbal contract between two parties by which one is to purchase land on joint account of both, and each to contribute a moiety of the purchase money, the title to be made to both, is void under the statute of frauds. In that case, the defendant bid off the land in his own name, and took a contract therefor, but refused to convey one-half of the contract to the plaintiff, and it was held that no action would lie to compel the execution of the agreement, because such an arrangement did not constitute a partnership between them; that the defendant had made no valid contract, and had a perfect right both in law and equity to refuse performance.

In our former opinion, *ante,* p. 566, it was said, on the authority of *Smith v. Putnam,* 107 Wis. 155, "that in cases of this character, where the agreement relating to the land has been fully completed and nothing remains to be done but to distribute the profits of a sale made, then the partnership relation may be established by parol," and the judgment of the trial court was reversed mainly upon that authority. It would seem that the learned commissioner who wrote the opinion overlooked the allegations in appellant's petition charging the defendant with refusing to recognize her rights, and with repudiating the alleged contract of partnership. Again, an examination of *Smith v. Putnam, supra,* discloses the fact that the contract there was an oral agreement between the plaintiff and the defendants that plaintiff should investigate desirable timbered lands, and, on defendants' approval, they would purchase, and either sell or log them. The agreement was that the plaintiff should take charge of the driving of the logs, which contemplated his rendering material and valuable services as

his contribution to the partnership funds. They entered upon the agreement, and the plaintiff did render services of value to the partnership. It was held that this agreement constituted a partnership, and, where the contract had been fully completed and executed, and nothing remained but to divide the profits, an action for an accounting and to recover such profits would lie. If the rule there announced could be applied in the case at bar, it could be applied to any case of oral contract to purchase land on joint account. If the transaction would otherwise be within the statute of frauds, it would only be necessary for the parties to stipulate that it should be a partnership, and the statute would be avoided. So we are constrained to hold that the contract here in question did not create or constitute a partnership.

2. Appellant next contends that, while the contract does not create an interest in the land in question, and therefore is not within the statute of frauds, yet by the agreement, and the facts relating to the purchase, a resulting trust was created in her favor; that by reason of such trust relation she acquired a half interest in the land, and is entitled to recover one-half of the profits arising from the sale thereof, from the defendant, who took the title to the land by inheritance. It would seem that her position is not maintainable. The fact that the appellant paid or contributed nothing toward the purchase price of the land is fatal to her contention. The rule is that, in order to establish a resulting trust of this class, it is necessary that the person paying the purchase money should have actually paid it as his own, as a part of the original transaction, at or before the time of the conveyance. The whole foundation of resulting trusts of this class is the ownership and payment of the purchase money by one, when the title is taken in the name of another. 10 Am. & Eng. Ency. Law (1st ed.), sec. 8; 2 Pomeroy, Equity Jurisprudence (2d. ed.), sec. 1,037. And we are not aware that the soundness of this rule has ever been seriously questioned.

In *Brooks v. Fowle*, 14 N. H. 248, it was said: "A pur-

chase of real estate completed on the credit of two and afterwards paid for wholly by one of them, does not, of itself, give rise to a resulting trust."

In *Hackney v. Butts,* 41 Ark. 393, it was held that, where no money is advanced, and there is nothing more in the transaction than is implied from the violation of a parol agreement, equity will not decree the purchaser a trustee. The rule of equity is that a resulting trust must have arisen at the time the purchase was made, and the money or consideration must have been paid, or secured to be paid, by such third party, at or before the purchase. *McElroy v. Swope,* 47 Fed. 380. The same rule has prevailed in this court since the decision of *Hoehne v. Breitkreitz,* 5 Neb. 110. In *Cameron v. Nelson,* 57 Neb. 381, Commissioner IRVINE said:

"Next, there are cases where two men join in the purchase of land, taking title in one, who is to resell and divide the profits. Such contracts are usually enforced, although not in writing, but it will be seen there is in such cases a resulting trust from contributing to the purchase money."

It is urged that the case of *Johnson v. Hayward,* 74 Neb. 157, sustains our former opinion. An examination of that case discloses that it was one where a person employed an agent to negotiate the purchase of certain real estate for him; that the agent, while acting as such, became himself the purchaser; and it was held that he should not be permitted, without his principal's knowledge and consent, to become the purchaser of the same property for himself, and, if he makes such purchase, he will be considered as holding the property in trust for his principal. So, it seems clear that the rule there announced has no application to the facts in the case at bar. We are therefore of opinion that the contract, the purchase of the land, and the facts surrounding the transaction were insufficient to create a resulting trust in favor of the appellant.

Counsel for the appellee insists that the appellant's right to recover has been adjudicated by the county court of

Buffalo county, in the matter of the claim filed by her against the administrator of the estate of C. D. Brink, on account of the purchase of the land in question, adversely to such right; that the judgment in that case is a bar to her right to recover in this action. We deem it unnecessary to determine that question, because we are constrained to hold: First, that no partnership was created by the transaction in question between the appellant and the deceased, C. D. Brink; that the contract relied on by the appellant is within the inhibition of section 3, chapter 32, Compiled Statutes 1905 (Ann. St. 5952), commonly called the statute of frauds. Second, that no resulting trust in favor of the appellant was created thereby. It also seems clear that, in order to maintain this action against the heir of the deceased, appellant must have had an interest in the land in question, which she could follow into his hands, and either compel him to convey to her her interest therein, or account to her for the profits arising from the sale thereof. For the want of such interest, as well as for the other reasons above stated, she cannot maintain this action.

Our former judgment is therefore vacated and the judgment of the district court dismissing the appellant's cause of action is affirmed.

JUDGMENT ACCORDINGLY.

LETTON, J.

I concur in the conclusion reached. I think the action cannot be maintained for two reasons:

(1) Granting that the relation between the plaintiff and the deceased was a partnership relation, the plaintiff's interest was not in the land itself, but in the profits derived from the transaction. This was a personal liability of the deceased, and, consequently, a liability of his estate, for which the administrator was answerable out of the estate. To hold that the plaintiff could follow the land itself would be to say that the alleged oral contract gave her an interest in the land, which would be obnoxious to the statute

of frauds. If the alleged partnership had been to deal in live stock or merchandise, the title to which was taken in the name of the deceased, his estate would be liable to account to the other partner. The fact that the property, which is alleged to have been the subject of the partnership, was real estate does not change the rule. It is not the property itself, but her interest in the profits derived from the same, which the plaintiff is seeking to recover, and this, in my view, is the only theory upon which she may maintain such an action. *Everhart's Appeal,* 106 Penn. 349; *Bunnel v. Taintor,* 4 Conn. 568; *McElroy v. Swope,* 47 Fed. 380.

(2) The plaintiff properly filed her claim in the county court of Buffalo county against the estate for her share of the profits. A demurrer to this claim was filed, was sustained by the county judge, and her action dismissed. No appeal was taken, and this judgment stands in full force and effect. The county judge testified, in substance, that the attorney for plaintiff said he would withdraw it or it could be dismissed, but that, a demurrer or objection having been filed, he thought he would make some order upon it, and he made the order dismissing or disallowing the claim; that there never was any hearing upon the merits. This testimony is not sufficient to vacate, set aside or annul the adjudication of the claim, as shown upon the records. If the judgment was inadvertently rendered or made by mistake, the plaintiff's remedy was to have it set aside by the means provided by law for that purpose. Until this is done, it stands as an adjudication, and cannot be obliterated by parol testimony, either of the judge who rendered it or of any other individual. As it now stands, it finally adjudicates the plaintiff's claim against her, and she cannot maintain another action upon the same cause.

CLAUS F. POGGENSEE V. WILLIAM FEDDERN.

FILED JANUARY 18, 1906. No. 14,062.

1. **An assignment of causes for trial** made at the opening of a term, which does not fix a day certain for the trial of each cause, is generally provisional and subject to such changes as may be required to meet unforeseen contingencies, and attorneys and litigants are chargeable with notice of that fact.
2. **Trial: ADVANCEMENT OF CAUSES.** In the absence of special circumstances, a party has no right to complain because his case is advanced on the assignment as a result of a continuance of a case preceding it.
3. **Dismissal: VACATING.** Where neither the plaintiff nor his attorney are in attendance when the cause is reached for trial, a judgment of dismissal should not be set aside, in the absence of a showing of due diligence.
4. **Evidence** examined, and *held* insufficient to show due diligence.

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

John Bridenbaugh, for plaintiff in error.

C. B. Willey, contra.

ALBERT, C.

This is a proceeding in error brought to reverse a judgment of dismissal. The case was at issue, and was placed on the trial list for the March term of the district court for 1904. On the first day of the term the docket was called and causes assigned for trial; neither the plaintiff nor his attorney was present. Plaintiff's case stood fourth in the order of trial. On the second day of the term the cause next preceding plaintiff's was continued, which left plaintiff's standing third. On the fifth day plaintiff's cause was called for trial, but neither he nor his attorney was present. The trial proceeded in their absence and resulted in the judgment complained of. A

motion for a new trial was filed based on four grounds: (1) Irregularity, in that "said cause was assigned for trial, out of its turn, in the absence and without the knowledge or consent of the plaintiff or his attorney." The second and third grounds relate to misconduct of the attorney for the defendant, but are not supported by the record or evidence. (4) Surprise, in this, that "four other causes were marked for trial on the first call of the docket * * * and it was represented to plaintiff, himself being sick and under the doctor's care, and fully believing that this cause could not be reached during the week, and relying on the promise of defendant's counsel to notify plaintiff's attorney should said cause be assigned earlier than the second week, plaintiff was induced to not be in attendance in court and remained away," etc. The motion was overruled.

The first contention in this court is that the court erred in not fixing a day certain for the trial, and in support of that contention our attention is called to section 323 of the code, which provides that "the trial docket shall be made out by the clerk of the court at least 12 days before the first day of each term of the court, and the actions shall be set for particular days in the order in which the issues were made up, whether of law or of fact, and so arranged that the cases set for each day shall be tried as nearly as may be on that day." Assuming that a litigant has the right under the section quoted to have his cause set for trial on a particular day, there is nothing in the record to show that it was not thus set for trial. This section does not require that a case be tried on the particular day for which it is assigned, but, at most, that "the cases set for each shall be tried as nearly as may be on that day." Every practitioner knows that an assignment of cases for trial is seldom, if ever, carried out as made, because continuances, settlements and other unforeseen contingencies arise which compel a change. Such changes are to be expected, and, ordinarily, litigants and their attorneys are expected to be prepared for them.

The next contention is that the court erred in putting the cause on for trial out of its order, and without notice to the plaintiff. The cause was called for trial out of its order, only to the extent that it took the place of the one next preceding it when the latter was continued. As before intimated, the assignment was only provisional. The plaintiff and his attorney were bound to take notice of that fact, and that one or more of the preceding cases might be continued or, for some other reason, lose their place on the assignment. They had no right to assume that the assignment would be carried out to the letter, and absent themselves from the courtroom resting on that assumption.

The last contention is that the court erred in overruling the motion for a new trial. The affidavits in support of the motion, as well as those in opposition thereto, are preserved in the bill of exceptions. They show that neither the plaintiff nor his attorney was in attendance during the term, until after the case was tried; that, instead of taking the ordinary precautions to ascertain the state of the docket, they relied on mere assumptions and opinions, and upon information derived from no source upon which they had a right to rely. The charge in the motion that defendant's attorney had promised to notify counsel for plaintiff in case the cause was reached before the second week is wholly unsustained. The affidavits also show, we think, that the absence of plaintiff and his attorney from the trial was without any sufficient justification or excuse, and we think the motion was properly overruled. Much is said in this connection as to the duty of courts to see that justice is done in each case, and much that meets with our unqualified approval. But a court would take a narrow view of this duty that would require a defendant to attend, and pay counsel to attend, term after term, awaiting the convenience or whim of his adversary to go to trial. Besides, a court owes some duty to the public. It is to the interest of the public that the work of the courts be conducted with due expedition and with as little

expense as is consistent with a proper discharge of their functions. This forbids that a jury should be kept in waiting day after day, merely because attorneys and litigants have not taken the trouble to inform themselves as to the state of the docket. Insistence upon the orderly conduct of public business occasionally works individual hardship, but the maxim of the greatest good to the greatest number fully justifies it.

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.

MARTHA J. SHOEMAKER, APPELLEE, V. COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, OF LONDON, APPELLANT.

FILED JANUARY 18, 1906. No. 14,380.

1. **Instruction**: VERDICT: EVIDENCE. Where the jury is instructed that the plaintiff is required to establish a certain fact in order to entitle her to a verdict, and there is no evidence tending to establish that fact, a verdict in her favor will be set aside.
2. **Pleading**: INSTRUCTION: EVIDENCE. Where the plaintiff pleads payment of an insurance premium, and the court instructs the jury that such payment must be established by the evidence to entitle the plaintiff to a verdict, the requirement is not satisfied by evidence tending to establish a waiver or postponement of the time of payment.
3. **Principal and Agent**: ADMISSIONS OF AGENT. It is not every admission or declaration of an agent that is binding on his principal. The general rule is that the principal is not bound by such admissions or declarations, unless they are made during the transaction of business by the agent for the principal, and within the scope of the agency.
4. **Evidence** examined, and *held* insufficient to sustain the verdict.

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

Sylvester G. Williams and *Field, Ricketts & Ricketts,* for appellant.

Lamb & Wurzburg and *George A. Adams, contra.*

ALBERT, C.

This case is here for the third time. The first opinion disposing of the case may be found in 63 Neb. 173; the second in 72 Neb. 650. The theory upon which the case was presented the first time was abandoned, so that the first opinion throws no light on the present controversy. The second opinion settled the question of the sufficiency of the facts stated in the amended petition to constitute a cause of action. The substance of the allegations of the amended petition is, that on the 5th day of January, 1895, the defendant agreed to insure, and did insure, a certain dwelling house belonging to the plaintiff against loss or damage by fire to the amount of $1,200, and to issue a policy of insurance covering such property, but that the defendant wrongfully refused, and still refuses, to deliver such policy to the plaintiff, and that in April, 1895, and within the term for which the defendant agreed to insure said property, the said dwelling was destroyed by fire, and the defendant refused, and still refuses, to pay said loss, although the plaintiff has given notice and made due proof thereof. The answer, for present purposes, may be said to amount to a general denial. A jury found the issues in favor of the plaintiff and the defendant appeals.

It will be observed that this is not an action on a policy of insurance. It is not claimed—certainly the evidence does not show—that the defendant ever issued a policy of insurance covering the property in question. The case was brought and tried on the theory that, the defendant having offered to insure the property for a certain premium, and the plaintiff having accepted such offer and

paid the premium, the defendant is bound by a contract of insurance. The court instructed the jury on that theory, and, among other things, that the burden was upon the plaintiff to establish certain facts, and, among those facts, the following: "That the plaintiff agreed to pay, and did pay, the premium to the defendant, the 'Commercial Union Assurance Company.'" It is now claimed that there is no competent evidence tending to establish the fact of payment of the premium by the plaintiff to the defendant. This claim seems to be well founded. It is true there is evidence, admitted over the defendant's objection, that the plaintiff paid the amount of the premium to a third party, who undertook to remit it to the defendant, but he never remitted it. He was not the agent of the defendant, nor was the defendant a party to the arrangement between him and the plaintiff in regard to remitting the money. Under the circumstances, this evidence should have been excluded, because it was calculated to mislead the jury. But, even if permitted to stand, it merely shows payment to a third party, and does not tend to prove payment of the premium to the defendant.

There is another item of evidence that should be noticed in this connection. Plaintiff's claim that the defendant offered to insure the property for a specific premium is based on a letter which she received from Crutcher & Welsh, who at the time were agents of the defendant. The letter is as follows:

"Kansas City, Mo., Jan. 5, 1895.

"Martha J. Shoemaker, 2209 S. 13th St., Lincoln.

"To Crutcher & Welsh, Dr.

"Insurance. 402, 403, 404 N. Y. Life Bldg.

"To insurance premium advanced on policy No. ——— 11-30-94, of Commercial Union Assurance Company, Limited, held as collateral to loan No. 038,701. Sum insured is $1,200. Rate 41.20. Term 3 yrs. If this amount is promptly remitted the policy will be filed with the receivers of the Lombard Investment Company for the benefit of the present owners of the mortgage. If not

paid the receivers will call on the mortgage holder for payment and the amount will be held by him as a lien against the property."

The mortgage referred to in the foregoing was one which the plaintiff had given on the property in question to the Lombard Investment Company, and by it transferred to a third party. The mortgage contained an insurance clause, and made the Lombard company plaintiff's attorney in fact, for the purpose of effecting or renewing insurance on the property for the benefit of itself or its assigns. It seems to us the letter is ineffective either to prove the fact of payment of the premium or of an offer on the part of the defendant to insure the property. If the letter be treated as that of the company, at most it shows a waiver of payment of the premium as a condition precedent to the contract of insurance becoming effective. But the plaintiff does not plead a waiver, but payment of the premium, and the court instructed the jury, in effect, that payment of the premium was one of the facts the plaintiff was required to establish to entitle her to a verdict. That the letter in question does not tend to establish that fact seems clear.

Besides, we do not think this letter should be treated as coming from the defendant or in any way binding upon it. It is true that Crutcher & Welsh, who sent the letter to the plaintiff, were agents of the defendant. But it is not every statement of an agent that is binding on his principal. The general rule is that the principal is not bound by the admissions or declarations of his agent, unless such admissions or declarations are made during the transaction of business by the agent for the principal, and within the scope of the agency. 1 Jones, Evidence, sec. 256. A valuable note on this point may be found following *People v. Vernon*, 95 Am. Dec. 1, 72 (35 Cal. 49). The letter purports to be a statement of an account between the plaintiff and the agents, personally, for a premium advanced by them for the plaintiff. In other words, it amounts to a statement that the agents had paid

their principal an insurance premium for the plaintiff and a demand on her for reimbursement. The statement, therefore, is not a declaration or admission made by the agents during the transaction of business by them for their principal, and within the scope of the agency, but made while they were acting solely on their own account, and dealing with a matter that concerned them and the plaintiff alone. That being true, the statement falls within the rule above stated and is not binding on the defendant. Without expressing any opinion as to the sufficiency of the evidence to sustain a finding on other questions submitted to the jury, it is clear to us that there is a total lack of evidence to sustain a finding of payment of the premium by the plaintiff, and, as that is one of the facts essential to plaintiff's recovery, under the theory upon which the cause was submitted, the failure of the evidence upon that point is fatal, and we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

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.

ST. JAMES ORPHAN ASYLUM, APPELLEE, V. MARY B. SHELBY ET AL., APPELLANTS.

FILED JANUARY 18, 1906. No. 14,013.

1. **Jurisdiction: QUIETING TITLE.** The original jurisdiction of the district court over an action to quiet the title to real estate is not affected by the fact that incident thereto there is involved the construction of a will.

2. **Wills: AMBIGUITY: PAROL EVIDENCE.** Parol evidence is admissible

to explain a latent ambiguity in a will, where such evidence is necessary to enable the court to ascertain the intention of the testator.

APPEAL from the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

H. P. Stoddart, for appellants.

Smyth & Smith, contra.

JACKSON, C.

Joseph Creighton died leaving a will as follows:

"Know all men by these presents, that I, Joseph Creighton, of the City of Omaha, in the state of Nebraska, being of sound disposing mind and memory, do hereby make, publish and declare this my last will and testament, as follows:

"Imprimis, after the payment of all my debts and the expenses of my funeral and the erection at my grave of a proper stone to mark the same, I give and bequeath unto the children of my daughter, Mrs. Mary Bridget Shelby, certain lots situate in the city of Omaha aforesaid, whereof I am seized, that is to say, lot eight (8) in block twenty-two (22) lot two (2) in block twenty-two (22) and lot four (4) in block sixty-one (61).

"Item. I hereby give and bequeath unto the Rt. Reverend James O'Connor, Bishop of Omaha, if he shall survive me, the following lands situate in the county of Douglas in said state, that is to say, the northwest quarter of the northwest quarter of section two (2) in township fifteen (15) north of range thirteen east of the sixth principal meridian, the southwest quarter of the northwest quarter of section thirty-five (35) and lot four (4) in said section both in township sixteen north of range thirteen (13) aforesaid, and also all that certain piece of land situate in Dallas county in the state of Iowa known as the east half of the northwest quarter of section twenty (20) in township eighty (80) north of range twenty-eight (28). If

the said Bishop O'Connor do not survive me then my will is that the said land shall go to his successor as bishop of Omaha. My wish and direction is that the said Bishop O'Connor, if he survive me, or his said successor as bishop of Omaha, apply the said lands and the proceeds arising from the same or the sale thereof to some charity according to his judgment, but I prefer that the same be applied to the establishment or maintenance of an orphanage.

"Item. Subject to the charge thereon mentioned in the next succeeding item of this my will, I do devise, bequeath and will all the rest, residue and remainder of all the property of which I may die seized or possessed of to my said daughter, Mary Bridget Shelby, in trust for her children or such of them as shall be living at her death, to take, have and hold the same and every part thereof and the rents, issues, profits and interest arising therefrom for the said children.

"Item. All of the property mentioned in the last above item shall be charged with the sum of fifteen dollars per week and to be paid by my said daughter for the support and maintenance of the sister of my wife, Mary Furlong, so long as she may live. My said daughter shall be executrix of this my last will and testament."

The testator never owned the southwest quarter of the northwest quarter of section 35, township 16, range 13, described in the bequest to the bishop of Omaha, but, in addition to the other real estate described in the will, he did own at the time the will was executed, and died seized of, the southwest quarter of the southwest quarter of that section, and, other than the tract last described and that correctly described in the will, he owned no other real estate. Bishop O'Connor did not survive the testator, and at his death was succeeded by Rt. Reverend Richard Scannell as bishop of Omaha, who after the death of Creighton deeded to the plaintiff the real estate described in the bequest to Bishop O'Connor. The defendants, Mary B. Shelby and her children, after the will was admitted to probate, entered into the possession of the southwest quar-

ter of the southwest quarter of section 35, township 16, range 13, and claim title to the same under the residuary clause of the will. The plaintiff claims title through the conveyance by Bishop Scannell, and instituted this action in the district court for Douglas county, reciting in its petition that Joseph Creighton died October 16, 1893, leaving the will set out above; that the will was admitted to probate as the will of Creighton; alleging title to the disputed tract in Creighton, both at the time of the execution of the will and his death, and alleging that Creighton did devise, and intended to devise, for the purpose stated in the will, that tract; recited the death of Bishop O'Connor and that the Rt. Reverend Richard Scannell became his successor; set out the conveyance from Bishop Scannell to the plaintiff; that the defendants had entered into the possession of the disputed tract and claimed title thereto; that their possession was wrongful and constituted a cloud upon the title of the plaintiff to that tract, and concluded with the following prayer: "That said mistake in the description of said ¼ section be corrected; that the said will be construed to convey the title of said Joseph Creighton to the said S. W. ¼ of the S. W. ¼ of said section 35 to the said Bishop Scannell, and that the said Bishop Scannell has conveyed the said title to this plaintiff; that the said claims of the said defendants, whatever they may be, together with said mistake in said will, be declared to be a cloud on the plaintiff's title; that the said cloud be removed; that plaintiff's title be quieted; that plaintiff be put in possession of said property, and for such other and further relief as justice and equity may require." There was a decree in the district court conforming to the prayer of the petition, and the defendants have appealed.

Two questions are presented by counsel for appellant: First, that the district court had no jurisdiction of the subject matter; and second, that the facts stated in the petition are not sufficient to constitute a cause of action.

It is urged that the action is one to secure the construc-

tion of a will and over which the county court has exclusive original jurisdiction. There should no longer remain a doubt as to what original jurisdiction is vested in the county court in the matter of settlement of estates. In *Boales v. Ferguson,* 55 Neb. 565, an action involving the accounts of an administrator, it was held that the county court had exclusive original jurisdiction. In *Williams v. Miles,* 63 Neb. 859, the question was as to the jurisdiction to vacate an order admitting a will to probate and for leave to present and have filed an alleged posterior will, and it was held that the county court had exclusive original jurisdiction. While in *Reischick v. Rieger,* 68 Neb. 348, an action by the administrator of the estate of a deceased heir against the executor of an estate, in which it was claimed that the representatives of the deceased had an interest and for the recovery of money only, it was held that the county court had original jurisdiction. And, finally, in *Youngson v. Bond,* 69 Neb. 356, the holding was that a suit by the administrator with the will annexed for the construction of a will, in order to enable him to administer the estate properly, was not maintainable in the first instance in the district court, and that the county court was not precluded from construing a will, in a proper case, and determining the effect and meaning of a devise of lands, so far as is necessary to give proper directions to an executor or administrator with the will annexed, but that the construction of the will in such a case is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue; that it adjudicates nothing beyond his rights and liabilities in the execution of his office; that controversies between adverse claimants under the devise, or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby. To the same effect is *Anderson v. Anderson,* 69 Neb. 565. Our attention has not been called to any authority holding that the district court is without original jurisdiction in actions such as the one here involved, although incident thereto the court

is required to construe a will. In *Reischick v. Rieger, supra,* it was said by Mr. Commissioner ALBERT:

"We do not wish to be understood, however, as holding that the district court has no jurisdiction, under any circumstances, to construe a will. On the contrary, we can readily conceive of actions of which the district court has original jurisdiction, wherein the construction of a will would be necessarily involved."

The plaintiff in this action seeks to quiet its title to the real estate in controversy. In such an action the district court has original jurisdiction, and such jurisdiction is not defeated by the fact that there is necessarily involved in the inquiry the construction of a will.

The second contention is based upon the proposition that the cause of action stated in the petition is one which could not be sustained except by the admission of oral evidence for the purpose of correcting a mistake in a will. The case of *Seebrock v. Fedawa,* 33 Neb. 413, seems to be decisive of the question. In that case the testator devised lots 4, 9 and the west half of 10, in block 32, in the city of Lincoln. He was not the owner of lot 4, but did own lots 3, 9 and the west half of 10, and those were all of the lots possessed by him in that block, and it was held that lot 3 passed by the will. Mr. Justice MAXWELL, speaking for the court, said:

"While it is true that oral evidence cannot be admitted to change the language of a written instrument, and particularly of a will, yet the universal rule at the present time is to admit oral proof to show that one term was used for another, or that an essential term, to make the definition perfect, was omitted or erroneously stated. For the purpose of arriving at the intention of the testator, therefore, the will is to be read in the light of the surrounding circumstances. * * * The rule in construing wills is, that although there may be errors in the description, either in the legatee or the subject matter of the devise, it will not avoid the bequest if enough remains to show with reasonable certainty what was intended. * * *

It is evident that the testator intended to devise all the lots he possessed in block 32 in the city of Lincoln, and that lot 3 was intended in place of lot 4."

The principle there invoked was involved in *Second United Presbyterian Church v. First United Presbyterian Church,* 71 Neb. 563. We entertain no doubt that the testator in this case intended to devise the property in question to the bishop of Omaha for the purposes stated, and under the authority of *Seebrock v. Fedawa,* we so construe the will.

In the closing paragraph of the brief on behalf of the appellants, it is suggested that there is no competent evidence to support the finding in favor of the appellee, because the deed from the bishop to the appellee carries the same description as that found in the will. The deed, however, recites the conditions of the will and is doubtless sufficient to convey whatever title the grantor received from the testator.

The decree 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.

ELIZA B. HAWLEY ET AL., APPELLANTS, V. GEORGE VON LANKEN ET AL., APPELLEES.

FILED JANUARY 18, 1906. No. 14,071.

1. **Equity: LACHES.** - Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations.

2. **Laches.** In applying the doctrine of laches the true inquiry should be whether the adverse party has been prejudiced by the delay in

bringing the action and whether a reasonable excuse is offered for the delay.

3. ———: DEMURRER. Where the laches of the plaintiff and the staleness of his claim are apparent from the petition, objection may be taken by demurrer.

4. Courts will take judicial notice of the changed conditions during the past thirty-eight years as affecting the values of real estate, and of the probability that during that time many witnesses who were of mature years and discerning judgment in the year 1865 have either died or permitted the ordinary events of that period to pass from their memory.

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

Herman Aye, R. S. Hall, G. W. Covell and *Wright & Stout,* for appellants.

John C. Cowin, W. C. Walton, D. Z. Mummert, I. C. Eller, Clark O'Hanlon and *E. B. Carrigan, contra.*

JACKSON, C.

The plaintiffs seek in this action to set aside a deed of conveyance executed by their ancestor, John Irwin. It is charged in the petition that Irwin purchased the real estate involved September 7, 1857; that he made a pretended deed of the same December 2, 1865, to Samuel Irwin; that John Irwin died intestate October 20, 1893, leaving no widow, and that he was continuously insane and without mental capacity to make a deed from the year 1856 until his death. They assert title by inheritance. It is alleged that the defendants are in possession and claim title through the deed to Samuel Irwin, and mesne conveyances, and that the defendants have no other title or interest in the premises except certain tax liens, which the plaintiffs offer to liquidate by redemption. A general demurrer to the petition, interposed on behalf of the defendants, was sustained and the plaintiffs prosecute an appeal.

The principal contention as to the correctness of the

judgment arises over the application of the doctrine of laches to the facts stated in the petition. It is urged by the plaintiffs that, under the well established and recognized rule, the question of laches cannot be raised by general demurrer. We find, however, no such established rule. The courts have quite consistently held that, if the laches of the plaintiff and the staleness of his claim are apparent from the petition, objection may be taken by demurrer. *Williams v. First Presbyterian Society,* 1 Ohio St. 478; *Solomon v. Solomon,* 81 Ala, 505; *Furlong v. Riley,* 103 Ill. 628; *Abraham v. Ordway,* 158 U. S. 416, 15 Sup. Ct. Rep. 894.

It is next contended that the action is one for the recovery of the title or possession of lands, and that the plaintiffs, within the statute of limitations, have ten full years from the death of their ancestor within which to institute their action, and under the rule of *Michigan Trust Co. v. City of Red Cloud,* 3 Neb. (Unof.) 722, laches will not be imputed to the plaintiffs who seek equitable relief, unless the delay is sufficient to bar the corresponding legal remedy. We are not reconciled, however, to the belief that the court in that case intended to lay down any such hard and fast rule. The first paragraph of the syllabus is:

"Laches cannot usually be charged against a party for failing to bring an action to enforce an equitable claim if he acts within the time allowed by the statute of limitations for commencing a corresponding action at law."

The rule so stated is correct and not open to criticism; it does not, however, militate against the right of a court of equity to apply the doctrine, often stated and always adhered to, that if by the delay and laches of the complainant it has become doubtful whether the other parties can be in a condition to produce the evidence necessary to a fair presentation of the cause on their part, or it appears that they have been deprived of any just advantage which they might have had if the claim had been put forward before it became stale and antiquated, or if they be sub-

jected to any hardship which might have been avoided by more prompt proceedings, although the full time may not have elapsed which would be required to bar any remedy at law, the court will deal with the remedy in equity as if barred. In the second paragraph of the syllabus in *Abraham v. Ordway, supra* (15 Sup. Ct. Rep. 894), the rule is thus stated:

"Independently of any statute of limitation, courts of equity have inherent power to refuse relief after undue and unexplained delay, and where injustice would be done by granting the relief asked, and the doctrine applies to suits relating to land."

In the body of the opinion Mr. Justice Harlan, speaking for the court, said:

"The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitations; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law."

And also, where, from delay, any conclusion the courts may arrive at must at best be conjectural, and the original transactions have become so obscured by lapse of time, loss of evidence, and death of parties as to render it difficult, if not impossible, to do justice, the plaintiff will, by his laches, be precluded from relief. 12 Am. & Eng. Ency. Law (1st ed.), p. 550, and authorities there cited.

And it is not even necessary that the court should be satisfied that the original claim was unjust. 12 Am. & Eng. Ency. Law (1st ed.), p. 551. In *North v. Platte County*, 29 Neb. 447, an action to restrain the payment of interest on bonds issued in aid of a railway corporation, Mr. Justice MAXWELL used this language:

"The action was brought nine years after the bonds were issued and delivered and the plaintiff shows by his petition that he has been a taxpayer of Platte county during 'many years past.' There are many cases holding that such delay and laches will defeat an action where relief would have been granted had the application been seasonably made."

The rule so stated is not in conflict with *Michigan Trust Co. v. City of Red Cloud, supra.*

Where it is sought to apply the doctrine of laches independent of the statute of limitations, the true inquiry should be whether the adverse party has been prejudiced by the delay in bringing the action, and whether a reasonable excuse is offered for the delay, because if the delay has resulted in no injustice to the adversary, or if it can be excused upon reasonable grounds, then equity will not refuse relief. Within the rule thus stated, have the plaintiffs, by their petition, shown themselves entitled to the remedy? One of the plaintiffs is a daughter and the others are the grandchildren of the ancestor through whom they assert title by descent. The ancestor conveyed the real estate by deed, which they now seek to avoid, 28 years prior to his death. The action for the relief sought was instituted on the 8th day of September, 1903; almost 38 years after the execution of the deed, and within 42 days of 10 years after his death. The sole ground urged why they ought to be permitted to recover is the insanity of the grantor, which they say was continuous from the date of the deed to the time of his death. It does not appear that the plaintiffs, or either of them, have at any time been under any disability during the time within which the powers of the court might have been invoked to es-

tablish their right, nor is any other reason given why they have not sooner instituted proceedings to assert such rights.

On the other hand we cannot remain unconscious of the situation of the defendants. For 38 years they and their grantors have been permitted to rest in the belief that their title was secure; nor can we close our eyes to the fact of the changed conditions during that time, within which the value of real estate has increased many fold, and during which doubtless, many witnesses who were of mature years and discerning judgment in 1865 have either died or permitted the events of that period, in which they had no personal interest, to pass from their memory. It does not appear from the petition that the plaintiffs were without notice of the condition of their ancestor at the time he executed the deed, or of the fact of the conveyance itself; and while they had no interest in the real estate at that time such as would justify a resort to the courts on their own behalf, yet self-interest should have prompted them to make use of the means afforded by law to prevent a dissipation of the estate of their parent through his insane whims or desires. They should at least have taken steps to have preserved to him during his lifetime what of right was his, and to the extent that they failed to do so should now be held accountable through lapse of time; nor should they be permitted, even after his death, to appeal to their technical rights under the statute of limitations, unless their action was seasonable and so taken as to prevent the least injustice to their adversaries. The absolute injustice of permitting the plaintiffs, at this late hour, to reap the reward of the industry of the defendants upon a mere offer to reimburse them for the taxes paid out on the property involved, is too apparent to require further notice.

It is evident that the trial court made no mistake in dismissing the plaintiffs' bill, and we recommend that the judgment 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.

PETER M. BACK ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 8, 1906. No. 14,457.

1. **Contempt: JURISDICTION.** The district court has jurisdiction to punish contempt by fine or imprisonment, or both.

2. **Injunction: VIOLATING: JURISDICTION.** By section 260 of the code a judge of the district court at chambers is given jurisdiction to enforce obedience of an injunction or restraining order, whether the same was allowed by the court or by a judge thereof. He has no jurisdiction to punish a violation of such order, as a criminal offense, by imprisonment.

3. **Courts: ADJOURNMENT: PRESUMPTIONS.** Where the record shows an order adjourning a term of the district court to a future day, and judicial proceedings in the interval, it will be presumed, if necessary to support the jurisdiction of the court over such proceedings, that the order of adjournment was vacated, and the court reconvened.

4. **Contempt: TRANSFERRING CASE.** Upon prosecution for contempt in the district court, the judge before whom the cause is regularly to be heard may refuse to transfer the cause to another judge of the same court for hearing, unless it is made to appear by due proof that a fair and impartial trial cannot be had before him, or that some other ground for change of venue prescribed by statute exists.

5. ———: **INFORMATION: AMENDMENT.** A prosecution for constructive contempt is based upon an affidavit or information alleging the facts constituting the contempt. If such information is amended by interlineation in matter of substance, it must be reverified, and there must be a trial thereon as upon a new prosecution.

6. **Injunction: VIOLATION: INFORMATION.** In a prosecution for constructive contempt in the violation of a restraining order, the affidavit or information must set forth the acts constituting the violation. The general allegation that the defendant has disobeyed the restraining order is not sufficient to give the court jurisdiction.

7. Contempt: INFORMATION. A prosecution for contempt is "in the nature of a prosecution for a crime," and the affidavit or information must state the acts constituting the offense with as great certainty as is required in criminal proceedings.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed and dismissed.*

W. J. Connell, for plaintiffs in error.

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

SEDGWICK, C. J.

While the city council of Omaha had under consideration the enacting of an ordinance entering into a contract on behalf of the city with the Omaha Gas Company providing for furnishing certain gas lights for lighting the city, an action was begun in the district court for Douglas county to enjoin these defendants and others as members of the city council, and the mayor of the city from "passing and approving" the ordinance in question. Application was made to one of the judges of that court for a temporary injunction. It appearing to the judge that notice should be given the defendants before an injunction was allowed, a time was fixed for the hearing, and in the meantime an order was entered restraining the mayor and council from passing and approving the ordinance. Afterwards, it having been brought to the notice of the judge by affidavits filed with him that there had been an alleged violation of the restraining order, the judge ordered an information filed by the county attorney charging the defendants with contempt of court. The information was filed accordingly, and trial had, upon which these defendants were adjudged guilty of contempt and sentenced to 30 days' imprisonment in the jail of Douglas county. To reverse this judgment they have brought the matter here upon petition in error.

1. The record and briefs present a question of jurisdic-

tion. There are two sections of the civil code which define contempts and provide punishment therefor. Proceedings to punish contempts, not committed in the presence of the court, when considered with reference to the object for which such proceedings are taken, fall into one of two classes: (1) They may be strictly punitive, that is, to vindicate the majesty of the law, and the authority reposed by law in the court or judge, and for this purpose to inflict exemplary punishment; or (2) they may be remedial, to compel and insure obedience to the mandate of the law as expressed in some order of the court, or judge, rather than to punish for a past offense. *Nebraska Children's Home Society v. State*, 57 Neb. 765. Section 260 of the civil code relates to the latter class. It provides: "An injunction granted by a judge may be enforced as the act of the court. Disobedience of an injunction may be punished as a contempt by the court, or by any judge who might have granted it in vacation. An attachment may be issued by the court, or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same; and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or, in default thereof, he may be committed to close custody, until he shall fully comply with such requirement, or be otherwise legally discharged." By the first clause character is given to the injunction order of a judge sitting in chambers; it "may be enforced as the act of the court." By the second clause of the section a judge of the court sitting in chambers may enforce the injunction by punishing a disobedience thereof as a contempt, and this he may do whether the injunction was allowed by the court itself or by a judge of the court in chambers. He may require the party guilty of a breach of the injunction to make restitution to the party injured, and to give further security to obey the injunction, and he may

enforce these requirements by imprisonment until they be complied with, but he is not given power to punish a past violation of an injunction as a distinct offense by imprisonment of the guilty party.

The general rule is that authority to punish for contempt belongs exclusively to the court in which the contempt is committed. *Johnson v. Bouton,* 35 Neb. 898. Without the provisions of section 260 the court alone, and not a judge thereof at chambers, could punish for contempt. This section declares the power of the court before whom the action is pending to punish for contempt, a power which exists independently of the statute. It also extends the power to punish to a judge of the court before whom the action is pending, and as the judge, as distinguished from the court, obtains his jurisdiction from this section of the statute, he must exercise it in accordance with its provisions and cannot exercise a greater jurisdiction than is there given him. In *Zimmerman v. State,* 46 Neb. 13, it is said in the opinion that the defendant "was arrested and brought before the court or judge," and later in the opinion there is language used indicating that a judge, as distinguished from a court, would have jurisdiction to punish a violation of a restraining order by imprisonment. It is not clear whether this language was *dictum* only, since the opinion does not show with certainty whether the proceedings were before the court in regular session, or before a judge in vacation. The defendant was restrained from diverting water from its natural channel, and immediately violated the restraining order by diverting the water. The offense was a continuing one, and the defendant might properly have been required by a judge at chambers to give security to obey the order, and in default of so doing might be imprisoned to enforce compliance. So far as the case appears to construe section 260 to give a judge at chambers jurisdiction to punish the violation of a restraining order by imprisonment, it is overruled. By section 669 of the code the jurisdiction of the court itself to punish for contempt

is recognized and declared, and without the limitations upon the power of punishment which are contained in section 260. There can be no doubt that under section 669, and even without regard to its provisions, the district court, being a court of general equity jurisdiction, could punish disobedience of its lawful orders by fine or imprisonment, or both.

Since the judge as distinguished from a court, deriving his jurisdiction from section 260, is without power to punish for contempt by imprisonment, it becomes important in this case to inquire whether these proceedings were had before the court or before one of the judges of the court sitting in chambers. The regular May term of the district court for Douglas county in 1905 began on the first day of May of that year, and continued from day to day thereafter by regular adjournment until the 7th day of August. On that day the seven judges of the court united in an order whereby the May term of court was adjourned until the 18th day of September, and the record shows that on the 18th day of September there was a formal opening of the court, all of the judges being present. The information in this case was filed on the 11th day of September. The defendants on the same day entered "their appearance in open court," and were arraigned and entered a plea of not guilty. An adjournment was taken until the 13th day of September, when a formal answer was filed by the defendants and the hearing was begun. After the evidence was completed, an adjournment was taken until the 15th day of September, at which time the argument was commenced, and in the midst of the argument the information was amended. This amendment and the objections taken thereto will be again referred to. The argument was completed on the 16th day of September and the court then took the matter under advisement until the 20th day of September, at which time the court announced the finding that the defendants were guilty of contempt.

It is urged in the brief that this record is conclusive

that these proceedings were had before the judge at chambers, and not before the court. We do not think that this contention is sustained by the record. In *Green v. Morse,* 57 Neb. 391, it was held:

"An adjournment of court to a subsequent day in the term is merely an intermission, and neither adjourns the term nor deprives the judges of control of the proceedings. Notwithstanding such an order the court may revoke it and reconvene before the time fixed in the order of adjournment. Where the record shows an order adjourning to a future day in the term, and judicial proceedings carried on in the interval, it will be presumed, in favor of regularity, that there has been a reconvention and an express or implied vacation of the order of adjournment."

The proceedings in this case purport to be in the court itself. The information was "filed in the office of the clerk of the district court," and the record recites that "at the May term of court, and on the 11th day of September, 1905, defendants were arraigned herein." All of the journal entries recite that the proceedings were had at the May term of court. The record recites that the defendants appeared in open court and were arraigned, and that the court heard the argument and the cause was submitted to the court. The rulings and orders all purport to have been made by the court rather than by a judge in chambers, so that the record brings the case within the rule announced in *Green v. Morse, supra.* These proceedings must be held to have been before the court, and there can be no doubt of the jurisdiction of the court to punish disobedience of its orders by imprisonment.

2. The defendants applied for a transfer of the hearing of the contempt proceedings to one of the other judges of the district court. This application was supported by an affidavit, which at some length recites various facts and circumstances tending, as was alleged, to show that the judge before whom the proceedings were pending was prejudiced against the defendant. This affidavit concludes as follows: "Affiant further says that he is and has

been upon friendly terms with his Honor Judge Sutton, and believes him to be honest and usually fair and impartial, but believes that for some reason Judge Sutton has an extreme bias or prejudice in this contempt matter, and affiant feels constrained to make this affidavit setting forth the facts hereinbefore narrated for the fair consideration of his Honor Judge Sutton to be passed upon by him in such manner as may seem reasonable and proper." Section 61 of the code provides for a change of venue when "it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested or has been of counsel in the case or subject matter thereof, or is related to either of the parties, or is otherwise disqualified to sit."

In *Le Hane v. State,* 48 Neb. 105, it is said: "There are other provisions of the statute allowing judges of different districts to hold court for one another; and in the first district, where this action arose, there are two judges. Where for any reason a case is of such a character that there would be any impropriety in the judge before whom it would in its orderly course go for trial presiding at the trial thereof, there is certainly nothing improper, by a respectful application for that purpose, in calling the facts to the attention of the judge and requesting that another judge of that district, or of some other district, be called in to try the case."

And so in the case at bar, if the judge to whom the application was addressed had considered the circumstances such as to make it proper to transfer the proceedings to another judge, certainly no objection could have been made to his so doing. If the evidence before the judge had been of such a character as to establish the fact that a "fair and impartial trial" could not be had before him, it would have been his duty to transfer the case. The affidavit, however, did not contain any allegation to the effect that a fair and impartial trial could not be had before the judge to whom the application was made.

The affidavit was made by the attorney for the defendants, and the above language quoted therefrom shows that the transfer of the case was not applied for as a matter of right, and fails to show that the defendants themselves believed that the supposed bias or prejudice of the judge was of such a nature that they could not have a fair and impartial trial before him. The application was rather an attempt to induce the judge upon his own motion to transfer the cause, and the evidence is not of such a nature as to show that the judge abused his discretion in refusing so to do. A judge is not disqualified to sit as a court to try a charge of contempt by the fact that the alleged contempt consists in disobedience of an order made by him. The facts proved must clearly show that an impartial trial could not be had before him.

3. It has already been stated that after the defendants had answered to the information, and the evidence had been taken, and the opening argument for the prosecution finished, and while the defendants' counsel was making his argument to the court, the prosecution requested leave to amend the information. Leave was granted, the information was amended, and this action of the court is assigned as error. The information contained a copy of the restraining order which it was alleged was violated. It restrained the defendants therein, who were the mayor and the members of the city council, "and each of them from passing and approving the ordinance now pending before the city council of the city of Omaha, which provides for a street lighting contract with the Omaha Gas Company, and enjoining the defendants and each of them from entering into any contract with any person or corporation for furnishing street lighting." The information contained no direct allegation that these defendants or any of them are, or at any time were, members of the city council. It alleged that in the action in which the restraining order was allowed the petition contained the allegations that these defendants and others were "the duly elected and qualified members of the city council

of the city of Omaha," and that the parties made defendants in that action, "for sometime last past, up to and including the present time, had constituted and do constitute the said city council of the city of Omaha." It also alleged that the petition for an injunction contained the allegation that the ordinance in question was pending before the city council, and that the city council would enact the same and would thereby enter into a contract with the Omaha Gas Company to furnish certain lights for lighting the city, unless restrained by the order of the court. But the information contained no direct allegation of any of these facts. The information then alleges that the restraining order, as set out in the information, was issued and was duly served on the defendants "named therein," but there is no direct allegation that the defendants therein who were served with the restraining order are the same persons here complained of. The violation of the restraining order on the part of these defendants was in the information alleged in these words: "That the defendants, Peter M. Back, Elliott D. Evans, Charles Dyball, Peter C. Schroeder and Charles S. Huntington, unlawfully, wilfully, knowingly, purposely and contemptuously neglected, refused and failed to obey said restraining order, after due service upon said defendants of said restraining order as by the court directed, and in unlawfully, wilfully, knowingly, purposely and contemptuously failing to obey said restraining order are guilty as of contempt of the district court for said county and state. That the disobedience of said restraining order tended to hinder, delay and annoy the court and prevent the due administration of justice." By the amendment which was allowed the words, "and did vote to pass said ordinance," were interlined after the words, "restraining order," as they first appear in the above quotation. The matter of allowing this amendment by interlineation was much discussed in open court. The defendants were asked to waive their objection to the amendment, and upon their refusing to do so it was stated by the court that the

amendment would be allowed, and that the defendants would be allowed a continuance, if necessary. The defendants then waived their objection to the manner of making the amendment, but insisted that no amendment ought to be allowed. It is now contended by the attorneys for the state that in the discussion which followed, the defendants waived all objection to amending the information, except as to the materiality of the proposed amendment. If the information is jurisdictional, and if all proceedings taken upon an insufficient information are void, it may well be doubted whether the defendants could at this stage of the proceedings waive objection to amend such information by inserting material allegations that would cure its defects, and consent that evidence taken upon such insufficient information might be considered in determining the questions presented by the amended information. In proceedings under section 260 of the code, it has been many times determined by this court that the affidavit is jurisdictional, and the cases do not appear to make any distinction in that regard between proceedings under that section and proceedings by information under section 669 of the code. In any view of the matter, such waiver should be express and clear, in order to justify the court in so proceeding upon such amended information, and we think that this action of the court was erroneous.

4. If we disregard all other defects in the information, the question would still remain, does the information as amended sufficiently charge acts of violation of the restraining order? It will be noticed that the original information was drawn upon the theory that it was sufficient to allege in the language of the statute that the defendants had disobeyed the restraining order. But this theory is contrary to the well-established rule in such cases. Proceedings for contempt under section 260 are based upon an affidavit filed with the court or judge, from which the court or judge is satisfied of the breach of the injunction. The language of this section precludes the idea that in a prosecution thereunder the mere allegation, under oath,

that the injunction has been violated would be sufficient to warrant the issuing of an attachment against the offending party. The court has something more to do in determining whether an attachment shall be issued under this section than to consider the probable veracity of the party making the affidavit. The court or judge must be satisfied that the things done by the defendant constitute a breach of the injunction or restraining order, and can only determine this from a consideration of the acts of the defendant as shown in the affidavit. It has been held that proceedings for contempt under either section are "in the nature of a prosecution for a crime and the rules of strict construction applicable in criminal proceedings are governable therein." *Herdman v. State,* 54 Neb. 626. It was also held in that case that "the affidavit must state the acts of the asserted contempt with as much certainty as is required in a statement of an offense in a prosecution for a crime." See, also, *Hutton v. Superior Court,* 147 Cal. 156, 81 Pac. 409; *United States v. Agler,* 62 Fed. 824. That part of the affidavit in this case which charges or attempts to charge the acts constituting the violation of the restraining order, as the same was amended by the interlineation, is embraced in these words: "Unlawfully, wilfully, knowingly, purposely and contemptuously neglected, refused and failed to obey said restraining order and did vote to pass said ordinance after due service upon said defendants of said restraining order as by the court directed, and in unlawfully, wilfully, knowingly, purposely and contemptuously failing to obey said restraining order are guilty as of contempt of the district court for said county and state." It will be observed that the only act or thing alleged to have been done by the defendants is in the words, "and did vote to pass said ordinance." It is not alleged in this information that the injunction was violated by voting to pass the ordinance. The allegation is that it was violated, and that defendants voted to pass the ordinance. If it was directly alleged in the information that these defendants were members of the city council,

the question would still remain whether it was as such members that they voted to pass the ordinance. Where was this vote taken? Under what circumstances? Was it in the council chamber? Was the city council in session at the time? Was the question of the passage of this ordinance before the council for consideration and determination? None of these things appear from the allegations of the information. For all that appears from the information, these five men might have been a private party at one of their homes, and the vote taken might have been a straw vote to ascertain what the probable action of the council would be when the restraining order should be dissolved. Certainly, this is not stating the acts constituting the contempt with that certainty which "is required in the statement of an offense in a prosecution for a crime." The motion to quash the information should have been sustained, and for the error in refusing to do so the judgment must be reversed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, EX REL. DOUGLAS COUNTY, RELATOR, v. JOHN C. DREXEL, COUNTY CLERK, RESPONDENT.

FILED FEBRUARY 8, 1906. No. 14,569.

1. **Statutes: CONSTRUCTION.** The object of the court in construing an act of the legislature is to ascertain the intention of the lawmakers. That intention, when ascertained, will prevail over the literal sense of the words used.

2. **County Clerks: SALARY.** In counties of more than 25,000 inhabitants the salary of the county clerk is fixed at $2,500 per annum by chapter 72, laws 1905, and he is also entitled to one deputy whose salary shall be $1,000 per annum.

ORIGINAL application for a writ of mandamus to compel respondent to account for excess fees. *Writ denied.*

W. W. Slabaugh, for relator.

H. C. Brome, contra.

SEDGWICK, C. J.

This case involves a construction of the act of 1905 amending the statute regulating the fees of county clerks and other county officers. Laws 1905, ch. 72. Since that act has been in force the county clerk of Douglas county has retained fees in excess of $1,500 per annum. A writ of mandamus is asked to compel him to pay over the excess to the treasurer for the county. His defense is that under the statute he is entitled to $2,500 per annum, and to have a deputy with a salary of $1,000 per annum. The section as amended provides that the fees of the county judge and county clerk shall be limited to $1,500 per annum each. It then provides that in counties having over 18,000 and less than 25,000 inhabitants the county clerk shall receive $1,500 per annum, which shall be paid by warrants drawn on the county general fund. By this proviso the other county officers also receive greater emolument in counties of this class. The section then provides as follows: "In counties having over 25,000 and less than 60,000 inhabitants the county treasurer shall receive the sum of three thousand (3,000) dollars per annum, and shall be furnished by the county board with the following clerks or assistants: One deputy or chief clerk whose salary shall be fourteen hundred (1,400) dollars; one clerk whose salary shall be one thousand (1,000) dollars, and one clerk whose salary shall be six hundred (600) dollars per annum. The sheriff shall receive the sum of two thousand five hundred (2,500) dollars per annum, also the necessary jail guard and one deputy, and the salary of such deputy shall be nine hundred (900) dollars per annum. The county clerk of such counties shall receive the sum of two thousand five hundred (2,500) dollars per annum; and he shall have one

deputy whose salary shall be one thousand (1,000) dollars per annum. The county judges of such counties shall receive the fees of such office, not to exceed the sum of two thousand (2,000) dollars per annum, provided that in counties having a population of over 60,000, the county judge shall receive the fees of said office not to exceed the sum of two thousand five hundred (2,500) dollars per annum, and in all counties having over 25,000 population the county judge shall be provided by the county board with the necessary clerks or assistants, whose combined salaries shall not exceed the sum of one thousand (1,000) dollars per annum."

It is the language of the provision just quoted that we are called upon to construe. The relator urged that in counties having over 60,000 inhabitants the county clerk is entitled to receive only $1,500 per annum, and the respondent's contention is that in all counties having over 25,000 inhabitants the county clerk is entitled to receive the sum of $2,500 per annum, and have one deputy whose salary shall be $1,000 per annum. It will be seen that the language of the statute, taken literally, would limit the fees of the county clerk to $1,500 per annum, except in those counties whose population was from 18,000 to 25,000, and those counties whose population was from 25,000 to 60,000. There can be no doubt that it is the province of the legislature to prescribe and regulate the fees of these officers. The court has nothing to do with the policy of these enactments nor the justice of the legislation. It must construe and apply the law as it is enacted by the legislature. The object of the court in construing an act of the legislature is to ascertain the intention of the lawmakers. To adhere to a technical and literal construction that was manifestly contrary to the intention and meaning of the legislature would be to legislate and not to construe. The rule has long been established by this court that "in the interpretation of a statute the intention of the lawgivers is to be deduced from the whole statute taken and compared together." *Swearingen*

v. Roberts, 12 Neb. 333. In the opinion in that case the following quotation was taken from 1 Kent, Commentaries, *462: "The real intention, when accurately ascertained, will always prevail over the literal sense of terms. When the expression of a statute is special or particular, but the reason is general, the expression should be deemed general, * * * and the reason and intention of the lawgivers will govern the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity." *State v. Baushausen,* 49 Neb. 558; *Kelley v. Gage County,* 67 Neb. 6; *Parker v. Nothomb,* 65 Neb. 315.

What, then, was the intention and meaning of the legislature in adopting this amendment of the statute? There was an act of the legislature in 1877 (laws 1877, p. 215) regulating the fees of county officers. This act has been many times revised and amended, and in each act so amending the statute the principle has been maintained that the duties and responsibilities of county officers are greater in counties having a larger population than they are in counties having a smaller one, and that the fees of the officers should be regulated with regard to their duties and responsibilities. And so, in the section of the statute now under consideration, the manifest intention of the legislature was to provide larger fees for these officers in counties having larger population. Thus, in counties with population under 18,000 the compensation of the county clerk is limited to $1,500 and is to be derived solely from the fees of his office; but in counties of over 18,000 population and less than 25,000 he is to receive a salary of $1,500 without regard to the amount of fees; and in counties with population exceeding 25,000 he is to receive a salary of $2,500 and have a deputy whose salary is fixed at $1,000 per annum. Can it be derived from this act and the history of the legislation upon this subject that the legislature intended that this latter provision should apply only to counties with less than 60,000 inhabitants? Did the legislature intend that the salary of this officer should decrease as the population exceeded

60,000? It will be noticed that in counties of more than 25,000 and less than 60,000 inhabitants the section under consideration provides fixed salaries for the deputies of various county officers; whereas in the section amended the clerks and assistants of the county treasurer were "furnished by the county board," when necessary, and their combined salaries should not exceed $2,400 per annum. The object of the amendment of this part of the law appears to be to make this and other similar changes.

Again it will be noticed that by the section under consideration, as amended, county judges in counties having more than 25,000 and less than 60,000 inhabitants receive fees not to exceed $2,000 per annum, provided that in counties having a population of over 60,000 the county judge shall receive fees not to exceed $2,500 per annum. The only distinction that is made in the fees of county officers between counties of less than 60,000 and those having a larger population is with reference to the office of county judge, and this appears to be the purpose of the legislature in inserting the words "less than 60,000" in the first part of this provision, and the words "over 60,000" in the latter part. The provision in regard to the fees of the county judge would remain the same if the words "less than 60,000" were omitted. But, in view of the whole section and of the history of the legislation upon this subject, it is manifest that the insertion of the provision for the increased fees of the county judge in counties of over 60,000 people caused the words "less than 60,000" to be inserted in the section. If, therefore, the words "less than 60,000" are omitted, the real intention and meaning of the legislature will be expressed by the section. It follows, therefore, that the respondent has not retained more fees than he is entitled to, and the writ must be denied.

WRIT DENIED.

CITY OF LINCOLN, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED FEBRUARY 8, 1906. No. 14,130.

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

Clark & Allen, for appellant.

E. C. Strode, D. J. Flaherty, Charles O. Whedon and *A. W. Field, contra.*

BARNES, J.

This proceeding was an application made by the city of Lincoln for the appointment of a receiver to take charge of the property of and operate the Lincoln Street Railway, in the suit of *City of Lincoln v. Lincoln Street R. Co., ante,* p. 523. For reasons not apparent to us this proceeding was docketed and tried in the district court as a separate action, and after that court had appointed a receiver was brought here by appeal by the Street Railway Company. As the right to appoint a receiver depended on the measure of relief granted the city in the main case above mentioned, and as we have found that the city was not entitled to the relief prayed for therein, it follows, as a matter of course, that the judgment of the district court in this proceeding must be reversed and the case dismissed.

JUDGMENT ACCORDINGLY.

STATE, EX REL. ELIZABETH S. POND, V. EDWARD A. CLARK ET AL.

FILED FEBRUARY 8, 1906. No. 14,153.

1. **Villages: TERRITORIAL LIMITS.** The law authorizing the incorporation of villages does not contemplate including in the corporate limits remote territory, or purely agricultural lands, not actually connected with the village, and not adapted to municipal purposes. *State v. Mote*, 48 Neb. 683.

2. ———: **INCORPORATION.** Such lands cannot be included within the limits of the proposed village for the sole purpose of obtaining a sufficient number of actual residents necessary to incorporate, without the consent of the owner, and such owner can maintain proceedings by *quo warranto* to determine the validity of the order of incorporation. *State v. Dimond*, 44 Neb. 154.

3. **Evidence** examined, and *held* to show less than the required number of actual residents within the village necessary to incorporate, at the time the proceedings for that purpose were had.

ERROR to the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

E. H. Benedict and *A. G. Wolfenbarger*, for plaintiff in error.

M. F. Harrington, contra.

BARNES, J.

The relator brought this action in *quo warranto* against the respondents, as trustees of the village of Inman, in the district court for Holt county to obtain a judgment of ouster, and have the proceedings purporting to incorporate said village declared void. The trial resulted in a judgment for the respondents, and the relator brings the case here by petition in error.

The record discloses that in the year of 1881 the Pioneer Townsite Company purchased the southwest quarter of section 19, township 28, range 10 west, in said county, and laid out and platted a small part of the southeast 40

acres thereof as a townsite. The Chicago & Northwestern railroad bisects the quarter section into two nearly equal parts, running through it from southeast to northwest, and leaving it in two triangular tracts. The townsite company later on platted some small additions to the original town, all of which are situated on the southeast forty acres of the quarter section, and are all south of the railroad. At the time the townsite company purchased its land and laid out its town as aforesaid, the relator owned and resided on the south half of the northwest quarter of said section, where she still resides. It appears that she has sold seven small tracts of said land as follows: In the northeast corner five acres; in the southeast corner two tracts of one acre each; in the south central part a lot for a church, and west of that lot she sold to one Crosser and his son five acres each, and to a Mrs. Simmons three and one-half acres. These tracts are disconnected, and the relator has never platted any part of her land, nor taken any steps to make it a part of the townsite, but, on the contrary, uses the unsold portion of it exclusively for agricultural purposes. The platted and inhabited part of said town, at its nearest point, is about a quarter of a mile from the relator's land, and the intervening territory is unplatted, uninhabited, and is used for a pasture and other agricultural purposes. It further appears that on or about the 19th day of April, 1902, an attempt was made to incorporate the village under the provisions of section 40, article I, chapter 14, Compiled Statutes 1901, and to that end a petition was presented to the board of commissioners of Holt county purporting to be signed by a majority of the taxable inhabitants of said town, setting forth that it contained more than 200 *bona fide* residents, and praying that the territory therein described by metes and bounds be incorporated under the name of the village of Inman. The board granted the prayer of the petition, and passed a resolution purporting to incorporate the said village.

It appears that in order to obtain the required number

of *bona fide* residents the petitioners took in and embraced the vacant pasture and agricultural lands belonging to the townsite company north of the railroad track, together with the land of the relator above described, and which is, as before stated, situated a quarter of a mile from the platted and inhabited part of the town or village. It further appears that the relator was not asked to sign the petition presented to the board of commissioners, and had no notice or knowledge of the proceedings until after the order of incorporation was made, and that the respondents are acting as the board of trustees of said village.

It is contended by the relator that the act of the petitioners and the county board in including and taking in her agricultural land and incorporating it as a part of said village was unlawful and void, and that she is not bound thereby. It would seem that her contention should be sustained. This identical question was before us in *State v. Mote,* 48 Neb. 683. There it was sought to incorporate the village of Allen in Dixon county. There, as here, the inhabited part of the townsite was south of the railroad track. There, as here, in order to obtain the requisite number of actual residents to authorize incorporation, the metes and bounds of the proposed village were extended north of the railroad so as to include the lands of the relator and one Pomeroy. In that case, as in this, there was a tract of purely agricultural land lying between the inhabited part of the town, or proposed village, and the lands of the relator sought to be included within the corporation. There the relator's land was situated about 40 rods from the platted and inhabited part of the townsite, while here the relator's land is situated a quarter of a mile from the village proper. In that case it was said:

"It appears from the evidence that one reason which moved the parties who were active in forwarding the incorporation to include the relator's property was that he was living thereon with his family, including the relator,

nine persons, and they needed them within the limits to make up the necessary 200 actual residents required by statute. It was shown that portions of farms not connected with the village proper and not platted or appropriated or adapted to municipal purposes were included within the corporate limits by the order of incorporation, and of such was the portion of the farm of relator, hence it was illegally included. *State v. Dimond*, 44 Neb. 154, and cases cited. The village organized had no legal existence and *quo warranto* was the appropriate action."

Without citing further authorities, it is sufficient to say that the rule above quoted is in entire harmony with the great weight of authority. In the case at bar it is not shown that the land of the relator is adapted to municipal purposes, and it is conceded that it has not been platted or dedicated to that purpose. It is a quarter of a mile distant and wholly disconnected from the platted and inhabited part of the village, and we fail to see how it could be in any way benefited by being included within the municipality. So we are of the opinion that the act of the incorporators in including the land of the relator rendered the whole proceeding void.

It is further contended that at the time the order was made the proposed village did not contain 200 actual residents. While the district court found generally to the contrary, is seems to us that the finding is not sustained by the evidence. D. L. Pond, the husband of the relator, made an accurate count of the inhabitants of the proposed village in the same month and year that the resolution of incorporation was passed. He testifies positively, and from his own personal knowledge, that there were 135 residents of the town proper; 30 persons residing on the out-lots, and that was all that he found on the quarter section on which the townsite is situated; that there were living on the land of the relator and the acre tracts sold by her which were wrongfully included within the boundaries of the corporation 24 persons, making, all told, 189 actual residents within the boundaries of the proposed

corporation. Clara Pond, a witness for the relator, testified, in substance, that in the month of April, 1902, she made a house to house canvass of the people who lived in the town at that time; that she found south of the railroad 169 people; that on the lands of the relator and the acre lots sold by her there lived 24 persons, making a total of 193 inhabitants, all told. It is true that some of the witnesses for the respondents testified that at the time the order of incorporation was made there were within the boundaries of the village 215 actual residents. It appears, however, that none of these witnesses made a house to house count in order to ascertain the correct number of such residents, but merely estimated the number in the several families residing on and in the vicinity of the townsite, and that in order to make 215 residents they counted the 24 persons living on the land which was wrongfully and unlawfully included within the proposed corporate limits, together with domestic servants and transients found by them in the village at that time. So it appears from the respondents' evidence that at the time the resolution of incorporation was adopted the proposed village did not contain the necessary 200 actual residents required by the statute, without counting the 24 persons residing on the relator's land and the acre property sold by her which was wrongfully included within the corporate limits. The village organization in question has, therefore, no legal existence. *State v. Uridil,* 37 Neb. 371.

The judgment of the district court is therefore reversed and the cause is remanded, with directions to that court to enter the proper judgment of ouster.

JUDGMENT ACCORDINGLY.

BANKERS UNION OF THE WORLD, APPELLANT, V. ELAM H. LANDIS, GUARDIAN, APPELLEE.

FILED FEBRUARY 8, 1906. No. 14,164.

1. **Appeal.** Questions not raised by the pleadings in the court of original jurisdiction cannot be considered by the supreme court on appeal.
2. **New Trial: EQUITY.** Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application is made when the court of law has no means of granting such a trial; but a court of equity will only grant such relief in case of newly discovered evidence, surprise or fraud, or where a party is deprived of the means of defense by circumstances beyond his control. *Horn v. Queen*, 4 Neb. 108.
3. ———: DILIGENCE. Where it is shown that the plaintiff has not used ordinary diligence in making or attempting to make his defense in the former action, he will be denied a new trial.
4. ———: SHOWING. In such a case the plaintiff must also plead and prove that he has a valid defense to the action in which the judgment complained of was rendered.
5. **Evidence** examined, and *held* sufficient to sustain the judgment of the district court.

APPEAL from the district court for Seward county: BENJAMIN F. GOOD, JUDGE. *Affirmed.*

Matthew Gering, for appellant.

Landis & Schick and *Norval Bros. contra.*

BARNES, J.

The appellant commenced this action in the district court for Seward county to set aside a certain judgment which had theretofore been rendered against it in that court in favor of Alice N. Landis, and to obtain a new trial in said action. The facts on which the appellant relied for relief are stated in the petition, in substance, as follows:

That the plaintiff is a fraternal insurance company, and the defendant, Elam H. Landis, is the duly appointed guardian of Alice N. Landis, to whom the plaintiff issued its insurance policy; that on September 22, 1903, Alice N. Landis recovered from the plaintiff, in the county court of Seward county, a judgment for $500, and interest thereon, upon the said insurance policy, and that plaintiff appealed therefrom to the district court; that in January, 1904, and while said action was pending in the district court, the attorney general of the state commenced a suit in the supreme court enjoining the plaintiff from pursuing its business as an insurance company; that its business was placed in the hands of a receiver, and from the date of issuance of the injunction plaintiff was constantly under the direction of the supreme court, and was prevented, by reason of said proceeding, from performing its duties as an insurance company, and was prevented from prosecuting any action at law which was then pending in behalf of or against the plaintiff; that such receiver was in charge of said company until June, 1904, at which time the injunction was dissolved; that while the injunction was in force, and prior to the entering of said judgment in the district court plaintiff advised the clerk and the judge of said court that it was prevented from appearing or defending, or from pursuing its business, by reason of said injunction; and said clerk and judge knew that plaintiff was in charge of a receiver and under injunction, and by reason thereof plaintiff did not appear to defend said suit; that while said injunction was in force said cause was tried, and a judgment was rendered against plaintiff in its absence; that after said cause was filed in the district court it was stipulated between the parties that said cause should be tried upon the petition and answer, together with the demurrer to the answer filed in the county court, and that without the knowledge of the plaintiff said judgment was rendered inadvertently, and at a time when plaintiff was unable, by reason of said injunction, to appear in said cause; that the plaintiff has a good and valid

defense to said action, as appears from the answer filed in said cause, and that plaintiff had no knowledge of the entry of such judgment, or that said cause was tried, until after the adjournment of the last term of court, and is now willing and ready to pay any and all costs in said cause.

The defendant answered this petition, admitting the first paragraph thereof, and denying each and every other averment contained therein. Further answering, the defendant alleged, in substance, that one Alice N. Landis, by Elam H. Landis, her guardian, on February 24, 1904, recovered a judgment on a policy of insurance against the plaintiff in the district court for Seward county, on which date said cause was regularly reached for trial, and the term of said court at which said judgment was rendered adjourned without day on March 31, 1904; that said judgment was in full force and effect, unappealed from, unreversed, unpaid and unsatisfied; that said policy of insurance was in full force and effect, and that from the time of the institution of the suit thereon in the county court on September 22, 1903, and during the pendency thereof, and since the rendition of said judgment, the plaintiff has accepted and received monthly payments on said policy, and receipted for the same. The reply was a general denial. The trial resulted in a general finding for the defendant, and the plaintiff appealed.

The appellant's first contention is that the district court for Seward county was without jurisdiction to render the judgment complained of because, after adjudging appellant to be in default, the plaintiff's evidence was received, and judgment was rendered, without the intervention of a jury. As this objection relates to the manner of procedure only, it is sufficiently answered by saying that no such issue was tendered by the petition herein, and that question cannot be raised for the first time in this court.

It is claimed by counsel for the appellee that this action cannot be maintained; that in order to obtain a new trial the appellant must proceed by motion in the same case, under the provisions of section 602 of the code. This

claim is not well founded. It was held in *Horn v. Queen*, 4 Neb. 108.

"Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application be made when the court of law has no means of granting such trial."

The rule thus established has been followed in an unbroken line of decisions from that day to the present time. It is equally well settled that a court of equity will only grant relief in case of newly discovered evidence, surprise or fraud, or where a party is deprived of the means of defense by circumstances beyond his control. If a party establishes any of these grounds, and in addition thereto pleads and proves that he has a valid defense to the former suit, he may have relief in the present form of action.

Keeping in view the foregoing rules, we come now to dispose of the main questions involved in this case. The appellant relies, as an excuse for its default and failure to defend when the case came on for trial in the district court, on the fact that an injunction had theretofore been obtained against it in this court, and its books, papers and records were in the hands of a receiver; that by the terms of the injunction it was restrained from transacting any business whatever. It is true that sometime in January, 1904, such an order was made by this court, but it appears the order was modified upon the giving of a certain bond by the appellant, and that the bond was given and approved on the 5th day of February, 1904. From that day to the time of the trial of the cause in the district court appellant was transacting its regular business, and its officers had access to its books, papers and records for that purpose. So it could have made its defense to the action, and the order of injunction constituted no excuse for its failure to do so.

It further appears from the testimony of appellant's counsel, who was in charge of the case in Seward county, that he was not personally engaged in the litigation in this

court; that he took no part therein, and no reason is shown why he could not have been present in the district court on the 24th day of February, 1904, when the case regularly came on for trial. It is not shown that appellant made any request to be permitted to use its books, papers and records for the purpose of defending in said action, as it could have done under the modified order of injunction. Again, no application was made to the district court for Seward county for a continuance of the cause there pending because of the injunction of this court, and the receiver was not requested to appear in that action and defend for the appellant. The only diligence exercised by counsel was to write a letter to the clerk of the district court informing him that the order of injunction had been allowed, and that a receiver had been appointed. Again, the evidence fails to show that the parties stipulated to try the cause on the same pleadings used in the county court. On the contrary, it appears that counsel for the plaintiff had, from time to time, notified appellant's counsel of the condition of the docket, and when the case would be reached for trial. Information had been given him of the fact that the plaintiff had filed a new petition, and suggestion had been made in the letter containing such notice that the answer used in the county court might be filed, and serve for the answer in the district court, if counsel desired to pursue that course, and, yet, appellant neglected to even take the precaution of filing such answer. So, when the case was regularly called for trial, appellant was in default, and there was nothing left for the court to do but to enter such default, and permit the plaintiff to proceed to judgment. The lack of ordinary diligence on the part of the appellant, as shown by the evidence herein, is fatal to its right to relief in the present action.

There is another reason why the judgment of the trial court must be affirmed. The appellant failed to plead any substantive facts which constitute a defense to the petition on which the judgment complained of was rendered. It is true, as above stated, that the petition

contains an allegation that "the plaintiff has a good and valid defense to said action, as appears from the answer filed in said cause." This statement, however, is a mere conclusion of law, and although it was treated as sufficient to permit the introduction of evidence on that point by the trial court, yet the proof shows that the alleged defense was practically without merit. It was claimed on the part of the appellant that, after the policy in question was issued and delivered to Alice N. Landis, the appellant changed its by-laws so that she was not entitled to recover for her total disability. It was admitted that but for such change she could recover, and that in case of a recovery judgment should be rendered for the sum of $500. It appears that sometime prior to the 15th day of March, 1902, the board of directors of appellant passed a resolution amending its by-laws, and that according to the terms of such resolution the contract with the assured was changed and altered, but it was held by this court that the board of directors above mentioned was not a representative body, and the appellant was restrained from transacting business until it so amended its constitution and by-laws as to give it a representative form of government. It is alleged in the petition of the assured that her disability accrued sometime before the 15th day of March, 1902, and that fact is undisputed. The evidence shows that the attempted change in the by-laws above mentioned was not approved or ratified by the grand lodge of the appellant until its session of 1902, which was held sometime in May of that year. So we are inclined to the view that the answer of the appellant in the case wherein the judgment complained of was rendered did not present a defense to such action.

For the foregoing reasons, the judgment of the district court was right, and it is hereby

AFFIRMED.

EMIL STOLTENBERG V. STATE, EX REL. DOROTHY KRUSE.

FILED FEBRUARY 8, 1906. No. 14,079.

Bastardy: INSTRUCTIONS. In a bastardy proceeding in which the defendant denies his guilt, the jury, if defendant so requests, should be instructed in accordance with the provisions of section 5, chapter 37, Compiled Statutes 1903, so far as applicable to the testimony, and it is error to refuse to so instruct.

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

Gurley & Woodrough, for plaintiff in error.

Frank T. Ransom and *Louis J. Piatti, contra.*

LETTON, C.

In a bastardy proceeding in Douglas county, the plaintiff in error was convicted of being the father of an illegitimate child. To review this judgment he prosecutes error to this court. His main contentions are that the verdict is not supported by the evidence, and that the court erred in refusing intsructions one, two and three requested by him. We deem it unnecessary to consider the point that the verdict is not supported by the evidence, since a new trial must be granted upon other grounds.

Instruction numbered 3 requested by the defendant is as follows: "The complainant is entitled to appear as a witness in her own behalf, and the question of her credibility is left to the jury; and on behalf of the defendant it is your duty to take into consideration any want of credibility in the complainant, any variations in her testimony before the justice of the peace which has been introduced as evidence in this case and her testimony before the jury, if any there be, and also any other confessions or statements which she may have made at any time, if the evidence discloses any such, which does not agree with her testimony." Section 5, chapter 37, Compiled Stat-

utes 1903 (Ann. St. 6254), provides, among other things: "At the trial of such issue the examination before the justice shall be given in evidence, and the mother of the bastard child shall be admitted as a competent witness, and her credibility be left to the jury; * * * and on the trial of the issue, the jury shall, in behalf of the man accused, take into consideration any want of credibility in the mother of the bastard child; also any variations in her testimony before the justice and that before the jury; and also any other confession of her, at any time, which does not agree with her testimony, on any other pleas or proofs made and produced on behalf of such accused person." It will be seen that the instruction is substantially a copy of the statutory provisions. This statute is in direct opposition to the rule which has been adopted by this court with regard to the trial court singling out by instructions the testimony of one witness more than another, and calling special attention to his or her credibility. We have held that it is prejudicial error to single out the testimony of any one witness more than another, and that instructions as to the weight of testimony and credibility of witnesses should be general in character. *Argabright v. State,* 49 Neb. 760. The statute relating to bastardy proceedings is a harsh and arbitrary one. The law only requires that the guilt of the accused be established by a preponderance of the evidence, and the safeguard that every criminal has that his guilt must be established beyond a reasonable doubt is not vouchsafed to the defendant. Every protection to which he is entitled by law should be given the defendant in such a case, and he is entitled to have the special attention of the jury called to the testimony of the complainant in the manner provided by the statutory provision under consideration.

It is insisted, however, that the instruction was not applicable, for the reason that there was no variation between the testimony of the complainant before the justice and that before the jury, and no confession made by her at any time which did not agree with her testimony.

There seems to be little or no variation between complainant's testimony before the justice and that given before the jury, but two witnesses testify to admissions or confessions made by the complainant, tending to show that other persons may have been guilty instead of the plaintiff in error. Under this state of evidence, we think the plaintiff in error was entitled to have an instruction given, telling the jury that they should take into consideration any confession or admission made by complainant which did not agree with her testimony, and that it was prejudicial error to refuse the same. Even though the entire instruction which was requested might not be applicable, still, in such a proceeding as this, we think it was the duty of the court to give the accused the protection granted him by the statute, by giving an instruction to the jury covering the points which were called to its attention, so far as the same was made necessary by the evidence.

The judgment of the district court should be reversed and a new trial granted.

AMES 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.

SEVERAL TRACTS OF LAND ET AL. V. STATE OF NEBRASKA.

FILED FEBRUARY 8, 1906. No. 14,317.

Tax Suit: APPEARANCE. In a tax suit under the "Scavenger" act, the action of the district court in disregarding a volunteer and unauthorized appearance of an attorney purporting to answer for all defendants in default and in rendering a default decree against such defendants, *held* to be proper.

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

John O. Yeiser and *Henry W. Pennock,* for plaintiffs in error.

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

LETTON, J.

A petition was filed in the district court for Douglas county under the provisions of the "Scavenger" act on July 1, 1904. On September 1, 1904, being the last day for the filing of answers by the owners of the several tracts of land embraced in the petition, John O. Yeiser, attorney at law, filed in the suit an answer for himself, as owner of a certain lot in the city of Omaha. In the answer he recited that he came "for himself and on behalf of all owners of real estate in the county of Douglas, state of Nebraska, whose property is sought to be foreclosed herein, who have not paid the alleged taxes claimed by the plaintiff thereon, who have not appeared or answered herein, for whom said John O. Yeiser volunteers to appear and answer as their attorney." The answer is very general and indefinite, and attacks the validity of the special assessments in various undesignated paving, sewer and improvement districts. At the time provided by the law for the entry of a default decree, the district court rendered a decree upon default against all the tracts of land embraced in the tax petition for which no answers had been filed, but entered no decree against the tract belonging to John O. Yeiser. Within three days a motion for a new trial was filed, purporting to be by "each of the defendants in the above entitled cause for whom John O. Yeiser volunteered to appear and answer," the grounds of the motion being that the decree was contrary to law, was not sustained by sufficient evidence and was rendered by default when the tracts were not in default of answering. A like motion for a new trial was filed, purporting to be by "each and every tract or parcel of land for which answer was filed by John O. Yeiser." Afterwards,

at the next term of the district court, a motion was filed by the state and the city of Omaha that the appearance of Yeiser for all owners of property except himself be vacated and the answer of Yeiser as to such defendants be stricken from the files. At the hearing upon this motion it appeared that prior to the entry of the decree certain orders had been made by the court allowing certain owners to file answers in the case, and as to such defendants the motion was overruled, but otherwise it was sustained, and afterwards the motions for new trial were overruled.

The petition in error filed by Mr. Yeiser in this court alleges the rendition of the default judgment and the overruling of a motion for a new trial, and assigns the same grounds of error that were set forth in the motions for a new trial, and, in addition thereto, that the court erred in striking out a part of the answer after the decree and adjournment. It appears that the tax petition contained a description of about 22,000 tracts of land and that the owners of only about 2,000 of these tracts filed answers before the time of default. It is apparent therefore that Mr. Yeiser undertook or volunteered to appear for about 20,000 clients. So far as the answer applied to the tract of land of which he was the owner, the court recognized it and took no default against him, but as to all the other tracts, except where the owners appeared before the day for the default decree to be rendered and ratified and adopted the answer of Yeiser, the court disregarded the volunteer appearance of Yeiser, and the filing of the answer, and rendered a default decree against them. None of the owners of any of these tracts appear to be in this court complaining of this action. It is true that in the bill of exceptions of the evidence upon the hearing of the motion to strike the appearance and answer of Yeiser a number of papers appear, presumably signed by the owners of tracts included in the decree, which appear to have been executed after the decree, but no one is here in court complaining of the entry of the decree but Mr. Yeiser. He, however, has suffered no prejudice, and no final judg-

ment has ever been rendered against him, so far as the record shows. With the authorities cited with regard to ratification of an unauthorized appearance of an attorney we have no fault to find, but think that they are not applicable to the cause under consideration. The "Scavenger" act is a special law complete within itself, which furnishes a systematic method of enforcing the collection of delinquent taxes, and whose orderly administration should not be interfered with by such a voluntary and unauthorized appearance as was made. It seems from his statement that the attempted appearance was made with the motive of preventing a default decree from being rendered against any persons who, perhaps by inadvertence, were not aware of the fact that a law of this nature had recently been enacted and whose rights the attorney desired to preserve. However laudable this motive might be, in a recent case, *State v. Several Parcels of Land, ante,* p. 538, this court held that, even after the default decree has been rendered in a tax suit, a number of remedies are preserved to any person against whose property taxes have been assessed by fraud, mistake or gross injustice, hence, the argument based upon necessity falls.

While the action of the court at the subsequent term may have been irregular, it merely made at that time a written record of what it had actually done at a former term, that is, entirely disregarded the appearance and answer of Yeiser, except as to his own tract of land and as to the persons who ratified his action before the decree. Since we are of the opinion that the court was justified in disregarding his answer and appearance at the former term, any action taken at the latter term was without prejudice.

The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. OMAHA ELEVATOR COMPANY ET AL.*

FILED FEBRUARY 8, 1906. No. 14,391.

1. **Statutes**: CONSTRUCTION. All statutes upon the same general subject are to be regarded as part of one system, and later statutes are to be considered as supplementary or complementary to those preceding them upon the same subject.
2. ———: ———. Statutes *in pari materia* should be construed together.
3. ———: REPEAL BY IMPLICATION. Repeals by implication are not favored. Where the legislature has passed two statutes upon the same subject, the later covering the entire matter embraced in the first and also additional provisions, the later act supersedes the first and repeals the first by implication. If the later statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together so far as the first still stands.
4. **Anti-Trust Act: REPEAL.** Rule applied, and *held* that the anti-trust act of 1897, known as the "Gondring Act," was repealed by implication by the anti-trust act of 1905, known as the "Junkin Act," except as to the first section thereof defining "trusts."
5. **Statutes**: CONSTRUCTION. Unless it appears from its terms that an act applying to a certain class of persons is meant to cover all inhibitions and regulations affecting them, a later general act applying to all persons and prohibiting in general terms the acts specified in the former act as well as a number of other acts and purposes, defining new crimes and prescribing new penalties, and giving new civil remedies, will not be held to except the persons embraced in the former act from the operation of the latter.
6. **Unlawful Combinations.** Rule applied, and *held* that the acts of 1887 and 1897 prohibiting combinations by grain dealers and others to fix the price of grain, etc., do not except such dealers from the operation of the later general anti-trust acts of 1897 and 1905, applying to all illegal combinations to fix prices, etc.

ORIGINAL action by the state against the Omaha Elevator Company and others. Defendants demurred to petition. *Demurrers overruled.*

*See opinion on exceptions to referee's report, p. 654, *post*.

Norris Brown, Attorney General, W. T. Thompson, J. J. Sullivan and *Jefferis & Howell,* for the state.

Kennedy & Learned, Hall, Woods & Pound, Smyth & Smith, Courtright & Sidner, Strode & Strode, W. C. Walton, F. A. Brogan, O. B. Polk, I. E. Congdon, A. A. Welch, D. O. Dwyer, L. S. Hastings, John C. Watson, Clark O'Hanlon, Brome & Burnett and *McDonald & Woodland, contra.*

LETTON, J.

This action was brought by the attorney general of the state of Nebraska, on behalf of the state, against the Omaha Elevator Company, a corporation, and 23 other corporations, and against William H. Ferguson and 25 other individuals. The petition alleges, in substance, that each and all of the defendant corporations and individuals are, and for many years have been, engaged in the several counties of the state of Nebraska in the business of dealing in and shipping of grains of all kinds, and were the owners and operators of over 400 elevators at stations along railway lines of said state, and that by reason of these facilities they are doing and have done an annual business in dealing in Nebraska grain to the amount of about 200,000,000 bushels a year; that the defendants now, and for the last three years have been, wilfully and unlawfully combining and conspiring together for the purpose of pooling the prices to be paid for all kinds of grain in Nebraska, and for the purpose of dividing between themselves the aggregate or net proceeds of the earnings of themselves, and for the purpose of fixing the prices to be paid for, and preventing competition and restraining trade and commerce in grain in said state, so as to give them and each of them a monopoly of the grain trade in this state, to the end that they might enjoy unreasonable and unconscionable profits, and that these unlawful purposes have been attained. That the defendants, for the

purpose of carrying out the conspiracy, organized what is known as the Nebraska Grain Dealers Association; that certain defendants (naming them) are the officers of said association; that by the rules of the association no person or corporation was eligible to membership therein unless he or it was engaged in the buying, selling or shipping of grain and owned one or more elevators situated upon the right of way of some railroad, and no person or corporation was eligible who owned, controlled or operated an elevator or "scoop-shovel house" off the right of way; that all the defendants are members of said association and are known to each other and designated as "regular grain dealers." All other dealers are known to the members of said association as "irregular grain dealers." That there are and were for the last three years in Nebraska more than 1,200 grain elevators controlled by said association and subject to its rules, by-laws, regulations and penalties, adopting and agreeing to the prices fixed for grain bought and sold by the officers of the association, and doing business only with such persons and elevators as they should name; that there are less than 50 independent elevators and grain dealers in the state of Nebraska; that the defendants control at least 90 per cent. of the grain trade in this state; that they intend to continue such combination, and will compel their respective members, agents and servants to refrain from bidding against each other, except perfunctorily, and by these means compel the owners of grains to sell at prices less than they would receive if the bidding was really and in truth competitive. That they have arbitrarily, from time to time, raised, lowered and fixed the prices of grain, and have undertaken, and do now undertake, to maintain uniform prices at which they will buy grain throughout the state. This purpose is and has been accomplished by means of secret meetings of the officers of said association, where the prices of grain are fixed, to be in force until changed by some subsequent meeting; that the prices are thereby maintained directly by the defendants, and by collusively restricting the volume

of trade, by imposing and collecting penalties for the violation of the rules of the association, by notifying one another of the delinquencies of any of its members and by keeping a black list of delinquents and refusing to deal with them, the price of grain is established and competition entirely destroyed. That the defendants have each and all engaged in, and will continue, agreements and arrangements with the several railroad companies doing business in Nebraska, whereby they receive secretly, by means of rebates and other devices, freight rates less than those charged the public, and thereby no competitor is able to engage or continue in the grain business, which facts result in giving the defendants a monopoly of the trade in grain in this state. That the defendants intend to continue and to sustain and carry on all the unlawful practices before recited, all in violation of law and to the irreparable injury of the public. That the defendants who are domestic corporations have abused and violated their franchises and forfeited their right to exist and do business in this state, and those defendants which are foreign corporations have likewise abused their franchises and forfeited their right to longer engage in business in Nebraska, by wilfully violating the laws of this state.

The prayer of the petition is that the defendants be adjudged guilty of the acts complained of, and be perpetually restrained from every connection with the Nebraska Grain Dealers Association; that the association be dissolved; that the defendants who are officers of the association be perpetually enjoined from acting as such officers; that the defendants who are domestic corporations be dissolved and ousted of their corporate franchises, and that those who are foreign corporations be decreed to have abused their franchises to do business in this state and be forever ousted from the further exercise of the same in this state; that the defendants be perpetually enjoined from engaging in any contract or combination with one another, or with other persons or corporations, to prevent or limit competition in the grain trade, or to fix and con-

trol the prices, or to divide the net profits, or to enter into any agreement for the pooling of prices, or to solicit or receive rebates from any railway company, or to create or carry out any restrictions or to limit or reduce the price, and for general relief in equity.

To this petition the defendants have severally filed demurrers, upon the grounds that the court has no jurisdiction, that the plaintiff has no legal capacity to sue, that there is a defect of parties defendant, that several causes of action are improperly joined and that the petition does not state facts sufficient to constitute a cause of action.

In order to understand the contentions made by the defendants, it will be necessary to review the legislation in this state having for its object the prevention of combinations, trusts, monopolies, pools and other devices designed to restrain competition. In 1887 the legislature passed an act entitled "An act to prohibit grain dealers, persons, partnerships, companies, corporations, or associations from combining or entering into any agreement or contract to pool or fix the price to be paid for grain, hogs, cattle or stock of any kind whatever, and to provide punishment for violations of the same." The substance of this act is that it was declared unlawful for any persons, partnerships, corporations or associations to enter into any agreement, contract or combination with any other of the same class for the pooling of prices of competitive dealers and buyers, or to divide between them the aggregate or net proceeds of their earnings, or for fixing the price which any of them should pay for grain, etc., and each day of the continuance of such acts was to be deemed a separate offense. In case of a breach of any of the provisions of the act, the guilty person or association was declared to be liable to the person or persons injured to the full amount of damages sustained. It was provided that the court might compel the attendance of the defendant and other grain dealers as witnesses, and the production of their books and papers; that evidence tending to criminate should not excuse the witness from testifying, but such evidence should not be

used against such person in the trial of a criminal offense. Whoever was guilty of any violation of the act was to be deemed guilty of a misdemeanor and, upon conviction, fined in any sum not exceeding $1,000 or imprisoned in the county jail not exceeding 6 months. Laws 1887, ch. 114.

The next act in point of time was passed in 1889 (laws 1889, ch. 69), and is entitled "An act to prohibit persons, partnerships, companies, associations or corporations engaged as manufacturers or dealers from entering into any understanding, contract, combination, pool or trust for any purpose whatever, and to provide punishment for violations of the same, and providing means for the suppression of such evils, and remedies for persons injured thereby." The act was in accordance with its title, but as it was afterwards expressly repealed it is unnecessary to set it forth specifically.

In 1893 an act was passed with the following title: "An act to prohibit lumber dealers, coal dealers or other persons, companies, partnerships or associations from entering into any contract or agreement or combination to pool or fix the price at which lumber or coal shall be sold, and to provide punishment for violation of the same." Laws 1893, ch. 49. Since this act does not affect dealers in grain its details are not important here, and we merely mention it as a part of the course of legislation upon the general subject.

Four years afterwards, in 1897, Mr. Gondring introduced an act which was passed, the title of which is "An act to define trusts and conspiracies against trade and business, declaring the same unlawful and void, and providing means for the suppression of the same, and remedies for persons injured thereby, and to provide punishment for violations of this act, and to repeal chapter 91*a*, entitled 'Trusts,' of the Compiled Statutes of Nebraska for the year 1895." Laws 1897, ch. 79. Section 1 of this act contained a definition of the word trust. Section 2 declared all acts by any person or persons carrying on, creat-

ing or attempting to create a trust to be a conspiracy against trade and business, and unlawful, and provided that the guilty party should be deemed guilty of a misdemeanor and fined not less than $25 nor more than $5,000. Section 3 provides that any domestic corporation which violates any of the provisions of the act shall forfeit its charter and franchise, and its corporate existence shall thereupon cease and determine, and makes it the duty of the attorney general, or county attorney within his county, upon his own motion, to institute suit or *quo warranto* proceedings for the forfeiture declared. Section 4 denies to nonresident corporations and persons guilty of a violation of the act the right to do business within the state, and makes it the duty of the attorney general, and each county attorney within his county, to enforce this provision by injunction or other proper proceedings in the name of the state, on his relation. Other sections provide that a general allegation shall be sufficient in an indictment or information, prescribe the quantum of proof required, provide that contracts in violation of the act shall be absolutely void, that the purchaser from a trust is not liable for the price of any article purchased, for the recovery of damages by any person injured, for the production of books and papers, and that witnesses should not be excused from testifying. Section 13 defines the word persons as including all classes of partnerships, corporations and associations, foreign and domestic, and section 14 repeals chapter 91*a* of the Compiled Statutes for 1895, which is the general trust act of 1889.

At the same session of the legislature, in 1897, another act was introduced by Mr. Loomis, and passed, relating to grain dealers. Laws 1897, ch. 80. The title of the act is lengthy, but the substance of the act is as follows: Section 1 makes it unlawful for any person, partnership, association or corporation engaged in the grain business to enter into any combination with any other like class, or to form, enter into or contribute to any trust, pool or combination which has for any of its objects the prevention of

competition among dealers, buyers or sellers of grain, etc. Section 2 provides for the liability of the guilty party to the party injured to the full amount of damages sustained, with reasonable attorney's fees. Section 3 makes the violation of the act a felony and the penalty not less than $1,000 nor more than $2,000, and in addition permits a 6 months' sentence to the penitentiary. Section 4 provides that any person aggrieved may prosecute the violator in a criminal action by his own attorney, and in case of conviction a reasonable attorney's fee shall be allowed.

The last expression of the legislature on this general subject was an act introduced at its session in 1905 by Mr. Junkin, which was entitled "An act to protect trade and commerce against unlawful restraints and monopolies, and to prohibit the giving or receiving of rebates on the transportation of property, and to provide a penalty for the violation thereof." Laws 1905, ch. 162. The act consists of 22 sections covering over 10 pages of the session laws. In substance, the law concerns trusts and monopolies, and declares them to be unlawful, and punishes any person engaged in a trust or attempted monopoly by declaring the same to be a misdemeanor punishable by a fine not exceeding $5,000 or imprisonment not exceeding one year, or both, and forfeiting the property of any such trust or combination to the state. It provides for the filing of annual statements by nonresident corporations and associations, and for filing an acceptance by its officers of the provisions and liabilities of the act. It prohibits underselling for the purpose of driving out business competitors, under like penalties. It provides that any corporation or association that shall have been twice adjudged to have violated the provisions of the act shall no longer be allowed to engage in business within this state; makes it the duty of the attorney general to enforce the provisions of the act by indictment or information; makes the officers of such corporation or association liable for all the debts of the company, and punishable by fine in addition,

The act also makes it unlawful to grant or to accept rebates for the transportation of any property within the state, and provides a penalty therefor. Section 16 provides that the several courts of record of this state having equity jurisdiction are hereby vested with jurisdiction to prevent and restrain all violations of this act, and to prevent or restrain any such corporation or combination which shall have solicited, accepted or received any such rebate or which shall have offered, granted or given any special prices, inducements or advantages in order to restrain or destroy competition in particular localities from engaging in commerce within this state. Other provisions are similar to those of the "Gondring Act."

It will be observed that only one of these acts has been expressly repealed, and, as is contended by the defendants, it becomes a question of first importance to determine which of these acts is applicable to the defendants in this case and to the contracts, agreements and combinations which it is charged they have entered into. The contention of some of the defendants is that, if the suit had been brought before the passage of the act of 1905, no liability on the part of the defendants would arise by virtue of the general anti-trust act of 1897, but the measure of their liability would be found in the grain dealers act of 1887 or in the Loomis act of 1897, which do not provide for a remedy by injunction. The ground of this contention is that the two acts of 1887 and 1897 having special reference to dealers in grain, the general act of 1897, known as the "Gondring Act," would not affect their operation, since a general statute operates upon all subjects embraced therein, except the particular one which is the subject of a special act. They further contend that the act of 1905 repeals by implication the general anti-trust statute of 1897, but, being a general act, has no effect upon the special statutes of 1887 and 1897 relating to grain dealers. The other defendants take the position that the law of 1905, being a general law covering the whole subject embraced in all the former statutes, repeals them all by implication and

is the sole enactment now in force. On the other hand, the attorney general contends that the correct view of the matter is that all the trust acts should be regarded as a single measure of legislation enacted for the protection of trade and commerce; that repeals by implication are not favored; that they are statutes *in pari materia* and should be construed as though they had all been passed at the same time and under one title. He further contends that, in the absence of any statute, the state has the right to the relief prayed for under the principles of the common law, and that, whatever may be the conclusion arrived at as to the statutes, the demurrer should be overruled.

The first question, then, for the court to determine is as to which of these rules of construction should be applied in ascertaining what is the statute law as it now stands which it is claimed that the defendants have violated, and whether this procedure is authorized by the statutes. The law of 1905 is the only statute which in express terms gives the right to the attorney general, upon behalf of the state, to apply for and receive, in a proper cause, the equitable remedy of injunction against any but foreign corporations, and, unless the provisions of this act are applicable, the state must rely upon the proposition that, independent of any statute, the right to restrain illegal combinations, such as is alleged the defendants have made, is a right to which it is entitled under the provisions of the common law. It is a matter of history and public knowledge that, while the origin and growth of combinations and conspiracies in restraint of trade is as old as organized society, the unprecedented volume and extent to which such unlawful combinations have now attained has been a matter of but recent growth. The enactment of statutes designed to remedy the injury to the public and to individuals which such associations are believed to inflict has to a measurable extent attempted to keep pace with the growth of the evil. When a law proved ineffectual to accomplish the desired end, a new enactment would be passed, and when, by some ingenious procedure or device, this

law would in its turn be evaded or rendered ineffective, another statute more sweeping in its terms, and usually more drastic in its penalties, would be the response of the legislature. Eighteen years ago the legislature of this state first enacted a law upon this general subject. This law prohibited all persons from combining to fix the price to be paid for "grain, hogs, cattle or stock," and provided penalties for the violation thereof. Two years afterwards a general act was passed prohibiting combinations to fix the price of any natural product or any article of commerce, and prohibited pooling and trusts, under like penal provisions. This act was repealed in 1897. An act was passed in 1893 relating to lumber and coal dealers only. In 1897 a general act, known as the "Gondring Act," was again passed, defining trusts and providing new remedies not before given by the prior laws. At the same session an act was passed with reference to grain dealers, known as the "Loomis Act." This act is conceded by the state and some of the defendants to be unconstitutional, by reason of defects in its enactment, but other defendants treat the same as being in full force. The most extensive and elaborate enactment covering the general subject, and providing preventives for the future occurrence of the evils, remedies for the relief of persons injured and penalties for violation of its provisions, is the act of 1905, known as the "Junkin Act."

It will be seen from this review of the legislation upon this subject that there has been a gradual growth and development of the law designed to counteract the evils of unlawful combinations, and that from time to time, as necessity seemed to require, the legislature endeavored to provide such measures as the nature of the case seemed to demand. While in minor matters, such as the severity of the penalty to be inflicted for a violation of the law, there is a variance between the several enactments, in the main the purpose and intent of the entire series is the same. It will be observed that each one of the later acts includes within its condemnation some element which had

hitherto escaped mention in the former statute. While perhaps a liberal construction of the language used in the "Junkin Act" might make it include within its terms all things prohibited by the former statutes, still, since penal statutes are not subject to liberal construction, unless any act which is specified in the later statute as a crime is not so designated in the former acts, it is not included in their terms and constitutes an addition to the already existing body of law upon the subject. We think it clear that the whole series of statutes directed against combinations and monopolies should be considered as parts of a connected system, and that no one act should be singled out for construction and be considered apart from the general trend of legislation upon the subject. Statutes *in pari materia* are to be construed together, and repeals by implication are not favored. The courts will regard all statutes upon the same general subject matter as part of one system, and later statutes should be construed as supplementary or complementary to those preceding them. They are to fill up the gaps left by former attempts to mend the evil. It has been said: "In the course of the entire legislative dealing with the subject we are to discover the progressive development of a uniform and consistent design, or else the continued modification and adaptation of the original design to apply it to changing conditions or circumstances. In the passage of each act, the legislative body must be supposed to have had in mind and in contemplation the existing legislation on the same subject, and to have shaped its new enactment with reference thereto." Black, Interpretation of Laws, sec. 86. The rule is that all statutes *in pari materia* must be taken together and construed as if they were one enactment. *Hendrix v. Rieman,* 6 Neb. 516; *State v. Babcock,* 21 Neb. 599; *People v. Weston,* 3 Neb. 312. Statutes should be so construed, if possible, as to give effect to every provision, and an act should not be placed in antagonism with another act, unless such was the manifest purpose and object of the legislature. See *McCann v. McLennan,* 2 Neb. 286; *Bur-*

lington & M. R. R. Co. v. Webb, 18 Neb. 215; *State v. Babcock,* 21 Neb. 599; *Barker v. Wheeler,* 71 Neb. 740; *Jackson v. Washington County,* 34 Neb. 680; *Dawson County v. Clark,* 58 Neb. 756.

Another well-settled principle is that, where the legislature has passed two statutes upon the same subject, the last one covering the entire matter embraced in the first and also containing additional provisions, the last act supersedes the former and repeals it by implication. *Brome v. Cuming County,* 31 Neb. 362. But this is true only so far as it appears that the intention of the lawmakers was to make an entire revision or substitution of the new enactment for the old. Repeals by implication are not favored. Where the legislature has passed two statutes upon the same subject, the last covering the entire matter embraced in the first and also additional provisions, the last act supersedes the first and repeals the first by implication. But if the latter statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together, so far as the first still stands. It is apparent that the Junkin act of 1905 in a large measure covers the same subject matter as the Gondring act of 1897. Its provisions in some respects are more specific. It is preventive in its nature as well as remedial, and it is apparent that it was intended by the legislature to cover the same subject matter and to furnish like and additional remedies to those provided by the Gondring act. It evidently was intended to be a substitute for that act, in so far as the preventive and remedial features are concerned. It fails, however, to specifically define or construe or determine what a "trust" is. We think that recourse may be had, however, to the definition of "trust" in the first section of the Gondring act to throw light upon what the legislature meant when it prohibited "every combination in the form of trust" in the Junkin act. The extent of the repeal of the former act is measured by the

extent to which it covers the subject matter, and if any portion of the former act is not inconsistent with or repugnant to the latter, and it can fairly be said that it was within the contemplation of the legislature when the later statute was enacted, it will be upheld and construed as forming a part of the later enactment. *State v. Grady,* 34 Conn. 118; *Wood v. United States,* 16 Pet. 343; *Putnam v. Ruch,* 54 Fed. 216. It is maintained by the defendants that the 1905 act repealed *in toto* the Gondring act of 1897. With this contention we agree, except that we are of the opinion that the first section thereof still stands and may be used to define and interpret the later act, as to what constitutes a "trust."

It is insisted that the general provisions of the act of 1905 do not affect the defendants, since their duties and liabilities are measured only by the acts relating to grain dealers specifically. The proposition maintained by the defendants is that, where there is found a special statute dealing with a particular subject and also a general statute broad enough in its terms to include the matters covered by the special statute, as well as other matters, the general statute will be held to apply to all matters not specifically covered by the special statute and, as to such matters, the special statute alone will apply. The same argument was made by the defendants in the case of the *United States v. Trans-Missouri Freight Ass'n,* 166 U. S. 290, 17 Sup. Ct. Rep. 540, where it was urged that the special commerce act related solely to railroads and their proper regulation and management, and that pooling was not forbidden therein, while the later general trust act applied to all contracts of the nature therein described entered into by other than common carriers, and was not applicable to railroads. The United States supreme court, Mr. Justice Peckham delivering the opinion, said:

"The first answer to this argument is that, in our opinion, the commerce act does not authorize an agreement of this nature. * * * If the agreement be legal it does not owe its validity to any provision of the commerce

act, and if illegal it is not made so by that act. * * * Although the commerce statute may be described as a general code for the regulation and government of railroads upon the subjects treated of therein, it cannot be contended that it furnishes a complete and perfect set of rules and regulations which are to govern them in all cases, and that any subsequent act in relation to them must, when passed, in effect amend or repeal some provision of that statute. The statute does not cover all cases concerning transportation by railroad and all contracts relating thereto. It does not purport to cover such an extensive field. The existence of agreements similar to this one may have been known to congress at the time they passed the commerce act, although we are not aware, from the record, that an agreement of this kind had ever been made and publicly known prior to the passage of the commerce act. Yet if it had been known to congress, its omission to prohibit it at that time, while prohibiting the pooling arrangements, is no reason for assuming that when passing the trust act it meant to except all contracts of railroad companies in regard to traffic rates from the operation of such act."

When the legislature of the state passed the acts of 1887 and 1897 relating to grain dealers, there is no reason to assume that it knew of the existence of a number of practices which are inhibited by the Junkin act, but not inhibited by these acts, and there is no reason for assuming that, when passing the Junkin act, it meant to except grain dealers from its operation in regard to practices prohibited therein not specially mentioned in the former acts. It may be said, as was said by COBB, C. J., in *State v. Arnold*, 31 Neb. 75:

"An examination of the law as it then existed could not fail to develop the necessity of further legislation to accomplish the object in view, but pointed out no provision or language in that already upon the statute book, not necessary or convenient to other purposes of equal utility. There was simply a *casus omissus* and not a misapplication

of provisions or words in the statute. The end desired could be attained by new and independent provisions and not by amending or changing the old ones." See also *State v. Phipps,* 95 Ia. 491.

An act of the legislature of this state provided that, if a county treasurer should neglect or refuse to render any account required by law, or fail to account for any balance due any of the political subdivisions, or was guilty of any other misconduct, the county board might forthwith remove him from office. An earlier act provided that all county officers might be charged, tried and removed from office for certain official misdemeanors, and provided that charges should be made and a hearing had. While the later act provided apparently for a summary removal of a county treasurer and, hence, was special in its nature to that extent, as applying to that office alone, while the earlier act was general, the court held that these statutes were *in pari materia,* and before the treasurer could be removed he was entitled to be tried under the provisions of the general act. *State v. Sheldon,* 10 Neb. 452. Unless it appears from its terms that an act applying to a certain class of persons is meant to cover all inhibitions and regulations affecting them, a later general act applying to all persons, and prohibiting in general terms the acts specified in the former act, as well as a number of other acts and purposes, defining new crimes and prescribing new penalties, and giving new civil remedies, will not be held to except the persons embraced in the former act from the operation of the latter. 1 Lewis' Sutherland, Statutory Construction, p. 528; 1 Kent, Commentaries, *462. The general act of 1905 covers many matters not specifically covered by the special statutes. It will be observed that the petition charges a number of acts, intentions and purposes which are inhibited by the general law and are not under the ban of the grain dealers' acts. It is charged that the defendants combined and conspired with the intention to prevent others from engaging in or carrying on a like business. That they combined and conspired

in restraint of trade and to monopolize the commerce of grain in Nebraska. It is further charged that as a part of their wrongful operations they solicited, accepted and received rebates from railroads and in such manner obtained an advantage over other dealers; that they formed rules refusing to do business with persons not members of their association, and that no person could be admitted thereto unless he owned an elevator upon a line of railroad. These acts are not embraced in the laws of 1887 and 1897, and whatever may be said as to the contention of the defendants that general laws are to be modified by special acts upon the same subject, where the special act fails to cover the point and a new remedy is afterwards provided by a general act, both acts may stand together and both be enforced, where not in conflict with each other. *United States v. Trans-Missouri Freight Ass'n, supra.* The whole question is one of intent of the legislature and we think the intention is clear. It is not necessary in this case to determine which of the penalties imposed for a violation of the criminal provisions of these statutes are applicable in case of criminal proceedings, or whether or not the 1897 law repealed by implication the act of 1887, or whether the Loomis act of 1897 is unconstitutional, as claimed by some of the defendants, or whether the Junkin act repealed both the 1887 and 1897 acts. It is sufficient to say that, in so far as the remedy by injunction is granted by the Junkin act, that remedy is not curtailed or taken away as to grain dealers by the provisions of any prior act.

Much time and labor have been devoted by counsel for both parties for and against the proposition that the general powers of a court of equity under the common law are sufficient to authorize the maintenance of such a suit as this by the attorney general, and the granting of relief by injunction. The discussion in the briefs is lengthy, able and interesting, and, if necessary, the court would consider the questions therein discussed, but, having reached the conclusion that the action is authorized by statute, this

question becomes merely academic and of no practical importance in this case.

The motion and demurrers are

OVERRULED.

The following opinion on exceptions to report of referee and motion to dismiss was filed December 21, 1906. *Exceptions overruled:*

1. **Depositions** cannot be used as evidence against parties who were not notified of the time and place of taking the same, and did not participate therein.

2. **Corporations:** INJUNCTION: FORFEITURE OF CHARTER. In an action under the statute, commonly called the "Junkin Act" (laws 1905, ch. 162), to obtain an injunction restraining violations of the act, the court is not authorized, in the first instance, to declare a forfeiture of the charters of corporations found to have violated the act.

3. **Interstate Commerce.** The allowance by railroad companies of certain charges, as elevator charges, to terminal elevators on shipments of grain from points in this state to points without the state is an incident of interstate commerce, and this court has no jurisdiction to limit or control the same.

4. **Reference:** REPORT: MOTION TO RECOMMIT. Upon the filing of the report of a referee in an action brought originally in this court, there is no doubt that the court in its discretion might, upon motion of one of the parties, recommit the matter to a referee to take additional evidence and report thereon. But when there has been a fair hearing before the referee, and there is no evidence of accident or surprise preventing a full investigation of the facts, nor that further evidence can be furnished that might probably change the result reached by the referee, such motion will be denied.

5. **Report of Referee:** EVIDENCE. The report of a referee will not be set aside, because it appears that he has given more weight to certain evidence tending to support his report than the facts, as shown by the whole record, will warrant. If the evidence considered together supports his findings it is sufficient.

6. **Unlawful Associations:** SUIT TO ENJOIN. For several years prior to the time the act of 1905 took effect, the defendants had been engaged, through the means of an association which they had formed for that purpose, in a systematic course of conduct made unlawful by that act. In forming that association and becoming

members thereof, they had agreed to continue to promote its objects until they severed their relations with it. In the absence of evidence showing affirmatively that they had taken the necessary steps to sever their connection with the association before or at the time the act took effect, the presumption will obtain against them that this action, brought soon after the act took effect, to enjoin a continuation of the association and restrain the defendants from carrying out its purposes, was necessary and proper for the enforcement of the act.

SEDGWICK, C. J.

In overruling the general demurrer to the petition the nature of the case as disclosed in the petition was stated, and the various statutes against illegal agreements and combinations in restraint of trade were discussed. *Ante*, p. 637. Subsequently the issues were formed, and Mr. L. M. Pemberton was appointed referee to take the evidence, and report his findings of fact and conclusions of law. This duty was performed by the referee, and a comprehensive report was filed. Exceptions to this report were filed by the state and also by various defendants.

The referee's findings of fact upon the main issues are as follows: (1) "Sometime prior to the year 1899, an association known as the Nebraska Grain Dealers Association was organized in this state, which adopted a constitution and by-laws under which it operated. Its officers consisted of a president, vice-president, secretary, treasurer, and a governing board consisting of the president, secretary and three other members of the association. (2) The object of such association, as expressed in the preamble of its constitution, was the advancement and protection of the common interests of those regularly engaged in the grain business, the formulation of rules for the transaction of business, and the promotion of friendly relations among legitimate grain men of the state. (3) According to the constitution, 'any person, firm or corporation conducting a reputable, regular, and continuous business of buying and selling grain, and having proper facilities for handling same, may be admitted to membership in

this association.' And 'any regular grain receiver, track buyer, terminal elevator, or commission merchant who conducts a reputable business, and confines his business to the regular elevator operators, shall be eligible to membership on the payment of regular fees and shall be rated as the owner of one elevator.' And no person, firm or corporation could be admitted to membership unless he or it should receive the unanimous approval of the governing board, subject to the approval of the association, and should subscribe the constitution and by-laws. (4) It was made the duty of the governing board to look after the interest of the association between all meetings; to follow the general policy outlined by the meetings, transact the necessary business of the association, investigate all complaints that might come before them, and work for their adjustment, act as a board of appeals and arbitration, and have all powers delegated to them by the constitution and by-laws. (5) It was provided that each member of the association should be governed in all matters pertaining to the association by the governing board, and a failure to obey the orders of the governing board subjected him to a fine not to exceed his membership fee, or expulsion, as the governing board should decide, subject to appeal to the association. (6) It was provided in the by-laws that no person should be allowed at any meeting of the association or governing board, unless a member in good standing, except as a witness in case of trial. (7) According to the evidence introduced by the state (there was no evidence introduced by the defendants) the main objects of said association were to fix, regulate and control the prices of grain in this state; to put an end to competition in the grain business; and to drive out of business all irregular and independent dealers in grain. (8) There were about 1,200 grain dealers, all told, in the state on April 1, 1905, of whom about 770 belonged to said Nebraska Grain Dealers Association, and about 200 more were in sympathy with such association. (9) To accomplish the objects of said association as above set forth, various expedients were re-

sorted to by it, some of which were as follows: (a) A price committee, consisting of persons chosen from five of the leading corporation members of said association, was formed, whose business it was to fix the prices which should be paid for grain by the various members of said association throughout the state, and the other regular dealers who worked in harmony with said association. All such members and persons were notified by card what such prices were, and as members of such association and regular dealers they were expected and required to fix their bids for grain on the basis of the prices sent to them on the cards, and they were not to pay any more for grain than other regular dealers in the same locality. For the purpose of facilitating the business, the state was divided into thirteen districts, and it was the duty of some member of the association, selected for that purpose on account of his or its superior location and facilities for that purpose, to send cards to all the regular dealers in his district. The prices were changed as often as the fluctuations of the market made it necessary, sometimes every day, and sometimes less often. The new prices always went into effect on the morning of the day succeeding the issuance of the cards, and never on the same day. In said manner and by said method uniformity of prices was maintained amongst the members of said association and other regular dealers over the state. Regular dealers were those who were in harmony with the purpose and objects of said association. (b) In a town where there were two grain dealers, one or both of whom were 'irregular' and refused to abide by the prices sent out on cards as aforesaid, the association resorted to various methods to force such dealer or dealers to become 'regular.' The committee of the association, or some one appointed by it for that purpose, would send some person or persons to visit such irregular dealers, whose business it was to prevail upon such dealers to agree to abide by the prices fixed as aforesaid, and also to agree upon a division of the grain marketed at said station between them so that

there would be no competition between them in the purchase of such grain. In this the person or persons so sent out were generally successful. If a dealer at any point persisted in being 'irregular,' he was summarily dealt with according to circumstances. If weak financially, prices would be raised on him so that he could not make any money and he would be forced to surrender or get out of business. If he was strong financially, so as to make such a proceeding as that just named unprofitable for the association, the bidders in the market where he sold would be prevailed upon to bid him less than the market price for his grain, so that he could not sell for as much as the regular dealers. By such means the 'irregular' dealers were generally either driven out of the business or forced to become 'regular.' (c) The association also made it a part of its business to look after legislation, in order to prevent any laws from being passed which were unfavorable to the interests of the 'regular' dealers. The testimony shows that during the 1903 session of the legislature several thousand dollars were spent by the association through its agents in trying to prevent unfavorable legislation. (d) The farmers' grain and elevator companies were the especial aversion of the Nebraska Grain Dealers Association, and the latter exerted themselves greatly to prevent the former from getting into, and doing business in, this state. The railroad companies were labored with to induce them to refuse sites for elevators to be put up by farmers' elevator companies. The members of the association and other regular dealers refused to deal with farmers who shipped their own grain, or with the farmers' elevator companies, and also with any person who would deal with such irregular dealers. (10) The evidence shows that, by such means as the foregoing and other means not herein mentioned, the said Nebraska Grain Dealers Association attempted to, and did, in a large measure, fix and control the prices paid for grain throughout this state; prevented competition in the grain business; and largely monopolized the grain business in this state.

(11) The evidence also shows that all of the defendants, except the Holmquist Grain & Lumber Company and William B. Banning, who had no notice of the taking of the depositions in relation to the foregoing matters, were members of said grain dealers association or regular dealers working in harmony therewith, and most of the defendants were active members in carrying out the purposes and objects of said association. (12) I also find from the evidence that said Nebraska Grain Dealers Association was in existence and engaged in carrying out the objects herein mentioned and described at the time of the commencement of this action, and that said defendants mentioned in the last paragraph were then members of said association, giving it their aid and assistance."

The conclusions of law are stated by the referee in these words: "On the whole case I conclude, as a matter of law, that the plaintiff is entitled to have the temporary injunction or restraining order granted herein made perpetual, except in so far as it restrains the defendants from soliciting or receiving rebates from any railroad company. This exception is made for the reason that the evidence does not show that the defendants, or either of them, was soliciting or receiving a rebate from any railroad company or threatening to do so. Such decree should apply to all the defendants, except the Holmquist Grain & Lumber Company and William B. Banning, who had no notice of the taking of the depositions which were taken on the question of a combination and conspiracy in restraint of trade, and are therefore not bound by the evidence contained in said depositions. As to them this action should be dismissed without prejudice."

1. The first exception to the report of the referee on the part of the state is as follows: "Excepts to the conclusion of law that the case should be dismissed as to the Holmquist Grain and Lumber Company and W. B. Banning." These defendants filed with the referee objections to the depositions so taken, and, of course, the depo-

sitions should have been suppressed as to those defendants who were not notified of the time and place of taking the same, and did not participate therein. This exception should therefore be overruled. The same objection was made by the Peavey Elevator Company, American Grain Company, Atlas Elevator Company, Anchor Grain Company and Spelts Grain Company. The defendants John T. Evans and the Evans Grain Company did not participate in the taking of the depositions of the witnesses Overton, Worral and Peavey, and had no notice that the same would be taken. These were very important witnesses for the state. The evidence should not be used against these defendants, and without it the evidence of the state is insufficient.

2. The second exception of the state to the report of the referee is: "Excepts to the conclusion of law that the plaintiff is not entitled on the facts found by the referee to a forfeiture of the corporate franchises of the defendant corporation." Provision for forfeiture of corporate franchises of corporations violating the laws against illegal agreements and combinations in restraint of trade were enacted in the act of 1897, known as the "Gondring Act." (Laws 1897, ch. 79.) In our opinion upon the demurrer, *ante,* p. 637, it was said:

"It is maintained by the defendants that the 1905 act repealed *in toto* the Gondring act of 1897. With this contention we agree, except that we are of the opinion that the first section thereof still stands and may be used to define and interpret the later act, as to what constitutes a 'trust.' "

The discussion of this proposition by the referee in his report is worthy of repetition here. He says: "The first important question to determine is under what law or statute this proceeding is brought. The state contends that it is brought and is maintainable under the act of 1897, known as the 'Gondring Act' as well as under the act of 1905, know as the 'Junkin Act'; and that under the former act it is entitled to have a forfeiture of the franchises

of the defendant corporations declared. The defendants contend that the action can only be maintained, if at all, under the Junkin act, and that under it no forfeiture of the franchises can be declared. In view of the findings of fact hereinafter made, it becomes important to determine this question. The Gondring act provides that any corporation organized under a law of this state which violates any of the provisions of said act shall thereby forfeit its charter and franchise, and its corporate existence shall thereby cease and determine. This is a drastic provision, and leaves no discretion in the courts. The Junkin act provides 'that any corporation * * * that shall have been twice adjudged to have violated the provisions of this act by the final judgment of any court having jurisdiction of the question in any civil suit or proceeding in which said corporation * * * shall have been a party, who shall thereafter violate this act, * * * shall no longer be allowed to engage in business in this state; Provided, That such prohibition shall only be enforced after such corporation * * * shall have been enjoined against further engaging in such business, on an information or suit brought in a court of competent jurisdiction, by the attorney general in behalf of this state.' And even then, if the attorney general or the court should deem that the interruption of the business of such corporation would cause serious public loss or inconvenience, a limited or conditional decree to take effect at a future day may be entered by the court. In this respect the Junkin act is much milder and more favorable to offending corporations than the Gondring act. It is perfectly plain that in this respect the Junkin act, being the later act, repeals the Gondring act, because both acts could not be in effect at the same time in relation to the same offense. The one would nullify the other. And this court has held in this case, as I understand it, that the Junkin act repeals all of the Gondring act except the first section, which merely defines what a trust is. But the state contends that, notwithstanding the Junkin act may repeal the Gondring act

as to future offenses, yet by virtue of section 2, chapter 88 of the Compiled Statutes 1903, there is a saving of all causes of action which had accrued under the Gondring act before the Junkin act went into effect, and that, therefore, the Gondring act applies to all offensive acts charged in the petition which arose prior to July 1, 1905, when the Junkin act went into effect. Section 2 of chapter 88, above referred to, provides that 'whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute.' Ann. St. 6966. The question is: Does this saving statute continue the Gondring act in force as to all acts committed in violation of it prior to its repeal? In reference to said saving statute this court, in *Kleckner v. Turk,* 45 Neb. 176, quoting from Sutherland on Statutory Construction, says: 'The legislature has power to pass a general saving statute, which shall have the force and effect to save rights and remedies, except where the repealing statute itself shows that it was not the intention of the legislature that such rights and remedies should be saved.' So that, after all, it is a question of what the legislature intended in each case that determines the matter.

"The question then is: Did the legislature intend, in enacting the Junkin bill, that all corporations which had, prior to July 1, 1905, been in a combination or conspiracy to restrain trade or control prices should be utterly destroyed, while corporations guilty of exactly the same offenses after July 1 should merely be enjoined from their evil practices, but otherwise be permitted to continue in their legitimate business undisturbed? Did the legislature intend that one set of corporations should suffer utter extinction for doing what other corporations should merely be restrained from doing if the court in its judgment thought that the proper thing to do? It would not seem that the legislature intended to discriminate so greatly against one offender and in favor of another of exactly the

same offense. It would rather seem that the legislature, in enacting the Junkin bill, intended to adopt and pursue a radically different course toward such offenders from that provided in the Gondring act; and there is no reason to suppose that it intended to make so great a discrimination between those who offended prior to a certain date and those who offended subsequently to such time. If it had intended to make such a distinction it would have given some intimation of it in the new act itself. The mere fact that the Junkin act only provides for the punishment of those who violate its terms cannot be conclusive that the intention was to punish those who had already offended under the Gondring act; for if the Junkin act had attempted to provide for the punishment of those who had offended before it took effect, it would, in that respect, have been an *ex post facto* law. When the Gondring act expired, the prosecution of all illegal acts committed under it prior to the last year was barred by the statute of limitations in any event; and the legislature, no doubt, thought that, as no effective suits for the forfeiture of the charters of offending corporations had been brought under the Gondring act during the seven years of its existence, none would be brought under it, even if left in force for another year. Therefore, it determined to do away with that act entirely and enact one that stood some chance of enforcement. The result was the passage of the Junkin act which is much less drastic in that respect than the other act. Then, in order to make it effective, the legislature made an appropriation of $10,000 for the enforcement of the Junkin act, but made no provision whatever for the enforcement of the Gondring act. This indicates very clearly which act the legislature intended to be enforced. I am therefore of the opinion that the legislature did not intend the saving statute above referred to to apply to the Gondring act, and that said act was repealed as to causes of action which had accrued under it as well as to future causes of action. But, if I should be mistaken in that respect, still I think it clear that this particular action

can only be maintained, if at all, under the Junkin act. From the allegations of its petition and from the relief sought, it is plain that the state has elected to proceed under that act. It cannot proceed under both acts at the same time for the same offenses. For if the Gondring act is in force and this action is brought under it, and the state has proved its case, then the only thing this court can do is to put an end to the existence of the defendant corporations. That is the express command of the Gondring act, and the court has no discretion in the matter. When the legislature speaks upon a matter wholly within its jurisdiction, the courts have no discretion but must enforce its commands. *State v. Pennsylvania & Ohio Canal Co.*, 23 Ohio St. 121; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290. On the other hand, if the Junkin act is in force and the defendants are guilty of the acts charged, it is the duty of the court to perpetually enjoin them from the further commission of such acts, unless the court think it would be more injurious to the public to do so than to enter a conditional decree to take effect in the future, such as the court may make under the Junkin act. But it is plain that the court cannot enter such a decree if it has already put an end to the defendant corporations under the Gondring act. The state cannot have destruction under the one and restraint under the other. The two things are, in their natures, incompatible; for, after a corporation was destroyed and completely ended under the Gondring act, how could it be perpetually enjoined from doing evil under the Junkin act? The restraining power of this court is not supposed to reach the dead.

"In its petition the state alleges the existence of a combination and conspiracy in restraint of trade and commerce on the part of the defendants, which was in existence at the time the petition was filed, namely, August 2, 1905, over a month after the Junkin act went into effect. A temporary injunction was at that time asked for and obtained restraining the defendants from further

proceeding in the prosecution and carrying out of the alleged combination and conspiracy. The state was entitled to an injunction only on the theory that the defendants were guilty of the acts charged at the time of the bringing of the suit; for it did not seek to enjoin the defendants from doing something that had already been done. Furthermore, according to the allegations of the petition, the combination and conspiracy that was in force amongst the defendants when this action was brought was a combination and conspiracy that had been in existence for several years. It was one continuing conspiracy, and this suit was brought to put an end to it by restraining the defendants from further carrying it out. The state could not cut it in two, and dispose of one part under the Gondring act and the other part under the Junkin act. It must be disposed of under the one act or the other. While I do not think it would make any difference in this case if it were otherwise, yet the authorities generally hold that equity has no jurisdiction to dissolve and put an end to corporations unless expressly authorized to do so by statute. The proper and appropriate remedy for that purpose is *quo warranto*. Clark, Corporations, p. 245-248; 4 Am. & Eng. Ency. Law (1st. ed), 303-304; 5 Thompson, Corporations, sec. 6,703. It is possible that, even at common law, equity had the power to enjoin corporations from committing acts injurious to the public welfare; but that is quite a different matter from destroying them altogether. *Quo warranto* was the only proper remedy when that was the object in view. And, as we have seen, injunction and *quo warranto* are incompatible in the same action for the same offense.

"The Gondring act provides that, for a violation of any of its provisions by any corporation, it shall be the duty of the attorney general of the state to institute suit or *quo warranto* proceedings in any county in this state in which such corporation was organized, or is engaged in transacting business, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

Section 704 of the code says that, when any persons within this state, being incorporated, do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, an information may be filed against them. Section 707 says that such information shall consist of a plain statement of the facts which constitute the grounds of the proceeding, addressed to the court, which shall stand for an original petition. Then, after providing for the appearance of the defendant and a trial, section 715 provides that, 'if a corporation be found * * * to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted, and altogether excluded from such office, franchise, or privilege.' A plain, speedy and adequate remedy is thus provided by statute by an information in the nature of *quo warranto* for ousting and putting an end to corporations violating the law. And since the only remedy or penalty in a civil action provided by the Gondring act is one of ouster and forfeiture of franchise, without discretion on the part of the court, no proceeding would be necessary or appropriate for that purpose other than the one by the information provided for by the statute. No equitable relief would be necessary or appropriate, and, least of all, a perpetual injunction which could take effect only after the offending corporation had been put out of existence. It seems plain that if the state had intended to proceed under the Gondring act for a forfeiture of the franchises and existence of the defendant corporations, it would have adopted the plain remedy provided for that purpose by the statute, and would not have resorted to equity, and asked for a perpetual injunction, as it has done in this case.

"I therefore conclude that the state has elected to proceed under the Junkin act in this case, regardless of whether the Gondring act has been repealed as to causes of action which accrued under it while it was in force."

3. The third and fourth exceptions of the state to the report of the referee are: "(3) Excepts to the conclusion

of law that the state is not entitled to an injunction restraining the defendants from soliciting or receiving rebates from the railroad companies. (4) Excepts to the conclusion of fact that all the shippers similarly situated were paid an elevator charge of 1¼ cents a hundred by the railroads, and that such payment was not a rebate forbidden by law." The facts in regard to the elevator charges were found by the referee as follows: "(1) On all grain shipped from the terminal elevators in this state to points on the Mississippi river, or beyond, which is loaded into the cars from such elevator, an elevator charge of 1¼ cents a hundred is paid to the elevator loading the car by the railroad company receiving the grain for shipment. (2) This practice is universal and is paid by all railroads to all elevators under the same circumstances and conditions. It is also paid to all shippers who load a car load of grain into an outgoing car for such points at places where there are terminal elevators. It is an open rate to all and is included in the tariff sheet of some railroads, notably, the Missouri Pacific and the Chicago & Great Western, and is paid by them to all shippers shipping grain over said roads to eastern and southern points. (3) On through shipments, that is, on shipments from within this state to points on the Mississippi river, and beyond, which are not transferred through any elevator in this state to any railroad in this state, no elevator charge is paid from the railroad company carrying the grain directly to any elevator company in this state. In such cases the elevator charge is paid by the railroad company to the consignee at the end of the shipment. So that on all such shipments an elevator charge of 1¼ cents a hundred is paid to some one. (4) On all purchases of grain for shipment from this state to points on the Mississippi river, or beyond, in car load lots, this elevator charge is taken into consideration. The purchasers in Chicago and St. Louis at least, and doubtless others, designate in their bids whether or not they are to receive the elevator charge. They bid 1¼ cents a hundred more for

grain when they are to receive such charge than when they are not, and the senders of through shipments get 1¼ cents a hundred more for their grain in the eastern and southern markets than do the elevator companies who receive such elevator charge. (5) The price received by the producers of grain in this state is just the same whether the grain is transferred through a terminal elevator in this state which receives said elevator charge, or whether it is shipped directly from the point of production to the point of consignment in the east or south. (6) According to the evidence in this case, the payment of this elevator charge by the railroads practically amounts to a reduction of the tariff rates as published of 1¼ cents a hundred on all shipments to the eastern and southern markets, and the rate is open to all such shippers alike. (7) But no such elevator charge is paid by the railroads on shipments made from any point in this state to any point in this state, whether the grain shipped passes through an elevator or not. In such cases the regular tariff rates are charged in all instances."

His conclusion on these facts is supported by him with the following reasons: "The question, then, is: Does the acceptance of the 1¼ cents a hundred by the elevator companies, defendants, in the manner and under the circumstances above set forth, constitute the receipt and acceptance of a rebate under the provisions of section 14 of the Junkin act? The practice of paying this elevation charge has been in force about one year and a half, and was brought about in the following manner: In the year 1899, F. H. Peavy, of Minneapolis, made a contract with the Union Pacific Railroad Company whereby he agreed to build a very large elevator at Council Bluffs, Iowa, at the terminus of the Union Pacific Railroad, and there unload all the cars of grain brought into Council Bluffs over the line of said railroad company, for which service said railroad company agreed to pay said Peavy 1¼ cents a hundred on all grain so unloaded from the cars of said railroad company into said elevator. This contract was carried out,

said Peavy built the elevator and received from the railroad company the stipulated payment. The other railroad companies complained of this arrangement, for the reason, as they contended, that it was an excessive charge for elevation and amounted to giving a rebate from its regular tariff rates by said railroad company to said Peavy, and thus enabled him to pay more for grain than the shipper over the other roads, who paid the regular tariff rates, could afford to pay. The matter finally came before the interstate commerce commission, which gave it a full hearing, and on June 25, 1904, decided that the payment of 1¼ cents a hundred for elevation by said railroad company to Peavy under said contract with him was not an unreasonable compensation for the services rendered, and dismissed the complaint. 10 I. C. C. Rep. 309. At this hearing the other railroad companies insisted that, if the Union Pacific Railroad Company was allowed to pay such charge, they would be compelled to do the same thing. To quote from the opinion of the interstate commerce commission: 'They (the other railroads) say, and this is perhaps the main ground of their objection, that if these charges are not unlawful, and the Union Pacific continues the arrangement indefinitely, they will be obliged to make similar allowance for a like service at points where the transfer of grain may by them be deemed necessary.' The commission then quotes from the brief of the other railroads as follows: 'If the allowance be permitted to stand the other railroads in the competitive territory must necessarily meet it in dealing with their patrons, or suffer their patrons and themselves to be placed at a constant disadvantage, with the tendency of creating in their territory a grain-buying monopoly in favor of the Peavy elevator, and a grain-haul monopoly in favor of the Union Pacific Railroad Company.' The commission saw that such practice on the part of the Union Pacific would probably result in forcing the other roads to grant a like privilege to their customers; for the commission say: 'Granted that the allowance to Peavy & Co. places these other car-

riers and grain dealers on their lines at some commercial disadvantage, that it introduces an element of competition which they will be forced to equalize—and that would seem to be its character so far as rival roads are concerned—on what theory can the commission interfere so long as the obligations of the Union Pacific to its own shippers are not disregarded? Plainly, as it seems to us, the indirect effect of the arrangement upon other lines or those who patronize them, whatever that effect may be, is no more a violation of the act than would be a reduction of the rate by the Union Pacific which a competing road, in justice to its shippers or in its own interest, might feel compelled to meet. Any resulting injury or detriment to rival carriers is something which the law does not, and, perhaps, should not, seek to prevent.' As the commission refused to declare the payment by the Union Pacific to Peavy unlawful, but permitted its continuation, the other roads, as predicted by the commission, were forced to grant the same concession to shippers on their lines. Peavy & Co. were themselves extensive purchasers of grain, and were the owners of 60 per cent. of the grain loaded into their elevator by the Union Pacific, on which they received the elevator charge the same as on grain not owned by them. The other railroad companies, in order to equalize matters with the owners of elevators and shippers along their lines, were compelled to grant, and did grant, them the same privilege enjoyed by Peavy & Co. on the Union Pacific. Such was the origin and cause of said practice on the part of the other railroads. It was brought about by competition, and not by favoritism to the defendants. If it is lawful for the Union Pacific to pay such elevator charge to Peavy & Co., it must be lawful for other railroad companies to pay other elevator companies on their lines the same charge for the same service. And if it is lawful for the railroad companies to pay it, then, it must be lawful for the defendants to receive it. The fact that all the roads, except the Union Pacific, on grain elevated into the Peavy elevator at Coun-

cil Bluffs, pay the elevator charge to the elevator loading their cars for the east and south, instead of to the elevator unloading their cars, is a matter of no consequence. Practically all the grain unloaded from the Union Pacific into the Peavy elevator goes east and south, and it is with such shipments that the other roads have to compete. So they all pay the elevator charge on the same class of shipments only. And it amounts to the same thing with the elevator companies; for, in order to load cars going east and south, they must unload cars coming from other directions. The interstate commerce commission found, as a matter of fact, that the Peavy company did not receive any elevator charge from the other roads on outgoing shipments of the grain shipped in by the Union Pacific Railroad Company. So that on such grain the Peavy company only receives the one charge for elevation, the same as the other roads on grain shipped east and south by them. The action of the railroad companies merely equalizes the matter between all shippers sending grain east and south from Missouri river points, or terminal points in this state. The Peavy elevator at Council Bluffs is now owned by the defendant Omaha Elevator Company, which has succeeded to the rights of Peavy under his contract with the Union Pacific. As its terminal elevator is at Council Bluffs, Iowa, outside of the jurisdiction of this court, it was conceded by the state, on the argument, that what it did at its elevator in Iowa could not be a violation of the Junkin act. It seems to me equally clear that what the railroad companies in this state are forced to do by competition with a concern outside of this state and of the jurisdiction of this court cannot be a violation of the Junkin act, when they treat all persons engaged in the same business, under the same circumstances, exactly alike."

The referee declined to determine whether this court has jurisdiction over the question discussed.

It is contended that these elevator charges affect only interstate commerce, which is wholly left to congress to regu-

late; and that this court is without jurisdiction in the matter. There seems to be merit in this contention. The argument is that the allowance of the elevator charges to shippers affects the price paid for grain in this state and gives to some shippers advantage over others. We do not quite see how this is true, since, as shown by the referee, these charges are not allowed except to terminal elevators, and all buyers of grain in this state for export are on an exact equality; but, if it were true, it would not help matters at all to restrain those operating elevators in this state from receiving these charges, while the elevators of Council Bluffs and Mississippi river points continue to allow them. The whole matter, it seems, is proper for interstate regulation, and the interstate commerce commission has justly assumed control of it.

4. The defendants insist that the evidence is not sufficient to support the general findings of fact against them. We think that, upon the evidence as it was submitted to the referee, the findings of fact are justified, for the reasons stated by the referee in his report. After the report of the referee was submitted to the court, some of the defendants, by written motion, requested the court to remand the case to the referee, "with instructions to receive such legal evidence as may be offered by defendants to prove their claim that, prior to the taking effect of the Junkin law, there was an arrangement and intent to comply therewith, and to dissolve the Nebraska Grain Dealers Association, and to refrain from any violation of said law, and that said law has not been violated," and to make a further report of findings of fact and conclusions of law. This was not allowed by the court: First, because the defendants had ample opportunity before the referee to make such showing as the facts would warrant, and, while it is undoubtedly within the discretion of the court to reopen the case and to allow further evidence to be taken, this should only be done when it is made plainly to appear that the interests of justice require it; second, the further proof that the defendants proposed to offer was not of such

a nature as to change the result. The constitution of the Nebraska Grain Dealers Association provided: "The association shall continue in force until dissolved by a majority of the members in full standing at time of such action." And article 8 of the by-laws provided: "Any member desiring to withdraw from the association must pay all dues, assessments or fines against him, and give the secretary thirty days' notice of his intention to withdraw." The defendants had been members of this association for several years. An affidavit was filed in support of their motion, in which the affiant testifies that he is "an attorney for a portion of the defendants," and has been their attorney for several years last past, and that a few years ago he advised his clients that all of the various statutes of Nebraska purporting to affect grain dealers were invalid; that it has since been determined that one of the acts is valid, and that he believes that all of the others are invalid. He says that, if his clients have violated the Junkin act, the blame should rest upon him, and not upon his clients. He also testifies that he is advised, and believes the fact to be, that a few years ago the officers of the Nebraska Grain Dealers Association counseled with an attorney, who was recognized by the bar and by this court as an able lawyer, "and was advised by him that none of the acts of the association violated any law of Nebraska." He says that after the Junkin law was enacted, and before it took effect, his clients called on him for an opinion as to the law, and that he advised them that the law was valid; that he then had frequent conferences with his clients as to the terms of the law, with the end in view that none of its provisions should be violated and that he advised the dissolution of the Nebraska Grain Dealers Association; that in June another conference was held, attended by some of the defendants and by attorneys representing a majority of the defendants, and at that conference it was determined to dissolve the Nebraska Grain Dealers Association, and that preliminary steps were then taken in that direction, and that it was determined that

when the law took effect "the greatest care should be taken by every one to see that none of its provisions should be violated either in letter or in spirit"; that he advised his clients to withdraw from the association, and was afterwards informed by them and by the secretary of the association that they had done so; that he believes that other defendants withdrew, "but some remained in, giving as their reason their belief that all should remain in and help effect a formal and official dissolution." Other matters are stated by him in the affidavit, upon information and belief, which would tend to indicate that some of the defendants, at least, were in good faith intending to comply with the Junkin act when the same took effect. From our knowledge of the character and standing of the member of the bar who makes this affidavit, we have entire confidence in the representations made by him. In view, however, of the relations of these defendants with the Nebraska Grain Dealers Association, as shown by the foregoing extracts from their constitution and by-laws, and considering their long connection with that association and operations under its provisions, it would seem that it would require an unequivocal showing of the acts done by the defendant, amounting to a severance of their relations with the association, to justify this court in holding that the injunction in this case was unnecessary and ought not to have been granted, and to relieve the defendants from the costs of these proceedings. The affidavit fails to show affirmatively any such action on the part of the defendants, and so states no sufficient reason for reopening the case.

5. Another exception to the findings of the referee is predicated upon the assertion that the referee considered certain evidence given by one witness as the evidence of another witness; that is, that the referee was mistaken as to the witness who gave the particular evidence in question, and that the witness who was supposed by the referee to have given the evidence was never a member of the Nebraska Grain Dealers Association, and was not in such

a position to know the facts as that his evidence should be given the weight given it by the referee. To set out in full the condition of the record as bearing upon this objection would add considerably to a discussion already quite extended, and from the view we take of the case, already indicated, such discussion is unnecessary. It is sufficient to say that, even if the evidence in question were wholly omitted from the record, we would not consider that there is such a failure of evidence as to require us to set aside the report of the referee.

6. Another ground for objection to the report of the referee is predicated upon the following language quoted in his report: "In a civil action there cannot be a presumption in favor of the innocence of parties who are proved to have been guilty of illegal acts for a number of years, and up to a very short time before the commencement of the action." If this language of the referee were separated from the context of his report, it might be thought to be technically incorrect. There is, of course, no presumption in law that one who has committed a crime will commit another crime if he has opportunity; that is, no such presumption could be used against him upon a trial for the second crime. But, when we take the whole language of the report together, it seems clear that the idea of the referee is correct as applied to this case. The defendants had for several years been engaged in a course of conduct which was made unlawful by the act which took effect July 1, 1905. They made use of an association which they formed to further and carry out a design made unlawful by this act. By the terms of their agreement in forming this association they were to continue as its members and assist in those methods until certain things specified in their agreement were done by them to terminate their connection with the association. Under these circumstances, it devolved upon them to affirmatively show that they had done those things necessary to terminate their connection with the association, and that there was no necessity for the interposition of the court, in the

method pointed out by the act itself, to prevent a continuance of those things which the act made unlawful.

We think that the findings of the referee are supported by the evidence, and his conclusions are justified. The action, however, for the reasons stated, should be dismissed without prejudice as to the defendants, the Holmquist Grain and Lumber Company, William B. Banning, Peavey Elevator Company, American Grain Company, Atlas Elevator Company, Anchor Grain Company, Spelts Grain Company, Evans Grain Company, and John T. Evans.

JUDGMENT ACCORDINGLY.

ALONZO L. CLARK, APPELLEE, V. ALICE PARKS ET AL., APPELLANTS.

FILED FEBRUARY 8, 1906. No. 13,972.

Judgment: COLLATERAL ATTACK. A judgment by a district court in conformity with a permissible interpretation of an obscure or ambiguous mandate from this court is not subject to collateral attack.

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

Batty & Dungan, for appellants.

John C. Stevens, contra.

AMES, C.

This case comes here upon a petition and answer, and a bill of exceptions containing a stipulation of facts only, by which are disclosed the following state of facts. George W. Parks died intestate, and the owner of a tract of land in Adams county, Nebraska, then and previously occupied by himself and family as a homestead. He left surviving him two minor and eight adult children by a deceased

wife, and a widow and three minor children by a subsequent marriage. Among his papers and effects were found, after his death, two deeds executed by him in due form of law, and each purporting to convey one-half the land to one of the first mentioned minors. Shortly afterwards the deeds were filed for record in the office of the register of deeds of the county, and a joint action to set aside and cancel them, as being without consideration, and as not having been delivered during the lifetime of the purported grantor, was begun in the district court for the county by the widow and the administrator of the deceased and by all the heirs at law of the deceased, except the purported grantees, against the latter. Those of the plaintiffs who were minors appeared by their next friend and guardian, and the defendants by Mr. John C. Stevens as their *guardian ad litem,* and the suit proceeded to trial and a judgment for the plaintiffs, from which an appeal was prosecuted by the defendants to this court. The case was disposed of here at the January term, 1900, pursuant to a written stipulation by counsel filed with the clerk, in consideration of which the court, as recited by its mandate, afterwards duly transmitted to the district court, adjudged that the appeal be dismissed at the costs of the appellees (plaintiffs below), "and that the costs of the case shall be paid by the estate of George W. Parks, deceased, and that the decree from which said appeal was procured shall remain in full force as if no appeal had been procured, and that the attorney's fees, of one John C. Stevens, Esq., representing the guardian of, and the minor heirs, shall be fixed by the judge of the tenth judicial district of Nebraska, in and for Adams county therein, and paid from the estate of George W. Parks, deceased, *and judgment accordingly rendered,*" and the cause was remanded for further proceedings pursuant to such directions, and "according to right and justice and the laws of the state of Nebraska." Upon the receipt of this mandate the district court on the 4th day of April, 1900, assessed the amount of Stevens' recovery at $150 and adjudged the

same to be a lien upon the premises in controversy. From this judgment no proceedings in appeal or error were ever prosecuted, and Stevens assigned his lien to the plaintiff who later began this action for its foreclosure and obtained a decree to that effect, and for the sale of the premises for its satisfaction, from which this appeal was taken.

The contention of appellant is that the judgment appealed from, in so far as it assumes to adjudge a lien upon the lands, is in excess of the authority conferred by the mandate, and that the latter was the sole source of jurisdiction for the rendition of any judgment at all, and that as to the excess the judgment is wholly void and open to collateral attack; but the appellee argues that the judgment is, at most, only erroneous and could have been successfully impeached, if at all, by direct proceedings in error or by appeal. The judgment and mandate of this court appear to have been inconsiderately rendered "as per stipulation," and the judges are not responsible for their ambiguity. Nevertheless they are in the form and have the force and effect of judicial acts, and were mandatory upon the judge of the district court, who was bound to interpret them and to take such action upon them as they seemed to him to require. Can it be said that his interpretation of them is so obviously variant from their meaning as to render his judgment, consequent thereon, absolutely void and open to collateral attack, as is attempted in the present case? We think not. There is at least equal, and we think greater difficulty with the construction proposed by the appellants. Let us see: The administrator was but a nominal party to the former action in which he had, and could have had, no interest or concern. The law did not give him possession of the homestead or charge him with any duty concerning it. He could not have distributed it to the heirs of the deceased or have impounded it for the benefit of creditors. He was not only not charged with the duty of defending it or the possession of it for the benefit of the widow and minor children

of the deceased, but if he had done so at the expense of his trust he would have rendered himself liable by so doing, both civilly and criminally. But the mandate (mandamus), imperatively required the district judge not only to ascertain the amount due Stevens for attorney's fees, but to adjudge somebody or something to pay it. Who or what should it have been? Certainly not the general estate of the decedent which was distributable to creditors and to the widow and heirs at law in equal proportions. We think that a more reasonable view was taken by the district judge, namely, that by the expression, "the estate of George W. Parks," found in the mandate, was meant so much or such part of that estate as was the subject of litigation and before the court, and that since there was no party before the court who could by any possibility be held personally liable for the attorney's fees of Stevens, or against whom a judgment not void on its face could have been rendered, the requirement to "render a judgment" for said fees intended a judgment against the homestead. If, however, this latter interpretation is not correct or if, in other words, the court was mistaken as to the meaning and legal effect or even the validity of the mandate, he was guilty of such a fault only as may intervene in the construction of any document in the trial of any action, and his judgment, as in other such cases, is merely erroneous, but not void and not subject to collateral attack.

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.

SHACKLEFORD & DICKEY V. INDEMNITY FIRE INSURANCE COMPANY.

FILED FEBRUARY 8, 1906. No. 13,988.

Insurance: AUTHORITY OF AGENT. From the mere fact that one delivered a policy of fire insurance, in the preparation or execution of which he did not participate, and is not shown to have been authorized to participate, it cannot be inferred that he had authority to modify the contract or to waive any of its covenants or stipulations.

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

Cunningham R. Scott and *E. H. Scott,* for plaintiffs in *error.*

McGilton, Gaines & Storey and *E. R. Duffie, contra.*

AMES, C.

The defendant in error, which was also defendant below, issued and delivered to the plaintiffs a policy of fire insurance on certain personal property to be and remain in force during a certain interval of time while the property should be contained in a certain building at 1510 California street, in the city of Omaha, "and not elsewhere." The policy stipulated that it should "not be valid until countersigned by the duly authorized agent of the the company at Omaha, Neb.," and it was countersigned by one C. D. Mullen as such agent, but was delivered to the plaintiffs by one Charles O. Talmage in exchange for a like policy on the same property previously issued through the same agency by another company. At the time of the delivery of the first mentioned policy, Talmage agreed that the premium thereon should be satisfied by the application thereto of the amount of unearned premium to which the plaintiffs were entitled on the policy taken up,

and it does not appear that there was any other payment of premium on the new policy. This transaction was on the 25th day of March, 1902, and the period of insurance recited in the contract was of one year from that date. Shortly before the first day of May, 1902, the plaintiffs told Talmage that they intended to remove the insured property on that date to another building situated on a different street in the city, and that they should want insurance, after the removal, in the new location. To this Talmage replied that he would leave the policy with the plaintiffs, and that when they moved he would have it fixed so that it would be good at the new place. He said: "All right, go ahead and move, and I will see that your transfer is made, when your property is moved," he says, "I will see to it."

Q. "Is that all that he said?"

A. "Well, that is about all that I recollect in regard to it." * * *

Q. "What was said?"

A. "I said: 'Mr. Talmage, we have begun to move, and we will have everything moved by the first of May,' I says, 'we have to give possession in here, the property is sold where we are, and we will have everything on the grounds up there by the first of May, and I want our insurance transferred by the first day of May,' I says, 'we will stand less risk at that time than any other time, and we will have to have everything away from here by the first, and so I want the transfer made by the first'; and he said: 'All right, I will see to it, now give yourselves no uneasiness or anything about it,' he says 'I will see to it myself and see that your transfer is made by the first day of May.'"

The foregoing is the substance of all the evidence upon this branch of the case, and from it we are unable to infer with any degree of certainty what were the relations of Talmage with the defendant company. He does not appear to have written or signed the instrument, or to have joined or participated in so doing, or to have received, or to have been authorized to receive, the premium upon that

or any other policy issued by this or any other company, nor did he promise to make any indorsement upon the instrument, or enter on behalf of the company or otherwise into any contract or stipulation with reference to it or to the removal. His sole promise was that he would see to it himself "and see that your transfer is made by the first day of May," that is, that he would see that it was done, not that he would do it. But if he had promised to do the act himself, such promise would have been no evidence of authority. All that is shown that he ever did do on the behalf of the company, or, perhaps, on the behalf of the authorized and contracting agent of the company, was to deliver the policy in question and receive from the insured the former policy of the other company, and so far as we know, that was all he ever was employed or authorized to do. The policy remained in the possession of the plaintiffs, and was never by them presented to Talmage, or to anyone else, for the purpose of having any indorsement made upon it, or for the purpose of having it reformed or modified in any way or manner, and it is the settled law that without modification or reformation, or something equivalent thereto, it ceased to be operative or in force upon the removal of the property from the building described in it. *Burlington Ins. Co. v. Campbell,* 42 Neb. 208; *Davison v. London Fire Ins. Co.,* 189 Pa. St. 132. The mere fact that the company was charged through Talmage with knowledge of the removal after it took place, if it were so charged, which we do not decide, and that it remained quiescent, was insufficient to revive its liability. The contract was terminated by the fact of removal, and it could have regained vitality only from some affirmative act by or on behalf of the company equivalent to the making of a new contract of insurance. *Davison v. London Fire Ins. Co., supra; Connecticut Ins. Co. v. Smith,* 10 Colo. App. 121; *English v. Franklin Fire Ins. Co.,* 55 Mich. 273. All the foregoing facts were disclosed by the evidence offered on behalf of the plaintiffs in an action on the policy for a loss occurring after the removal, at the conclusion

of which the court instructed a verdict for the defendant. We recommend that the judgment 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.

GAMMEL BOOK COMPANY V. CLARENCE S. PAINE ET AL.

FILED FEBRUARY 8, 1906. No. 14,084.

1. **Assignee: LIABILITY.** The contract and transaction set out in the opinion, *held* not to constitute an assumption of liability to the plaintiff by one who had purchased the interest of a person with whom the plaintiff had contracted.
2. **Instructions** discussed, and *held* not to be, under the circumstances, erroneous.
3. **Evidence** examined, and *held* to support the verdict.

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

T. W. Blackburn, for plaintiff in error.

W. A. Saunders, contra.

AMES, C.

In December, 1900, Paine and Lindsey entered into a written contract with the plaintiff book company, by the terms of which it was stipulated that in consideration for the use of the name of the Gammel Book Company, as publisher, the furnishing of a room for transacting the business, and the transfer to Paine and Lindsey of its interest in the "Biographical History of Texas Counties" and "The Bench and Bar of Texas," two publications thitherto undertaken by the plaintiff, and the transfer to Paine and Lindsey of all the contracts, engravings, plates,

data, biographies, etc., connected with these works, Paine and Lindsey agreed (1) energeticaly to push the sale of the proposed "Illustrated History of Texas" until a thorough canvass of the state should have been made; (2) to pay to the party of the first part 10 per cent. of all cash received from the sale of the books, and 10 per cent. of all cash received on orders for steel plates to be used therein; (3) to deposit with the plaintiff $5 out of the first payment made on each contract up to $5,000; (4) to assume all obligations incurred by the plaintiff in connection with "Biographical History of Texas Counties" and "Bench and Bar of Texas," for which orders to the amount of $3,350 had been taken; (5) to pay plaintiff $2,000 for these orders upon completion of the work. Incidentally it was also agreed that certain correspondence should be conducted by the plaintiff; that neither party should engage in a similar work, and that both sides should mutually assist each other in prosecuting the enterprise.

In February, 1902, Lindsey entered into a contract with Jacob H. North, of which the following preamble and stipulations are sufficient for the understanding of this case so far as respects North: "Whereas, Clarence S. Paine and J. Clyde Lindsey are equal partners in the publishing and engraving business under the firm name and style of Western Publishing and Engraving Company, and are the owners and holders of a large number of contracts with individuals for subscription to books known as 'History of Nebraska,' 'History of South Dakota,' and 'History of Texas,' contracts for steel plate work and engravings to be placed in said books, together with a large number of steel plates, copper plates, engravings, and other contracts and personal property. And, whereas, J. Clyde Lindsey is willing to sell all his right, title, claim, or interest in said firm and the assets thereof, and to turn over all contracts in his possession or under his control for the History of Nebraska, History of South Dakota, and History of Texas, and all steel or copper plates and engravings to be used in said books, all photographs, biographies, biographical

data, all impressions and engravings, that are now in his possession or under his control, contracts for steel and copper plate engravings, all books of account or memoranda, all promissory notes or evidence of indebtedness to said firm, and surrender transportation for himself and J. C. Knowles on the Union Pacific and Burlington & Missouri River and Elkhorn railroads, one copy holder, one table, and all contracts for the publication of the History of Nebraska, South Dakota, and Texas, together with the goodwill connected with said business, for the sum of seven hundred ($700) dollars: and, whereas, said Jacob H. North is willing to pay said seven hundred ($700) dollars for the above:

"Therefore, it is agreed by and between the said J. Clyde Lindsey, party of the first part, and Jacob H. North, party of the second part, that said J. Clyde Lindsey does hereby, and by these presents does sell, assign, and transfer unto Jacob H. North all his right, title, claim, lien, or interest in and to the business of Paine & Lindsey or the Western Publishing and Engraving Company, and to the assets of said firm, and to all business relating to plate contracts for steel or copper plates, the impressions from which are to be used in the History of Nebraska, History of South Dakota, and History of Texas, that are now owned or claimed by the party of the first part, either as an individual or as a partner in the firm of Western Publishing and Engraving Company, all steel or copper plates and impressions or engravings, prints, biographies, photographs, biographical data, all books of account or memoranda, promissory notes or evidences of indebtedness or accounts and bills due said firm, and the good will of all said business, and surrender transportation for himself and J. C. Knowles on the Union Pacific and Burlington & Missouri River and Elkhorn railroads, one copy holder, one table, all his interest in the contracts for the publishing of the History of Nebraska, History of Texas, and History of South Dakota, and all contracts with Jacob North & Co., Henry Taylor, Jr., & Co., E. G. Williams & Bro. and Barnes-

Crosby & Co., all of which are hereby sold and assigned to said Jacob H. North. The plate contracts which are assigned are set forth in the paper hereto attached and marked exhibit A, and the amount set opposite each name is the amount due and unpaid from the persons whose names are set opposite said amounts."

North agreed to pay as a part of the price of his purchase certain indebtedness of Lindsey, or of the Western Publishing and Engraving Company, to third persons, but the plaintiff was not mentioned, and North testifies, without contradiction, that at the time he was ignorant of the existence of the contract between it and Paine and Lindsey. This action was brought by the plaintiff against Paine and Lindsey and North to recover damages for an alleged breach of the latter mentioned contract. North was made defendant upon the ground that by reason of his contract with Lindsey he had been substituted for, and assumed the obligations of, the latter in the contract between the plaintiff and Paine and Lindsey. There is nothing in the contract of North having that purport or effect, and we think the trial court was right in holding that there is nothing in the evidence or the circumstances of the transaction by which such a claim can be supported, and in directing a verdict in his favor. The same we think is true of affidavits in support of a motion for a new trial for newly discovered evidence as against North. A recital of the facts and circumstances sufficient for an exposition of the theory of the plaintiff upon this point would extend this opinion to a length which, we think, would be out of proportion to its importance, and it must suffice to say that the conclusion at which we have arrived is founded upon as thorough and careful an examination of the record as we have been able to give it.

Lindsey was not served and did not appear in the action. Paine answered, denying the breaches of contract alleged in the petition, and alleging breaches by the plaintiff, for which he prayed damages. The evidence, both upon the issues tendered by the petition and upon those tendered

by the answer, was conflicting, and the jury returned a verdict for the defendant, assessing his damages at one dollar. It is complained that the court instructed the jury that they should determine "whether the plaintiff, the Gammel Book Company, or Clarence S. Paine violated the terms of the contract," instead of whether the partnership of which Paine was a member had done so, but we think that the error, if any, upon this record, was formal only and could not have misled the jury. Paine was the only member of his firm active in the transaction, and, although in strict, technical legal phrase his sins of commission or omission, if any, were those of his partnership and properly describable as such, it was not only not objectionable to direct attention to his own personal conduct in the matter, but an instruction so framed as to have intimated that the partnership might have been otherwise guilty of some misconduct subjecting it to liability would have lacked support by the evidence and might have been prejudicially misleading.

A large number of exceptions were taken to rulings with respect to the admission and rejection of evidence offered as tending to prove breaches of the contract by the plaintiff or excuses by the defendant for nonperformance. It would be a tedious and profitless task to set them forth and discuss them *seriatim*. Indeed, it is a task which counsel for the plaintiff did not undertake in his brief or argument, except in the shortest and most perfunctory manner, which has not impressed us with the idea that any of them was so far erroneous, if at all so, as to be likely to have diverted the minds of the jury from the real issues, or to have led to the misapprehension of any evidence, pertinent or otherwise, to their determination. In short, the case appears to us to have been carefully and fairly tried without the intervention of any serious error, and the verdict seems to be fully supported by the evidence, and we recommend that the judgment be affirmed.

OLDHAM, C., concurs.

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

AFFIRMED.

ELEANOR GETCHELL, APPELLEE, V. LISS ROBERTS ET AL.; JUSTIN E. PORTER, APPELLANT.

FILED FEBRUARY 8, 1906. No. 14,111.

Sheriff's Deed: PRIORITIES. It is well settled in this state that a sheriff's deed takes precedence from the date of its record of all outstanding conveyances and incumbrances executed by the judgment debtor which were not recorded and of which the purchaser had no actual notice.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Justin E. Porter and *A. G. Fisher,* for appellant.

A. W. Crites, contra.

AMES, C.

Plaintiff was the owner of a mortgage executed by one Dennis Regan upon a tract of land owned by him. After the death of Regan, the plaintiff began an action against the heirs of the mortgagor for the foreclosure of the mortgage, which action proceeded regularly to decree and a sale, at which the plaintiff became the purchaser for a sum exceeding the mortgage debt. The sale was duly confirmed, and a deed of the premises executed and delivered by the sheriff to the purchaser, who made the same of record in the county, and paid the excess of purchase money to the defendants in the action. During the progress of all these proceedings the premises were vacant and unoccupied, and the record title and right of possession was in the deceased mortgagor. Thus far the facts are not in dispute. After the execution and record of the sheriff's deed, Justin E.

Porter took possession of the land, claiming a right thereto under an unrecorded lease executed by the mortgagor to one Roberts, and by Roberts assigned to one McDowell, and by the latter assigned to Porter. This action is prosecuted to obtain a decree quieting title in the plaintiff against all three of these persons, the petition alleging among other things, that she had at no time until after the conclusion of the foreclosure proceedings knowledge or notice of the lease. Roberts and McDowell disclaimed, but Porter answered, pleading the lease, the nominal term of which had not expired. There was a trial and a decree for the plaintiff, and the defendant appeals.

There are various issues made by the pleadings and discussed in the briefs as to an alleged abandonment of the lease, and as to forfeiture for breach of its conditions by the lessee or his assignees, which we refrain from discussing, because we are satisfied from an examination of the evidence that the plaintiff's foreclosure was begun and completed in good faith and without any knowledge or notice of the existence of the lease. It is well settled in this state that, under such circumstances, a sheriff's deed takes precedence from the date of its record of all outstanding conveyances and incumbrances executed by the mortgagor which were not recorded and of which the execution purchaser had no actual notice. *Metz v. State Bank,* 7 Neb. 165; *Mansfield v. Gregory,* 11 Neb. 297; *Hubbart v. Walker,* 19 Neb. 94; *Sheasley v. Keens,* 4 Neb. 57.

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

OLDHAM, C., concurs.

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

AFFIRMED.

HETTIE L. YEISER ET AL. V. PORTSMOUTH SAVINGS BANK ET AL.

FILED FEBRUARY 8, 1906. No. 14,133.

Equity: EXECUTORY CONTRACT: FORFEITURE. A court of equity will not enforce against a vendee a technical forfeiture of an executory contract for the sale of land, if the defendant offers to do equity in consideration of being restored to his contractual rights.

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

John O. Yeiser, for plaintiffs in error.

T. B. Dysart and *William Baird & Sons, contra.*

AMES, C.

The plaintiff, the Portsmouth Savings Bank, a corporation, obtained title to a certain city lot in the city of Omaha under a deed conveying the same in fee simple, subject to certain conditions with reference to the possession of enjoyment of the same for the term of 15 years from the date of the instrument, August 1, 1889, which affected the title to the lot as an incumbrance thereon. On the 13th day of March, 1899, the plaintiff entered into a written contract for the sale of the lot to one John Ruthven for the sum of $1,800, payable $50 cash in hand and the residue in monthly instalments of $25 each, such instalments to include interest on the principal sum unpaid at the rate of 5 per cent. per annum, with the further provision that any larger sum or the whole of the unpaid principal might be paid by the purchaser at any time, and that upon the payment of the whole amount of the purchase price, and interest, the plaintiff would convey the lot to the purchaser or his assigns by a good and sufficient warranty deed in fee simple and free from incumbrances, but providing for forfeiture in case of default in the payment of any monthly

instalment as stipulated. Ruthven entered into and remained in the possession of the premises, making the payments reserved in the contract, until the 13th day of June, 1900, when he sold and assigned his interest in the premises and rights under the contract to Hettie L. Yeiser who then entered into possession of the premises and thereafter made the payments reserved in the agreement until September 21, 1901, since which time no payments have been made to the plaintiff either by said Yeiser or by her assignor Ruthven. On the 1st day of July, 1902, this action was begun against both Yeiser and Ruthven, the petition alleging, among other things, that an exception from the covenant to convey by warranty of the incumbrance above mentioned was omitted by mutual mistake, and praying for a reformation of the instrument by an insertion of such exception, and that an account be taken of the payments made and ascertaining the amount of the unpaid residue of the purchase price, and that the premises be adjudged to be sold for the satisfaction of the latter, and for general relief. But it was not averred that Yeiser had knowledge or notice of such alleged mistake. Ruthven defaulted in the suit, but Yeiser answered, alleging as a defense the present inability of the plaintiff to convey an unincumbered title as it had covenanted to do by the contract of sale, and the desire of the defendant to obtain the same at once, and her repeated offers to pay the plaintiff the unpaid remainder of the purchase price upon conveyance thereof to her being made. At the time the answer was filed there was unpaid on the contract of principal, and accrued interest, something like $1,300. By her answer the defendant offered to pay $1,000 and accept a deed from the plaintiff, subject to the incumbrance mentioned. There was a general demurrer to this answer, which was sustained, and, the defendant electing not further to plead, there was a judgment of foreclosure and sale as prayed in the petition. The defendant Yeiser prosecutes error.

We think that the offer made in the answer, though in-

formal, was substantially an offer to perform the contract upon her part after the diminished value of the property occasioned by the incumbrance should have been ascertained and deducted from the unpaid portion of the purchase price, or, in other words, that it is an offer to do equity, and that it could not have been, and cannot be, rightfully ignored by the court; and that therefore the order sustaining the demurrer and the judgment consequent thereupon are erroneous. The contention of the plaintiff that, if the monthly payments contracted for in the agreement had been continued without default until the stipulated time, the restraints upon the use and enjoyment of the premises would before their date have expired by their own limitation is, we think, unavailing. One of the rights secured by the contract to the vendee Ruthven and his assigns was the privilege of making full payment and receiving an unincumbered title before that date had arrived, and it is conceivable that that right was as valuable as any other stipulated for in the agreement; at all events, it is one of which the defendant could not have been deprived without her consent or default, and without compensation. It is true that when she made the offer she was in default of several monthly instalments, and had incurred a technical forfeiture of her contract, but we do not think that a court of equity should enforce the forfeiture in a suit brought by her adversary, in the face of a substantial offer on her part to meet its just demands.

We are of opinion, therefore, that the judgment of the district court should be reversed and the cause remanded for further poceedings.

OLDHAM, C., concurs.

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.

ANNA HALL, APPELLEE, V. R. JEAN MOORE ET AL., APPELLANTS.

FILED FEBRUARY 8, 1906. No. 14,401.

1. Taxation: REMEDIES. The sole remedy, in the first instance, of one who conceives that his property has been excessively valued for taxation is to apply to the board of equalization to correct the error.
2. Appeal: FINAL ORDER. An order overruling a motion to deny confirmation of a judicial sale and to set the sale aside is not final or appealable.
3. Tax Lien: FORECLOSURE: PARTIES. A mortgagee of real property is not a necessary party to an action against the owner of the fee to foreclose a tax lien. Whether he is the proper party, *quære?*

APPEAL from the district court for Buffalo county: CHARLES L. GUTTERSON, JUDGE. *Affirmed.*

R. A. Moore and *Edwin E. Squires,* for appellants.

F. E. Beeman, contra.

AMES, C.

Very little needs to be said about this case except to relate the steps already taken in it. Since the year 1889, R. Jean Moore has been, and she is now, the owner of the fee title of a certain city lot in the city of Kearney in this state. Delinquent state, county and municipal taxes were permitted to accumulate upon the lot from the years 1890 to 1895, both inclusive, and the liens therefor were obtained by tax sale procedure, under the statute then in force, by the appellee Anna Hall, who in November, 1896, began an action in the district court for Buffalo county for their foreclosure. There was at that time a mortgage on the lot executed in March, 1890, by Mrs. Moore and her husband, R. A. Moore, to one Oliver H. Dodd to secure an indebtedness to the latter. Dodd was made a party to the action, and constructive service was made

upon him pursuant to section 77 of the code. He did not appear in the case but was formally defaulted, and the action proceeded to trial upon issues raised by answers of the Moores and to a decree of foreclosure and sale on the 25th day of March, 1898. Dodd died in June of that same year, and the suit was never revived as to him, but after his death the Moores prosecuted an appeal from the decree to this court, where, in November, 1902, certain local assessments included therein were held to be void, and the decree was vacated and set aside, and the cause remanded to the district court, with instructions to ascertain the amount of the valid tax in accordance with the opinion of this court, and to enter a decree therefor. *Hall v. Moore,* 3 Neb. (Unof.) 574. A new decree in obedience to this opinion and a mandate from this court was rendered by the district court in May, 1903. The effect of the proceedings thus far was to relieve the property from certain unlawful impositions, and to ascertain the amount of the valid tax liens thereon, and to merge the latter in a judicial decree.

It is urged, however, that the former decree of the district court having been set aside, the later one is void as against the personal representative of the mortgagee because of failure to revive the suit as against her. In view of what follows we think the question is immaterial. The suit was brought to enforce the lien of a public charge or tax against the equity of redemption. In the opinion of the writer, there is much reason to doubt whether a mortgagee is even a proper party to such a suit, but he is certainly not a necessary one. He is not a party to any previous step in the tax proceedings, and his right of redemption is granted to him by statute, and is required to be exercised within the time and in the same manner in which the same right may be availed of by the owner of the fee. But if, as appellants contend, this right is not cut off by a judicial decree of foreclosure to which he is not a party, as it certainly would be by the lapse of time after a valid tax sale, he has nothing of which to make a just complaint.

In the interval between the death of Dodd and the rendition of the decree of May, 1893, appellant Maude M. Keck procured an assignment to herself of the mortgage from the personal representative of the former. In April, 1904, she began an action in the district court for Buffalo county to perpetually enjoin a sale of the lot under the decree, and to cancel the latter on the ground that neither she nor her assignor was a party to nor bound by it, and that for several years the property was by the negligence and mistake of the precinct assessor appraised for taxation, both upon his returns and upon the tax lists, at a sum largely in excess of its true value, so that the amount of tax levied upon it in those years is exorbitant. Meantime the lot was advertised and sold under the decree, and both she and R. Jean Moore, the owner of the title, moved the court, separately, to deny confirmation, and to set aside the sale and decree on these grounds, attaching the petition in the injunction suit to their motions by way of evidence. From an order overruling their motions they have appealed to this court. But the sale has not been confirmed, and a motion for confirmation is still pending and undisposed of. The order appealed from is therefore, in that respect, not final or appealable. It can hardly be necessary to cite authority to the effect that the motion and petition, so far as they attack the validity of the decree itself and ask its vacation, state no cause of action or ground for relief. The exclusive remedy, in the first instance, of one who conceives that his property has been excessively valued for taxation is to apply to the board of equalization to correct the error. Whether even this remedy is open to a mortgagee, it is not necessary now to decide.

We have already given our reasons for holding that the decree is not void or impeachable for lack of jurisdiction or irregularity in procedure. R. Jean Moore, the owner of the fee, was personally served with process and participated in the trial, so that she has had her day in court and must abide by the result of the litigation. Maude M.

Keck, or her assignor of the mortgage, was not a necessary party, and if neither of them has been brought within the jurisdiction of the court the rights of neither have been affected, no harm has been done, and no error committed of which they, or either of them, can complain. If either was a proper party and desired to become a party to the record, reasonable application to that end should have been made during the pendency of the action. If either was a party both are, of course, bound by the result. In no conceivable view of the case is there ground for the vacation of the decree on motion. The holder of the mortgage may exercise, at any time before confirmation of the sale, the mortgagor's right of redemption, and has thus a speedy and adequate remedy for the protection of her rights in the ordinary course of practice. For these reasons, it is recommended that the judgment of the district court be affirmed.

LETTON and OLDHAM, CC., concur.

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

AFFIRMED.

W. S. GILMAN V. ARTHUR C. CROSSMAN ET AL.

FILED FEBRUARY 8, 1906. No. 13,925.

Evidence examined, and *held* sufficient to sustain the judgment.

ERROR to the district court for Holt county: JAMES J. HARRINGTON, JUDGE. *Affirmed.*

J. C. Robinson, for plaintiff in error.

M. F. Harrington, contra.

OLDHAM, C.

This was an action to foreclose a real estate mortgage on lands situated in Holt county, Nebraska. The petition

was in the usual statutory form, and alleged that the plaintiff was the indorsee of the note, or bond, which the mortgage was given to secure. The mortgagors were not made parties to the action. The petition alleged that the defendant named in the petition claimed title under a sheriff's deed issued in a tax foreclosure proceeding against the premises. Defendant filed a general denial, and alleged that he was the owner in fee simple of the premises and in possession thereof under claim of title. At the trial of the cause plaintiff offered in evidence the note and mortgage, and testimony tending to show that he had purchased the note for value before maturity. Defendant testified that he was, and had been, in possession, claiming title thereto, at and before the beginning of the action. Under this testimony the court found the issues in favor of the defendant, and to reverse this judgment plaintiff brings error to this court.

The only question involved is as to the sufficiency of the evidence to support the judgment. It is first contended by plaintiff in error that the possession of the note and mortgage was *prima facie* evidence of his ownership thereof. This contention is clearly well founded. His next contention is that, to secure a decree of foreclosure of a real estate mortgage, it is not necessary for the mortgagee, or the holder of the note secured by the mortgage, to prove title to the mortgaged premises in the mortgagor. This proposition is true so far as a mortgagor and his privies are concerned, for they are each estopped by the execution of the mortgage from denying the mortgagor's title to the premises. But, as against a defendant who claims a title adverse to the mortgagor, this rule does not apply. Plaintiff's petition showed that this defendant named was claiming under a tax foreclosure proceeding, to which neither the plaintiff nor his assignee were made parties. Defendant's answer claimed adversely under a fee simple title, and denied the allegations of the plaintiff's petition. Plaintiff introduced no evidence tending to show title in the mortgagor, or that defendant ever claimed

under tax foreclosure proceeding, to which the mortgagor was a party, but rested, as before stated, by simply introducing his note and mortgage, and the indorsement on the note. Defendant was permitted to testify, without objection, that he was the owner of the premises and in possession thereof under claim of title. He was not interrogated as to what his claim of title was based upon. In this condition of the record, plaintiff clearly failed, as we view it, to establish his claim to a lien on the premises as against the defendant named in the petition. We are therefore of opinion that the judgment of the district court dismissing plaintiff's petition was the only judgment warranted by the pleadings and the evidence, and we recommend that it 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.

HENRY GIES V. STORZ BREWING COMPANY.

FILED FEBRUARY 8, 1906. No. 14,042.

1. **Forcible Entry and Detainer.** To authorize an action for forcible entry and detainer, the relation of landlord and tenant must be established between the plaintiff and defendant at the time the action is instituted.
2. **Landlord and Tenant: DENIAL OF TITLE.** A tenant cannot, while occupying the premises, deny his landlord's title thereto.
3. **Harmless Error.** Action of the trial court in the admission and exclusion of testimony examined, and *held* not prejudicial.

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

E. F. Pettis, for plaintiff in error.

A. J. Sawyer and *H. V. Failor, contra.*

OLDHAM, C.

This was an action in forcible entry and detainer originally instituted before a justice of the peace in Lancaster county, Nebraska, and taken by appeal to the district court for said county, where, on trial to the court and jury, there was a verdict for the plaintiff and judgment on the verdict. To reverse this judgment defendant brings error to this court.

The facts underlying this controversy are that on and prior to October 1, 1901, one Peter Grass was in possession of a building situated in the city of Lincoln, Nebraska, under a three years' lease of the premises executed to him by Mrs. Hoppe. This lease expired in April, 1903, and contained a condition giving a privilege to the second party of two years more at the same rent and on the same terms, provided the second party gave notice in writing of his intention to avail himself of this option on the first of January prior to the expiration of the lease. Peter Grass was engaged in the saloon business in the building and was selling beer for the Storz Brewing Company, which had advanced him money for his license and was to this extent interested in the business. In October, 1901, Grass sold his saloon fixtures to the defendant Gies and turned over possession of the premises to Gies under the agreement that Gies could conduct the business for the remainder of the year under Grass' license. Gies claimed that Grass agreed to assign him the lease, but this is denied by Grass. When Gies went into possession of the building, Grass continued to pay the rent to Mrs. Hoppe, and Gies paid to Grass. After the building had been occupied for some time under this arrangement, a difficulty arose between Gies and Grass, and Grass threatened to take down his license and close up the place of business. In the settlement of this difficulty, the vice-president of the Storz Brewing Company intervened, and agreed in writing to guarantee Gies against any interference from Grass and to guarantee Grass against any

liability on the lease for rent due to Mrs. Hoppe. When this arrangement was made, Grass assigned the lease to the Storz Brewing Company, and thereafter the Storz Brewing Company paid the rent to Mrs. Hoppe, and Gies paid to the company. When the written lease had expired, Gies made no effort to avail himself of the option of its renewal, and the Storz Brewing Company procured a lease of the building from Mrs. Hoppe in its own name. According to the testimony of Mr. Haubens, vice-president of the brewing company, and Mrs. Hoppe, the owner of the building, this arrangement was consented to by Gies, and he continued in possession thereafter as a subtenant of the Storz Brewing Company by consent of Mrs. Hoppe. Ten months after this latter agreement Gies paid rent monthly to the Storz Brewing Company, and it in turn paid rent to the proprietor of the building. At the end of the ten months Gies stopped paying rent, and after he had been in arrears for some days, the Storz Brewing Company served the statutory notice of three days to quit, and on the expiration of the notice instituted this action.

One of the questions urged in defendant's brief is that the plaintiff has failed to show its right to maintain this action. This question depends on whether or not the relation of landlord and tenant existed between the plaintiff and defendant at the time the action was instituted. Plaintiff's testimony tends to show that this relation did exist, while defendant's evidence is that he never recognized the Storz Brewing Company as his landlord. This question of fact, however, was submitted under proper instructions by the court to the jury, which determined the dispute in plaintiff's favor, and this finding, based, as it is, on competent testimony, we regard as conclusive on this court.

It is also contended by defendant that there is no competent testimony in the record to show that Mrs. Hoppe, the landlady of the premises in dispute, was ever authorized to lease the premises. In view of the fact that

defendant claimed his right to occupy the premises under a lease executed by Mrs. Hoppe to Peter Grass, it does not lie in his mouth to question her right to the ownership of the premises; and again, if, as testified to by plaintiff's witnesses, Gies accepted an oral lease of the building from the Storz Brewing Company for one year and continued in possession under this lease, he cannot now be heard to deny the authority of the plaintiff to execute such a lease. While the trial of the cause took a very wide range and much unnecessary testimony was admitted, the only question involved was as to whether or not the defendant was occupying the premises as plaintiff's tenant at the time the action was instituted, for there was no dispute of the fact that defendant was in arrears of rent and that he owed somebody for the occupancy of the building when the suit was brought.

There are numerous allegations of error in the admission and exclusion of evidence, but no ruling in this regard was in any way prejudicial to the defendant's rights.

There is also complaint of the action of the trial court in striking certain allegations from defendant's answer. The issues in forcible entry and detainer are tried on plaintiff's petition and defendant's plea of "not guilty," and, under this plea, defendant was permitted to introduce everything that in any manner tended to constitute a defense, as well as much extraneous evidence that threw little light on the real issues in controversy. The instructions, as a whole, fairly presented the issues to the jury, and, finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES, C., concurs.

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

AFFIRMED.

IN RE APPLICATION OF CHARLES E. MCMONIES FOR WRIT OF HABEAS CORPUS.

FILED FEBRUARY 8, 1906. No. 14,097.

1. **Villages: POOL-HALLS, REGULATION OF.** The charter of villages confers on the trustees of the village power to regulate billiard and pool-halls, but not to suppress them. Authority to regulate does not give power to suppress. *State v. McMonies, ante*, p. 443, followed and approved.
2. **The writ of habeas corpus will lie to relieve the relator therefor from arrest and detention for the violation of the provisions of a void municipal ordinance.**

ERROR to the district court for Burt county: EDMUND M. BARTLETT, LEE S. ESTELLE and WILLIAM A. REDICK, JUDGES. *Reversed with directions.*

H. H. Bowes and *J. A. Singhaus*, for plaintiff in error.

P. E. Taylor and *E. D. Wigton, contra.*

OLDHAM, C.

This was an application for a writ of habeas corpus to the district court for Burt county, Nebraska. The application recites that the relator, Charles E. McMonies, was illegally restrained of his liberty by the respondent, J. F. King, marshal of the village of Lyons, Nebraska, under a warrant issued by respondent, Paul Calnon, justice of the peace in said village, on a complaint filed by one George W. Davis, charging the relator with the violation of ordinance No. 90 of the village of Lyons prohibiting the keeping of any billiard or pool-hall for hire in said village. The respondents by way of return admitted the arrest of the relator under the warrant, as stated in the application, but alleged that the warrant was legally issued on a complaint filed before the justice of the peace for a violation of the provisions of ordinance No. 90, which ordinance was alleged to have been regularly

passed and a valid and binding ordinance. On issues thus joined the court denied the writ and remanded the relator to the custody of the village marshal. To reverse this judgment the relator brings error to this court.

The validity of the identical ordinance in question has just been determined by this court in an able and exhaustive opinion by DUFFIE, C., in *State v. McMonies, ante,* p. 443, and it is there held that "the charter of villages confers on the trustees of the village power to regulate billiard and pool-halls, but not to suppress them. Authority to regulate does not give power to suppress." As this decision determines that the ordinance, for the violation of which the complaint was filed, is void for lack of power in the village board to enact the same, the only question to be determined is as to whether or not the writ of *habeas corpus* will lie for relief from an arrest for the violation of a void ordinance. The *habeas corpus* act of this state (cr. code, sec. 353) provides, among other things, for the writ on application of any one who "shall be unlawfully deprived of his or her liberty." As to the nature of the detention which will authorize the issuance of the writ, it was determined, under an act similar to our own, by the supreme court of the state of Pennsylvania, in *Commonwealth v. Ridgway,* 2 Ashm. 247, that, "whenever a person is deprived of the privilege of going when and where he pleases, he is restrained of his liberty, and has a right to inquire if that restraint be illegal and wrongful; and that whether it be exercised by a jailer, constable or private individual."

The writ of *habeas corpus* is a writ of liberty and not of error, and it will issue, not for the purpose of correcting errors in a proceeding of a court of competent jurisdiction, but rather for the purpose of determining the legality of the restraint. Where the arrest is made upon process issued from a court without jurisdiction, or where the process is based on the provisions of a void statute, or a void municipal ordinance, *habeas corpus* will lie to relieve the relator from such confinement or restraint. *Ex*

parte Grace, 9 Tex. App. 381; *In re Gribben,* 5 Okla. 379; *Ex parte Keeney,* 84 Cal. 304.

We are therefore of opinion that the district court erred in refusing relator's application for the writ prayed for, and we recommend that the judgment of the district court be reversed and the cause remanded, with directions to the court below to issue the writ as prayed for in relator's application.

AMES, C., concurs.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court be reversed and the cause remanded, with directions to the court below to issue the writ as prayed for in the relator's application.

JUDGMENT ACCORDINGLY.

HORACE BROCKWAY ET AL., APPELLEES, V. ROBERT POMEROY, APPELLANT.

FILED FEBRUARY 8, 1906. No. 14,110.

Judicial Sale: APPRAISAL. Where no injury or prejudice is shown in an appraisement at a judicial sale, such sale will not be set aside for mere irregularity on the part of the sheriff in selecting a tenant on the premises as one of the appraisers.

APPEAL from the district court for Dawes county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. E. Porter, for appellant.

W. H. Fanning, contra.

OLDHAM, C.

This is an appeal from a confirmation of a judicial sale in a foreclosure proceeding. The only objection urged

against the regularity of the sale is that one of the appraisers was a tenant on the mortgaged premises when the appraisement was made. There is no showing of prejudice in any manner in the making of the appraisement. The land was, in fact, appraised at $500, and sold at $723, which was the full amount of the indebtedness and costs. There was no evidence offered in anywise tending to show that the land was appraised at any less than its actual value, and there was no allegation that the appraisers had any interest in the land in controversy, other than such as might be inferred from the fact that one of them was a tenant on the land when it was sold. While we look with great disfavor on the selection of anyone in any manner connected with the lands in controversy as an appraiser at a judicial sale, and while, on the slightest showing of injury or prejudice resulting from an appraisement made by one having even a remote interest in the property, we would not hesitate to set aside a sale based on such an appraisement, yet, where there is a total failure to even attempt to show injury or prejudice in the appraisement, we hardly feel justified in setting aside a sale which has been confirmed by the trial court, on the mere irregularity of the selection of a tenant on the premises as one of the appraisers.

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

AMES, C., concurs.

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

AFFIRMED.

MARY PARRATT ET AL. V. ALBERT HARTSUFF ET AL.

FILED FEBRUARY 8, 1906. No. 14,127.

1. **Foreclosure:** DEFICIENCY JUDGMENT. In a proceeding for a deficiency judgment under section 847 of the code as it existed prior to the amendment of 1897, the usual and better practice is not to determine the liability of a defendant for such deficiency until after the report of the sale, when, for the first time, it can be definitely ascertained that a deficiency actually exists. *Brown v. Johnson*, 58 Neb. 222, followed and approved.
2. ———: DECREE: REVIEW. While the decree finding personal liabilities first rendered in a foreclosure proceeding is to a certain extent interlocutory, yet, as to findings of fact made in such decree on issues properly pleaded, it is not subject to review on objections to a deficiency judgment.
3. **The contract of a married woman** can only be enforced against the separate estate which she possesses at the date of the contract. *Kocher v. Cornell*, 59 Neb. 315, followed and approved.
4. **Judgment:** DEFAULT. Where there is personal service and default, such default confesses every material allegation of the petition which is well pleaded.
5. **Deficiency Judgment:** LIMITATIONS. The cause of action for a deficiency judgment does not accrue until the coming in of the report of the sale.
6. ———: PROCEDURE. Application for a deficiency judgment may be heard on a motion after the coming in of the report of the sale.

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

Nelson C. Pratt, for plaintiffs in error.

Hall & McCulloch, Montgomery & Hall and *Warren Switzler, contra.*

OLDHAM, C.

This is a proceeding in error to review the action of the district court for Douglas county in awarding a personal judgment in a foreclosure proceeding against different defendants in the court below, who now bring error

to this court. John H. Parratt, Martha Parratt, Mary Parratt and Ella Parratt were makers of the note and mortgage on which the original action was founded, and filed their joint objections to the motion for a deficiency judgment, and prosecute a joint petition in error to this court. Henry F. Cady was a subsequent purchaser of the mortgaged premises, who by the terms of his deed agreed to assume and pay the mortgage, and he filed his separate objection to the deficiency judgment in the court below, and separately prosecutes error to this court. Sarah M. Hendrix was likewise a subsequent purchaser of the mortgaged premises, who by the terms of her deed agreed to assume and pay the mortgage, interest and taxes, and she filed her separate objection to a deficiency judgment, and separately brings her petition in error to this court.

The mortgage, on which the original foreclosure proceeding was founded, was executed on the 14th day of February, 1891, and the suit for its foreclosure was filed on September 1, 1896. The petition was in the ordinary statutory form, and alleged the execution of the note and mortgage and default in the payment of the indebtedness, and, among other things applicable to the questions now at issue, it was alleged: "That thereafter, for a valuable consideration, the makers of said note and mortgage conveyed the said mortgaged premises to the defendant Henry F. Cady by their certain warranty deed of date November 25, 1893, subject to the plaintiff's mortgage, which mortgage the said Cady at the same time assumed and agreed to pay; "that thereafter the said Henry F. Cady and wife, for a valuable consideration, conveyed said mortgaged premises to the defendant, Sarah M. Hendrix, by their certain warranty deed, of date January 2, 1894, in which deed it was expressly stipulated and agreed that the said Sarah M. Hendrix should pay the aforesaid mortgage, together with interest and taxes; that thereafter the said Sarah M. Hendrix and husband Jacob R. Hendrix, conveyed the said mortgaged premises," etc. After asking

for an accounting, and foreclosure and sale of the mortgaged premises, the petition further prayed: "That, in case the proceeds of such sale shall be insufficient to satisfy the amount due the plaintiff, he may have judgment for the deficiency against the defendant, the Byron Reed Company, as indorser of said note, and also against the defendant, Henry F. Cady, and the defendant, Sarah M. Hendrix, upon their respective agreements whereby they assumed and agreed to pay said mortgage, and for such other and further relief as may be proper and just."

The defendants Parratt and Cady were personally served and made default. Defendant Hendrix answered. On the 31st day of March, 1897, a decree of foreclosure was rendered in the district court for Douglas county, in which the amount due on the note and mortgage was ascertained, and the court further found, among other things, that the makers of the note had conveyed the premises to defendant H. F. Cady by warranty deed on November 25, 1893, subject to plaintiff's mortgage, which mortgage the said Cady at the same time assumed and agreed to pay. A similar finding with reference to the conveyance of the premises by Cady and wife to Sarah M. Hendrix was made in the decree. There was also a finding of the amount due from the defendants Parratt, as makers of the promissory note which the mortgage was given to secure. After finding the facts tending to show the personal liability of these defendants for the indebtedness, the court entered a decree directing the sale of the mortgaged premises, but did not assume to enter a deficiency judgment against any of the defendants in case the proceeds of the sale were not sufficient to pay the indebtedness. After this judgment had been stayed, on a fourth *pluries* order, a sale of the premises was had, which was confirmed by the district court for Douglas county on October 18, 1902. On August 2, 1904, plaintiff filed a motion for a deficiency judgment for the balance due after the coming in of the report of the sale against these various defendants and others, and the defendants, who

are now plaintiffs in error, filed their objections and answers, which will be separately considered in this opinion.

At the outset of this controversy there is a difference of opinion among the learned counsel representing plaintiffs in error and the defendant in error as to the nature and effect of the judgment and decree of the district court first rendered in the foreclosure proceeding. By counsel for the plaintiffs in error it is contended that all the findings of fact in the decree which tend to show a liability of defendants for a deficiency judgment are merely interlocutory and, not having been subject to review when made, are open for traverse on objections to a deficiency judgment after the coming in of the report of the sale. Counsel for defendants in error, while admitting that the decree first entered could not of itself operate as a personal judgment against the defendants, contend that each finding of fact tending to show the personal liability of defendants for the indebtedness is final, and that by such decree defendants are foreclosed from any defense that existed when the decree was entered, and that on objections to a deficiency judgment they can only avail themselves of such defenses as have arisen after the original judgment of foreclosure was entered. We think that the nature of a decree fixing personal liability for a deficiency judgment under section 847 of the code, as it existed prior to the amendment of 1897, is established in this court by the learned and exhaustive opinion of HOLCOMB, J., in the case of *Parmele v. Schroeder,* on rehearing, 61 Neb. 553. In speaking of such decree, the writer of the opinion in this case says:

"It lacks an essential element to make it a judgment or final decree in fact, and other and subsequent action by the court in the exercise of its judicial functions is absolutely necessary before there is a final adjudication concluding the rights of the parties and giving to it the character of a final order, decree or judgment, from which an appeal will lie. The decree does not purport to award

any personal judgment against appellants. They can in no way be injured or damnified until something further is done of a judicial character upon which a process can issue. No sum of money is awarded appellees upon which a general execution will rest, and no execution can issue. Nor can the decree as to appellants be enforced by ministerial acts to carry it into execution in the future. Further exercise of the power of the court acting judicially must be resorted to before the rights of the parties are effectually and finally determined with respect to a judgment *in personam* for any deficiency that may exist after the exhaustion of the security pledged for the payment of the debt."

In this opinion the suggestion of NORVAL, C. J., in *Brown v. Johnson,* 58 Neb. 222, that "the usual and better practice is not to determine the liability of a defendant in a foreclosure for a deficiency judgment until after the report of the sale, when, for the first time, it can be definitely ascertained that a deficiency actually exists," is quoted with approval.

It is contended, however, by counsel for defendant in error that, although the decree first entered be regarded as interlocutory rather than as a final decree and judgment, yet, as to each fact well pleaded in the petition tending to show a personal liability against the defendants, it is not subject to review on objections to a deficiency judgment. Counsel cite in support of this contention the opinions of this court in *Kloke v. Gardels,* 52 Neb. 117; *Stover v. Tompkins,* 34 Neb. 465, and *Patrick v. National Bank of Commerce,* 63 Neb. 200. In *Kloke v. Gardels, supra,* it is said:

"In such foreclosure proceeding the execution of the contract, the identity of the real estate described therein, the breach of the same, and the amount remaining due thereon, are material issues determined by the decree."

In *Stover v. Tompkins, supra,* it is held that, where the grantee of the real estate has assumed in the deed of conveyance a mortgage as part of the consideration in the pur-

chase price of the premises, and a decree is rendered against him that he should be liable in case of deficiency, against a motion for a deficiency judgment, he will not be permitted to set up defenses which should have been pleaded at the first hearing of the cause. Now, as before stated, the court on the original hearing found certain facts to exist in conformity with the allegations of the petition tending to show the liability of the defendants for a deficiency judgment, but the court did not attempt to render such a judgment against any of them. In other words, the court evidently intended to leave the question of the deficiency judgment until after the coming in of the report of the sale, which is the policy favored by this court in *Parmele v. Schroeder, supra,* and *Hanscom v. Meyer,* 61 Neb. 798.

In the separate objection and answer of Sarah M. Hendrix it is alleged that at the time she received the deed to the premises in controversy, which contained the agreement to assume and pay the mortgage and taxes on the premises, she was a married woman and the owner of no property whatever, excepting the mortgaged premises, and that she never actually received the deed or knew of the condition contained therein, and that the entire transaction was conducted by her husband and the property placed in her name without her knowledge or consent, and that it was subsequently conveyed by herself and husband without her knowledge of any conditions that the deed contained. There was no reply filed to this objection and answer, which was duly verified, and at the oral argument counsel for defendant in error admitted that the facts stated in the answer were true, so far as he could ascertain. Now, then, conceding that this plaintiff in error is bound by the finding of the trial court in the original judgment that she did agree to assume and pay the mortgage debt, is such finding of fact as against a married woman sufficient to sustain a judgment at law against her? In the recent case of *Kocher v. Cornell,* 59 Neb. 315, it was held that, under the statute existing when the contract

now in issue was entered into, "the contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract." This opinion has been adhered to in *McKell v. Merchants Nat. Bank*, 62 Neb. 608. It would therefore follow that the objection of Sarah M. Hendrix should have been sustained.

Plaintiff in error Cady, by his separate objection and answer, alleged that the condition in the deed received by him from the original makers of the note, in which he agreed to pay the mortgage debt, was inserted in the deed by oversight and mistake, and that he received no consideration whatever in the purchase of the premises for such agreement. The objection and answer were supported by affidavits, and no reply to these allegations was filed by the plaintiff in the court below, nor was there any traverse made to the affidavits supporting the allegations of the answer. It will be remembered that Cady, although he was served, made default in the original suit for foreclosure, and, as claimed by counsel for defendant in error, by this default he admitted every material issue well pleaded in the petition. Now, the issue pleaded with reference to Cady was that he had assumed and agreed to pay the mortgage, but there was no allegation in the petition that the mortgage was assumed as part consideration of the purchase price, or that any consideration moved to Cady for the assumption of the mortgage. The finding of the court in the foreclosure decree was that Cady had assumed and agreed to pay the mortgage, but the court did not pretend to find that such assumption was for any consideration whatever. Consequently, Cady is only bound by the finding that by the deed he assumed and agreed to pay the debt, but we think he is not foreclosed by this finding from showing, as against his liability for a deficiency judgment, that this assumption was a mere *nudum pactum*.

The Parratts by their joint objection and answer pleaded the statute of limitations, which plea is not well taken, for the cause of action for a deficiency judgment did

not accrue until the coming in of the report of the sale. They also objected to the jurisdiction of the court to hear the proceeding on a motion, but this question is also determined against them in the recent case of *Patrick v. National Bank of Commerce, supra.* They also objected because the prayer of the original petition did not ask for a deficiency judgment against them. The allegations of the petition, however, were that they were the makers of the note, and this allegation was sufficient to sustain the finding in the decree that they were liable as makers of the note which the mortgage was given to secure. As against these plaintiffs in error, therefore, the judgment of the district court is fully supported.

We therefore recommend that the judgment of the district court against Sarah M. Hendrix be reversed and the cause dismissed as to this defendant; and that the judgment against defendant Henry F. Cady be reversed and the caused remanded for further proceedings on issues properly joined as to whether or not the assumption of the mortgage debt in the deed was made for valuable consideration; and that as against defendants Parratt the judgment of the district court be affirmed.

AMES, C., concurs.

By the Court: For the reasons given in the foregoing opinion, it is ordered that the judgment of the district court against defendant Sarah M. Hendrix be reversed and the cause dismissed as to this defendant; and that the judgment against defendant Henry F. Cady be reversed and the cause remanded for further proceedings on issues properly joined as to whether or not the assumption of the mortgage debt in the deed was made for valuable consideration; and that the judgment of the district court against the defendants Parratt be affirmed.

JUDGMENT ACCORDINGLY.

GEORGE H. BANGS, APPELLEE, V. CHARLES F. DWORAK ET AL., APPELLANTS.

FILED FEBRUARY 8, 1906. No. 14,109.

Villages: FIRE LIMITS: INJUNCTION. Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances *per se*, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property.

APPEAL from the district court for Antelope county: JOHN F. BOYD, JUDGE. *Affirmed.*

E. D. Kilbourn, for appellants.

N. D. Jackson and *George F. Boyd, contra.*

DUFFIE, C.

Oakdale is an incorporated village in the county of Antelope. In November, 1904, an ordinance was passed prescribing the limits within which no building or buildings should be erected in said village except of brick, stone or other incombustible material, and providing a penalty for the violation of such ordinance, and for the destruction or removal of any building or buildings constructed or repaired in violation of such ordinance. The ordinance contained a prohibition against the removal of wooden buildings to a lot within the prescribed fire limits. Bangs, the appellee, alleges in his petition that he is the owner of certain lots lying within the fire limits of the village of Oakdale, upon which he resides in a dwelling house of the value of $2,000; that there are other improvements upon the premises consisting of a barn, outbuildings, etc.; that appellant Dworak is the owner of the adjoining premises, also situated within the fire limits of the village, and that Dworak has purchased, and employed the appellant Blesh to move onto his premises, a frame building with a

shingle roof, not constructed of stone, brick or other incombustible material and not covered with a fireproof roof and purposes to locate the same within a distance of 15 feet of the residence of the plaintiff; and that, if allowed to do so, the plaintiff will be damaged on account of the increased danger from fire to his residence and other improvements, and by the enhanced rate of insurance which he will be required to pay by reason of the increased hazard occasioned by the removal and location of said buildings. He prayed a writ enjoining the defendants from proceeding with the proposed removal. A temporary injunction was issued, and a motion to dissolve the same overruled by the court. Thereafter a general demurrer to the petition was overruled, and the defendants electing to stand upon their demurrer, the temporary injunction was made perpetual. Defendants have appealed.

The appellants insist that a court of equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation restraining an act, unless the act is shown to be a nuisance *per se,* and 1 High, Injunctions (4th ed.), sec. 788; *St. Johns v. McFarlan,* 33 Mich. 72; *Phillips v. Allen,* 41 Pa. St. 481; *Attorney General v. Utica Ins. Co.,* 2 Johns. Ch. (N. Y.) 370, and *Trustees of Waupun v. Moore,* 34 Wis. 450, are cited in support of the proposition that a court of chancery has no jurisdiction to restrain the threatened violation of a village ordinance, unless the act threatened to be done, if carried out, will be a nuisance. It may be conceded that the municipal authorities and a citizen of the village who suffers no special damage from the violation of an ordinance cannot, ordinarily, have the assistance of a court of equity to enjoin a threatened violation thereof. The reason is plain. In the case under consideration the village authorities may, without judicial authority and on their own motion, tear down a wooden builing erected in violation of an ordinance fixing the fire limits, and a private citizen, not specially damaged, may institute a proceeding to enforce the penalty provided by such ordinance. *Lemmon v.*

Guthrie Center, 113 Ia. 36, and authorities cited. Their remedy at law is full and adequate. The facts stated in the appellee's petition, and which are admitted by the demurrer, show that he would sustain special damage, not suffered by the public at large, in consequence of the proposed removal of the house to the near vicinity of his own residence. In such case equity will interfere to protect him against the threatened injury. *First Nat. Bank v. Sarlls,* 28 Am. St. Rep. 185, 129 Ind. 201. In the case cited it is said: "Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances *per se,* if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property." This case was followed by the supreme court of Illinois in *Griswold v. Brega,* 160 Ill. 490, 52 Am. St. Rep. 350; and these cases are in line with the general equitable rule that one may have relief in a court of equity against an act from which he would suffer special damages or injury not common to the public at large.

We recommend an affirmance of the decree appealed from.

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

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

AFFIRMED.

SOUTH OMAHA NATIONAL BANK V. SAMUEL K. STEWART ET AL.

FILED FEBRUARY 8, 1906. No. 14,128.

1. **Chattel Mortgage: DESCRIPTION.** A defective or incorrect description of property covered by a chattel mortgage is immaterial, so far as the parties to the mortgage are concerned, when it is admitted by the mortgagor that the property claimed by the mort-

gagee as included therein is the identical property intended to be mortgaged.

2. ———: SUBSEQUENT PURCHASER. A chattel mortgage giving a lien on the mortgaged property as against the mortgagor is, notwithstanding an imperfect description of the property covered thereby, good as against a subsequent purchaser or mortgagee who fails to show that he purchased in good faith and without notice of the mortgage.

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

Wolcott & Morrissey and *E. M. Morsman, Jr.*, for plaintiff in error.

A. W. Crites, D. B. Jenckes, W. W. Wood and *Stewart & Munger, contra.*

DUFFIE, C.

In May, 1903, the defendant Stewart made to the South Omaha National Bank his two promissory notes, aggregating $14,887. To secure the payment of these notes he executed a chattel mortgage covering a large number of cattle, 124 horses two years old and upwards, and 36 yearling colts. The clause in the mortgage describing the horses is in the following language: "All my * * * horses of every age and sex consisting at this time of not less than one hundred and twenty-four (124) horses two years old or older, and thirty-six (36) yearlings. Horses branded "Ꝗ". Horses divided as to age and classes as follows: 100 head three years or older, 28 head two years old, 32 head of yearlings, 114 head of the horses are located near Bear Creek, three miles north of Merriman in Cherry county, Nebraska." The mortgage contained the following provisions: "Said above enumeration and description being intended to cover and include all of said property and all additions and accretions and increase thereof. * * * It is hereby covenanted and stated as a fact that all of said live stock, cattle and chattels are owned by said party

of the first part and are free and clear of all liens and incumbrances of every kind and character: That said live stock, cattle and chattels are now in perfect health and in the undisputed possession of the party of the first part on the premises of said party as above in the counties of Sheridan and Cherry in the state of Nebraska." While the mortgage makes no mention of the grade or character of the horses, it developed on the trial that all of Stewart's horses were what is known as "Belgian" horses and that no other horses of this breed were owned or kept in Cherry or Sheridan counties. In the fall or early winter of 1903 Wood came into possession, and at the commencement of this action had possession at his ranch in Sheridan county and claimed ownership of 60 head of horses and colts which the plaintiff claims were covered by its mortgage. The petition alleges that the defendants had converted these horses to the plaintiff's damage in the sum of $3,000. It is conceded that a part only of the herd of horses were branded as described. The defendants filed separate answers. These answers admit the making of the notes and chattel mortgage set out in the plaintiff's petition, but deny that the 60 head of horses in Wood's possession were included in said mortgage, or that plaintiff had any lien thereon or interest in the same by virtue of said mortgage. It is further alleged that Wood had no notice, knowledge or information that plaintiff claimed any interest in the 60 head of horses until long after he became the absolute owner of 53 of said horses by purchase, and of 7 head of said horses as security for money loaned. It is alleged that Wood purchased in good faith and paid $800 in cash for 53 head of the horses, and that he advanced to the owner of the other 7 head the sum of $400, and took said 7 horses as security for the money so advanced; that said money is now due and wholly unpaid, and that he has a lien thereon for that amount. Other matters are alleged by way of estoppel which are not material to a determination of the case.

After the plaintiff had introduced its evidence and

rested, the court, on motion of the defendants, gave a peremptory instruction to return a verdict in their favor. The district court was of opinion that the evidence offered by the plaintiff failed to show that it had any title or lien on the horses which it charged the defendants with converting, and this is the principal question argued on the submission of the case. The only question which we are called on to determine is this: Does the chattel mortgage describe the 60 head of horses, or any of them, sufficiently to give to the plaintiff a lien thereon as between the bank and Stewart, the mortgagor? If it does, the court was wrong in directing a verdict for the defendants. It will be remembered that the defendants have offered no evidence. The question of the good faith of Wood in purchasing 53 head of these horses, and taking 7 head as security for money advanced to the owner, was neither tried nor determined by the district court. The case had not advanced to that stage when the jury were instructed to find for the defendants. If, when it rested, the plaintiff had made a *prima facie* case, then the defendants should have been put to their proof, and it was error to instruct for the defendants. If the evidence offered by the plaintiff identified the horses in Wood's possession, or any of them, as those included in the mortgage and intended by the parties to be covered thereby, then, as between the parties to the mortgage, the plaintiff was invested with a lien thereon, and this lien was as effectual as against a stranger or person who had no title to the horses as between the parties themselves. It is only where the rights of innocent third parties have intervened that an incorrect or faulty description in a chattel mortgage can be taken advantage of, and, even as against innocent third parties, a faulty description is sufficient if the mortgage contains such description as would lead to the identification of the chattels intended to be mortgaged on reasonable inquiry. As the defendant Wood has introduced no evidence tending to show his *bona fides* in the purchase of these horses at the time the instruction complained of was given, he stands

in the position of a stranger, and has no reason to complain if the mortgage was good as between the parties to create a lien on the horses held by him. In *Leighton v. Stuart,* 19 Neb. 546, it was held that "a chattel mortgage may be void as against the *bona fide* creditors of or purchasers from the mortgagor for defective description of the property mortgaged and yet good as between the immediate parties to the mortgage, especially where the property included in the mortgage is identified by them." This appears to be the general rule everywhere, and this rule ought to obtain with more force where, as in this state, it is held that a verbal agreement to give and accept security upon personal property is valid between the parties, although of no validity as against creditors and subsequent purchasers in good faith. *Conchman v. Wright,* 8 Neb. 1.

A careful examination of the evidence convinces us that the evidence was sufficient to make a *prima facie* case for the plaintiff. If the evidence showed that Stewart was the owner of these horses at the time the mortgage was executed and intended to include them in the mortgage which, by its terms, covered all his horses, then, as between the parties to that instrument, the mortgage was good, regardless of any insufficiency in the description given. D. B. Ingram, who had charge of the business of the bank leading up to the execution of this mortgage, testified that, in a conversation had with Stewart, he asked him if he had moved these horses from Merriman over to Judge Wood's ranch, and Stewart said he had, that they were the same horses that were at Merriman that he had moved from there. Robert Fields, who had charge of gathering up the horses and cattle included in this mortgage, testified as follows: "Q. Do you know from what place these horses were taken to Judge Wood's ranch? A. Yes, sir. Q. From where? A. From out north of Merriman. Q. Do you remember of having had a conversation with Mr. Stewart at Gordon, Nebraska, at which Mr. Ingram and myself were present? A. Yes, sir. Q. You may state

what he then said in regard to these horses that were then at Judge Wood's place. (Objection being made to this question, the following ruling was made by the court: Sustained as to the defendant Wood, and overruled as to the defendant Stewart.) A. He stated that he had taken the horses from his ranch out north of Gordon to Merriman, and he claimed that he had moved somewhere in the neighborhood of 150 or 160 head of horses down there, and he had taken these horses that were then at the ranch from there down to the Wood ranch. Q. Did you have another conversation with Mr. Stewart at the time the sheriff served the summons upon him in this case? A. Yes, sir. Q. What did he say then in regard to these horses? A. Well, he told me that he had bought somewhere in the neighborhood of 150 or 160 head—I think he enumerated it 161—with the last bunch of 7 head he claims he had bought down there, and I asked him if that was all the horses he owned or controlled in that country, and he said it was. I asked him if they were included in the mortgage, and he said they were, and I asked him then if these horses he had taken down to Mr. Wood's ranch were some of the same bunch, and he said they were, and taken from the same place."

Were this an action against Stewart alone, no one would, question the sufficiency of this evidence to make a *prima facie* case in favor of the plaintiff. He admits his ownership of these horses at the time the mortgage was made, and that they were included in the mortgage. As between the parties to the instrument this is sufficient, and the sufficiency or insufficiency of the description of the animals is wholly immaterial in such a case. In the attitude which the case assumed, Wood stands in no better position than does Stewart. He elected not to present any evidence of his good faith in his alleged purchase of these horses, and elected to allow his claim to them to be determined upon the evidence submitted by the plaintiff alone. That evidence, as we have seen, was sufficient, in the absence of any countervailing proof, to entitle the

plaintiff to a verdict. If Wood desired to show his purchase of these horses and his good faith in the transaction, the opportunity was offered him, and he might have done so. In the absence of proof, it must be presumed that he took either with knowledge of the plaintiff's lien or that he did not pay value for the property.

The court was clearly wrong in instructing for the defendants, and we recommend a reversal of the judgment.

ALBERT and JACKSON, CC., concur.

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

REVERSED.

SAMUEL ECCLES, APPELLEE, V. WILLIAM H. WALKER, APPELLEE; UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANT.

FILED FEBRUARY 8, 1906. No. 14,388.

1. **Official Bonds: SURETIES: LIABILITY.** The surety on the official bond of an officer is not liable for the penalty of $50 imposed by section 34, chapter 28 of the Compiled Statutes, for exacting fees in excess of those prescribed by statute. *Eccles v. United States Fidelity & Guaranty Co.*, 72 Neb. 734, disapproved.

2. **Second Appeal: LAW OF CASE.** An appellate court, on a second appeal of a case, will not ordinarily reexamine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may reexamine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

Hazlett & Jack, for appellant.

A. Hardy, William H. Walker and *E. O. Kretsinger, contra.*

DUFFIE, C.

Eccles sued Walker upon his official bond as justice of the peace to recover $1.25 illegal fees exacted from him, and also the penalty of $50 provided in section 34, chapter 28 of the Compiled Statutes 1905 (Ann. St. 9060). The trial resulted in a judgment against Walker for the amount claimed, but the district court dismissed the action as against the surety, the United States Fidelity & Guaranty Company. From this order Eccles appealed, and the court reversed the order and remanded the case for a new trial. (72 Neb. 734.)

The opinion is direct and specific that the surety on the official bond of an officer is liable for the penalty of $50 denounced against the exaction of fees in excess of those provided and limited by the statutes of this state, and on the retrial of the case the court so charged the jury, and refused an instruction, tendered by the defendant surety, that the penalty provided by statute could be recovered only from the officer guilty of exacting the excessive fee. The headnote to the former opinion is in the following language: "Sureties upon an official bond are liable for a statutory penalty incurred by their principal by taking illegal fees." The opinion cites *Kane v. Union P. R. Co.,* 5 Neb. 105, and *Phœnix Ins. Co. v. McEvony,* 52 Neb. 566, as cases involving the question and holding the surety liable. A reexamination of these cases convinces us that in neither was the question directly raised or decided. In *Kane v. Union P. R. Co.* the treasurer of Cheyenne county seized and levied upon four locomotives of the railroad company for the payment of delinquent taxes due the county. The company, after the seizure of its locomotives, tendered to the treasurer the full amount

of taxes due, but he refused to receive the same and release the locomotives unless it paid a further amount which he claimed he was entitled to demand and receive in the nature of fees and penalties, and which the company claimed was illegal and unauthorized by law. Finally the company paid the taxes, and also the fees and penalties demanded, the latter under a written protest, and then brought an action on the treasurer's bond to recover the fees and penalties so paid. From this statement it will be seen that there was no attempt to recover from the treasurer and the sureties on his bond any statutory penalty denounced against an officer for taking illegal fees; the plaintiff in that action sought no relief except the recovery of money paid to the treasurer as fees and penalties which he demanded as a condition of the release of the property levied on, and this court held that the exaction of fees and penalties not imposed by law was a breach of the treasurer's bond, for which the sureties were liable, but the question of the liability of the sureties for a statutory penalty, in addition to the illegal fees exacted, was not an issue in the case and not passed on by the court.

In *Phœnix Ins. Co. v. McEvony, supra,* the company brought ten separate actions against McEvony, the sheriff of Holt county, and the sureties on his official bond to recover certain fees which, it alleged, the sheriff had charged and taken from it for services performed by him as sheriff, and which it claimed were in excess of those permitted by statute. The penalty denounced by statute for taking illegal fees was also asked in each case. After the plaintiff had introduced its evidence and rested, the district court, on motion of the defendant, compelled the insurance company to elect on which of the two causes of action stated in its petition it would stand, that is, the court compelled the insurance company to abandon the cause of action against the sheriff for the recovery of the illegal fees collected or to abandon the cause of action for the statutory penalty. This court, in discussing the question, said: "This action of the court was erroneous. The learned

district court seems to have been of opinion that the two causes of action could not be united in the same petition; but the two causes of action in each of the petitions of the insurance company grew out of the same transaction and are connected with the same subject of the action. The two causes of action affected all the parties to the suit and did not require different places of trial (code, secs. 87, 88); and the plaintiff had the right to join those two causes of action in one petition. It is true that the two causes of action were not separately stated and numbered as the code requires, but that could not be taken advantage of by a motion to compel the plaintiff to elect on which cause it would stand."

The grounds upon which the defendant's motion to compel the plaintiff to elect was made does not appear with certainty, but from the foregoing quotation it is quite plain that the motion was based upon the well-understood rule that two causes of action, one upon contract and one for a tort committed, cannot ordinarily be joined in the same petition. So far as we are able to judge from the opinion, the question of the liability of the sheriff's sureties for the statutory penalty was not raised in the district court and was not a question presented to this court for its decision. The only question decided was that the two causes of action, conceding the liability of the sureties for the statutory penalty, might be joined in the same action.

Passing now to the liability of a surety for the statutory penalty provided by section 34 of chapter 28, *supra,* against the principal for exacting illegal fees, the wording of the statute is to our minds conclusive that the officer alone is subject to the penalty. The section is as follows: "If any officer, whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, or if any such officer shall charge or demand, and take any of the fees hereinbefore ascertained and limited, where the business for which such fees are chargeable shall not be actually done and performed, such officer

shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable by law." The several cases heretofore brought to recover the penalty for taking or exacting illegal fees have apparently proceeded against the officer alone. *Graham v. Kibble,* 9 Neb. 182; *Cobbey v. Burks,* 11 Neb. 157; *Lydick v. Palmquist,* 31 Neb. 300; *Iler & Co. v. Cronin,* 34 Neb. 424; *Phœnix Ins. Co. v. Bohman,* 28 Neb. 251. In the case last cited it is said: "While an officer taking illegal fees is liable to the full penalty of the law, yet the statute, being highly penal in its nature, will not be extended by construction or implication beyond the clear import of its language." There is nothing in the language of the statute which in express words, or by implication even, gives a right of action to the party injured on the official bond of the offending party. On the contrary, the statute is that "such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable by law." In our judgment the legislature had in mind in enacting this statute a penalty to be inflicted upon the officer alone for his violation of a duty, and from the fact that in the past the practice has been to sue the officer alone, this seems to have been the construction heretofore placed upon the statute by the profession. Penalties of this character are never extended by implication, nor are surties held beyond what is clearly within the scope of their undertaking, and when a statute provides a penalty for the doing or not doing of certain acts, and does not by express terms make the sureties liable, they are not responsible for such penalty. *Casper v. People,* 6 Ill. App. 28; *State v. Baker,* 47 Miss. 88; *Moretz v. Ray,* 75 N. Car. 170; *Brooks v. Governor,* 17 Ala. 806; *State v. Bagby,* 160 Ind. 669, 67 N. E. 519; *State v. Flynn,* 157 Ind. 52, 60 N. E. 684; Murfree, Official Bonds, sec. 654; *McDowell v. Burwell,* 4 Rand. (Va.) 317; *Treasurers v. Hilliard,* 8 Rich. Law (S. Car.), 412; *Jeffreys v. Malone,* 105 Ala. 489; *Hixon v. Cupp,* 5 Okla. 545, 49 Pac. 927; *Furlong v. State,* 58 Miss. 717. We think it is clear,

both upon reason and authority, that a surety is not liable for a statutory penalty denounced against his principal, unless the statute imposing the penalty so provides. Is this a case where the former decision of the court becomes the law of the case, to be followed on subsequent appeals, or may the legal question involved be again examined and a different judgment given?

In *City of Hastings v. Foxworthy,* 45 Neb. 676, this court announced the following rule: "An appellate court, on a second appeal of a case, will not ordinarily reexamine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may reexamine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect."

It will be remembered that on the first trial of this case in the district court the court dismissed the action as against the surety, the present appellant. This was manifestly wrong, as no one contends that the surety was not liable upon Walker's bond for the amount of the illegal fee exacted from Eccles. This error required a reversal of the case, and the case was reversed generally and remanded for a new trial. On the second trial the liability of the surety for the penalty was again raised and that question is a second time before us for determination. If the first opinion was manifestly wrong in holding the surety liable for the statutory penalty, as we believe it was, then the rule in *City of Hastings v. Foxworthy, supra,* should obtain and the correct rule of law should now govern.

We recommend that the judgment be reversed and the action dismissed against the United States Fidelity & Guaranty Company, so far as judgment is sought against it for the statutory penalty of $50.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment is reversed and the action dismissed against the United States Fidelity & Guaranty Company, so far as judgment is sought against it for the statutory penalty of $50.

REVERSED.

LETTON, J., not sitting.

LYDIA M. HAYS, APPELLEE, V. JOSEPH A. HAYS, APPELLANT.

FILED FEBRUARY 8, 1906. No. 13,991.

1. **Divorce: DECREE: EVIDENCE.** Evidence examined, and *held* to justify a decree of divorce on the ground of extreme cruelty, and an order giving the plaintiff custody of the children.

2. **Authority as to Property.** Where a court has jurisdiction of the parties, its authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its jurisdiction.

3. **Alimony.** On the facts stated, *held* that the alimony allowed the wife is not excessive.

4. ———. Where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed at a lump sum without danger that such allowance may prove unjust or inequitable to one or other of the parties, it is proper for the court to provide for the payment of a stated sum at fixed periods for a given length of time, or until the further order of the court.

APPEAL from the district court for Nemaha county: PAUL JESSEN, JUDGE. *Affirmed.*

Stull & Hawxby and *H. A. Lambert,* for appellant.

Neal & Quackenbush and *E. F. Warren, contra.*

ALBERT C.

This is a suit by a wife for divorce. The petition shows a marriage between the parties, the name and age of each

surviving child born to the parties, extreme cruelty on the part of the defendant, and his unfitness to have the care and custody of the children. The petition also shows that the defendant is the owner of certain real estate of the value of $4,300, and that the plaintiff is without means of support. The prayer is for a divorce, the custody of the children, and alimony. The district court granted the divorce, awarded the custody of the children to the plaintiff, and allowed her $1,000 alimony and the further sum of $6.66⅔ a month for the support of each child until 14 years of age, or until the further order of the court. The court also awarded the plaintiff "all the household furniture now in her possession in the house now occupied by her, and heretofore the homestead of said parties." The defendant appeals.

It is insisted that the evidence is insufficient to sustain the finding of extreme cruelty upon which the decree is based. The evidence covers some 400 pages. The particular act of cruelty charged in the petition is that the defendant, without cause or provocation, assaulted, beat and choked the plaintiff. The plaintiff's testimony amounts to a reiteration of the charge. According to her testimony the defendant, in a fit of anger, seized her by the throat and choked her, so that her throat was inflamed and swollen for something like a week. She is corroborated in her story by a witness who was in the adjoining room when the assault took place. Her story is rendered highly probable from the evidence of the defendant's previous conduct, which shows that he had become indifferent to his wife and careless of her feelings, and which prepares the mind to receive the story of his assault upon her without question or surprise. The defendant admits that he was angry and laid hands on her, but denies that he choked or beat her. To corroborate his denial, the nine years' old son of the parties, whom the defendant had taken from the plaintiff's custody some weeks before the trial, was produced as a witness. But after a careful examination of the boy's testimony, taking

into account its inherent weakness, his situation for some weeks previous to the trial, the circumstances under which he testified, and the other evidence adduced by the parties, we are of the opinion that it tells rather against the defendant than in his favor. The charge of extreme cruelty appears to be abundantly sustained by the evidence.

It is next claimed that the allowance of alimony is excessive. The value of the personal property owned by the defendant is not given. The evidence shows that his real estate is worth, over and above all incumbrance, from $2,200 to $2,400. It also shows that, at the time of the marriage, neither party owned any property, and that the property now owned by the defendant represents the joint accumulation of the parties during their association together as husband and wife. The defendant is an able-bodied man, between 40 and 45 years of age, and a carpenter and builder by trade. At the time of the trial, and for sometime before, he had been earning $125 a month. The plaintiff is between 35 and 40 years old; she has no property; she has the care and custody of three of the defendant's children, the oldest of whom was but nine years old and the youngest five years old at the time of the trial. As to the allowance of $1,000 out of $2,200 or $2,400 accumulated as a result of their joint efforts and management, it is certainly not unreasonable under the circumstances of this case. The monthly allowance of $6.66⅔ for the support of each child until 14 years old is not munificent, and involves no greater sacrifice on the part of the defendant than the time and care the plaintiff will be required to bestow upon them entail upon her. It does not appear to us that the alimony is excessive.

The defendant contends that the monthly allowance is in the nature of continuing alimony, and that alimony in that form was discountenanced in *McGechie v. McGechie*, 43 Neb. 523. There the court said:

"We do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum

each month during the life of the other party, or for an indefinite period of time."

In that case the trial court had awarded $500, and the decree provided for the payment of the further sum of $10 a month indefinitely. On the facts stated, the court held the allowance excessive and modified the decree, striking therefrom the monthly allowance. But the court did not intend by the language quoted to commit itself to the proposition that an allowance of a fixed amount, payable at stated periods, would be disapproved in all cases. As there stated "the amount (alimony) should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties." In the present case, the monthly allowance was obviously made because the custody of the children was awarded to plaintiff. But she may die or become so situated that their nurture should be confided to some other person; one or more of the children may die; the defendant may become disabled by disease or accident. In short, the amount which the plaintiff should be allowed, in consequence of her custody of the children, depends upon so many contingencies that it would be impossible to fix upon a gross amount with any reasonable certainty that would prove just and equitable to both parties. We think the trial court wisely fixed upon the plan of monthly payments, to continue until the children respectively attained a certain age, reserving at the same time authority to revise the allowance to meet such contingencies as might arise from time to time.

A complaint is based on the order allowing the plaintiff the household furniture in her possession at the time of the decree. The defendant insists that this portion of the decree is outside the issues, because this furniture was not mentioned in the petition. Where the court has jurisdiction of the parties, authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its juris-

diction. It is not necessary that each item of personalty be specifically mentioned in the petition. The evidence discloses with reasonable certainty the amount of household furniture. It also discloses that the defendant had appropriated a portion of it after the final rupture between him and the plaintiff and before the decree. He retains the tools and implements of his trade, and all personal property, save that portion of the household furniture awarded to the plaintiff. He has no just cause to complain of the division.

The defendant lastly contends that the custody of at least one of the children should have been given to him. The issue as to his fitness to have the care and custody of a minor child of tender age was squarely joined, and the evidence bearing thereon submitted to the court. We have gone over it with care. It would serve no good purpose to comment upon it, further than to say that it satisfies us that the court made no mistake in denying the defendant the custody of any of the children.

It is recommended that the decree of the district court 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.

FRANCIS X. MOHAT, APPELLEE, V. JOHN HUTT, APPELLANT.

FILED FEBRUARY 8, 1906. No. 14,086.

The remedy by injunction is not available to enforce a bare legal right, when there is a plain and adequate remedy at law.

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

Kirkpatrick & Hager, A. P. Johnson and *Milton Schwind,* for appellant.

H. M. Sullivan, contra.

ALBERT, C.

On the 15th day of March, 1904, the plaintiff filed his petition in the district court, praying for an injunction restraining the defendant from driving plaintiff's cattle from a certain tract of land, and from interfering with plaintiff's possession of such land. A temporary restraining order issued the same day, and on the final hearing a perpetual injunction was granted as prayed. The defendant appeals.

It sufficiently appears from the pleadings and the evidence that at the commencement of the suit both parties claimed the right to possession of the land mentioned in the decree under leases made to them, respectively, by the owners. Both leases were oral. The defendant's lease was made about April 20, 1903, and, according to his testimony, was for one year from the 1st day of May of that year; according to the evidence adduced by the plaintiff on that point, the length of the term was not fixed. The plaintiff's lease was made February 25, 1904, and was for one year from the 1st of March, following. There was no dwelling house on the land, but the defendant was in possession on the 1st day of March, 1904, and the right of possession was of some substantial value because of the natural pasturage and corn stalks on the land. At that date a dispute arose between the parties to the suit as to the right of possession; the plaintiff claiming such right by reason of his lease for the ensuing year, and the defendant under his lease made the previous year. The plaintiff undertook to turn his stock upon the land, but was prevented by the defendant. About the 5th of the month, and during a temporary absence of the defendant, the plaintiff turned his stock upon the land and began to

cultivate a portion of it. On the defendant's return he drove the plaintiff's stock from the land, and held possession until the temporary order was issued.

It is clear to us that this suit is simply an attempt to employ the extraordinary writ of injunction to enforce what, at most, is a mere legal right, and one which the ordinary remedies at law are amply adequate to protect. In other words, it is an attempt to substitute the remedy by injunction for ejectment, and forcible entry and detainer, and the prayer for an injunction for that purpose should have been denied. *Warlier v. Williams*, 53 Neb. 143; *Wehmer v. Fokenga*, 57 Neb. 510. See also *State v. Graves*, 66 Neb. 17.

It is recommended that the decree of the district court be reversed, with directions to enter a decree in favor of the defendant.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed, with directions to enter a decree in favor of the defendant.

REVERSED.

JOHN POWER V. DOUGLAS COUNTY.

FILED FEBRUARY 8, 1906. No. 14,116.

1. **Officers:** COMPENSATION. A public officer is required to perform the duties of his office for the compensation fixed by law, and must look to the statute for compensation.
2. **Fees.** Where the law fixes the source to which a public officer is to look for compensation, as, for example, the fees of his office, he must look to such source alone.
3. **Sheriffs:** FEES. The provisions of section 42, chapter 28, Compiled Statutes 1903, not only limit the salary of sheriff to a certain sum per annum, but require him to look to the income of his office for such salary and the salaries of his deputies.

4. Persons summoned by the sheriff, under his authority to summon the power of the county, are not deputies in the proper sense of the term, and the sheriff is not liable to them for compensation.

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

Smyth & Smith, for plaintiff in error.

W. W. Slabaugh and *F. A. Shotwell, contra.*

ALBERT, C.

The district court sustained a general demurrer to plaintiff's petition, and judgment went accordingly. The plaintiff brings error.

The question presented by the record is whether a county having over 60,000 inhabitants is liable to the sheriff for salaries paid by him to his deputies, where the fees of his office, after deducting his own salary, are insufficient for that purpose. The rule is well settled that a public officer is required to perform the duties of his office for the compensation fixed by law. He must perform every service required of him by law, and must look to the statute for compensation. *State v. Meserve,* 58 Neb. 451; *State v. Silver,* 9 Neb. 85; *Bayha v. Webster County,* 18 Neb. 131; *Adams County v. Hunter,* 78 Ia. 328; *City of Decatur v. Vermillion,* 77 Ill. 315; *Troup v. Morgan County,* 109 Ala. 162; *Sampson v. Rochester,* 60 N. H. 477. As a corollary to the foregoing proposition, it would follow, and it has been held, that where the compensation of an officer is to be paid out of a particular fund, as, for example, the fees of his office, he must look to that fund. *Gage County v. Wilson,* 38 Neb. 165; *Gage County v. Wilson,* 38 Neb. 168; *Wolfe v. Kyd,* 46 Neb. 292; *Maurer v. Gage County,* 72 Neb. 441; *Lethbridge v. New York,* 133 N. Y. 232.

Section 42, chapter 28, Compiled Statutes 1905 (Ann. St. 9069), is a part of the act to regulate the fees of certain

county officers, enacted in 1877. The act has been frequently amended, the last amendment having been enacted in 1905. It will not be necessary to notice the changes made by the amendments at this time, and for present purposes we may take the act as it now stands. The section referred to requires the sheriff and certain other officers to pay into the county treasury all fees earned by them in excess of the amounts which, by the provisions of that section, they are permitted to retain as their official salary and the salaries of their deputies and assistants. This section allows a sheriff a salary of $2,500 per annum, the necessary jail guard, and one deputy; the salary of the latter being fixed at $900 per annum. The section further provides: "That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officer may retain any amount necessary to pay for such assistants or deputies not exceeding the sum of seven hundred (700) dollars per year for each of such deputies or assistants except in counties having a population of over 18,000 and less than 25,000 inhabitants; in which case such officers may retain any amount of fees collected sufficient to pay the salaries of such deputies and assistants, not exceeding the sum of one thousand (1,000) dollars per annum, for each of said deputies, except in counties having a population of over 60,000 inhabitants, in which case such officers may retain such amount as may be necessary to pay the salaries of such deputies or assistants, as the same shall be fixed by the county board; but in no instance shall such officers receive more than the fees by them respectively and actually collected." The obvious effect of this section is, not only to limit the compensation of the several officers to a fixed sum, but to require them to look to the income of their respective offices for such compensation. Such was the construction placed upon it by this court in the cases cited *supra*.

But it is contended that the section referred to, so far as it relates to the sheriff, must be read in connection with

section 119, article I, chapter 18, Compiled Statutes 1905 (Ann. St. 9211), which authorizes him to summon the power of the county when he deems it necessary to preserve the peace, and section 4, chapter 24, Compiled Statutes 1905 (Ann. St. 9255), which empowers him to appoint "such number of deputies as he may see fit." So far as concerns the authority of the sheriff to summon the power of the county, it will suffice to say that he is not liable, and never has been, at least in modern times, to the persons thus summoned for their fees or compensation, if, indeed, they are legally entitled to any. Such persons are not deputies in the proper sense of the term, and the question of their compensation does not concern the sheriff, nor is it involved in this case. So far as concerns section 4, chapter 24, it stands just as it stood in chapter 15 of the Revised Statutes of 1866. At that early day the sheriff was required to look to the fees of his office for his own compensation and that of his deputies. This is not only a matter of history, but is clearly implied from section 6 of the same chapter, which is still a part of the laws of the state (Comp. St. ch. 24, sec. 6; Ann. St. 9257), which provides: "When a county officer receiving a salary and no fees is compelled by pressure of business of his office to employ a deputy, the county commissioners may make a reasonable allowance to such deputy." As the fees of the sheriff, then as now, were fixed by law, and he received no salary, he was not included in this provision, and the affirmative grant of authority to the county board to make an allowance for one class of deputies impliedly negatives its authority to make such allowance for those not included in that class. It would seem to follow, then, that if we should take section 4, *supra,* in connection with section 42, *supra,* of the act regulating the fees of the sheriff and other county officers, which is the later enactment, the most that can be claimed for the plaintiff is that, while he had authority to appoint such number of deputies as he saw fit, he was obliged to look to the fees of his office for their compensation. That being true, taking into account the nature of

plaintiff's claim, the effect of the enactment of the act regulating the sheriff's fees on section 4, allowing him a free hand as to the number of deputies, is not necessarily involved at this time.

There is some suggestion in the argument of a contractual liability on the part of the county to the plaintiff. But there can be no such liability. Aside from the invalidity of a contract between the county board and a county officer (*Wilson v. Otoe County*, 71 Neb. 435), a county board has no authority to provide other or different compensation than that fixed by statute.

The petition presents no theory upon which a recovery could be had, and the demurrer was properly sustained.

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.

STATE, EX REL. DENNIS H. CRONIN, APPELLANT, V. DANIEL J. CRONIN, COUNTY TREASURER, APPELLEE.

FILED FEBRUARY 8, 1906. No. 14,479.

1. **Tax Sales: NOTICE: PUBLICATION.** Section 7, article IX, chapter 77, Compiled Statutes, provides for the publication of notice of the filing of a petition in the district court, under what is known as the "Scavenger Act," and that the county commissioners "shall designate the newspaper in which said notice, and in which all notices of tax sales made by the county treasurer" under said act "shall be published, *provided*, the county treasurer shall designate such newspaper where the county commissioners fail to do so." Among other proceedings of the county board, its record shows the following: "On motion, the printing of the scavenger delinquent tax list was awarded to the O'Neill Frontier." *Held*, That such record is sufficient to show a desig-

nation by the county board of a newspaper to publish the notice required by said section.

2. The writ of mandamus is properly denied, where it would be unavailing if allowed.

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

R. R. Dickson, for appellant.

A. F. Mullen and *M. F. Harrington, contra.*

ALBERT, C.

This is an appeal from an order denying a writ of mandamus. The appellant is the owner and publisher of the "Frontier," sometimes known as the "O'Neill Frontier," a weekly newspaper published at O'Neill and of general circulation in Holt county. The appellee is treasurer of said county. In January, 1905, the county board of the county formally elected to enforce the collection of delinquent taxes against real estate under the provisions of chapter 75, laws 1903, commonly known as the "Scavenger Act," and which constitutes article IX, chapter 77, Compiled Statutes (Ann. St. 10644-10691). Section 5 of the act prescribes the form of a petition to be prepared by the county treasurer against the several tracts and lots of land against which there are taxes delinquent, and section 6 for the filing of such petition in the district court. Section 7 prescribes the form of a notice of the filing of such petition, and provides for the publication of such notice in a newspaper, and that there shall be published in connection therewith "a complete list of the lands and lots as shown in the county treasurer's statement of delinquent taxes," etc. It also contains the following provision: "The county commissioners of each county shall designate the newspaper in which said notice, and in which all notices of tax sales made by the county treasurer hereinafter provided for, shall be published, *provided,* the county treasurer shall

designate such newspaper, where the county commissioners fail to do so." The appellee prepared and filed the petition in accordance with sections 5 and 6, and, taking the position that the county board had failed to designate a paper in which the notice prescribed by sec. 7 should be published, designated the "Holt County Independent" as such paper. The appellant contends that his paper, the "Frontier," was designated by the county board to publish the notice, and, consequently, that it was the duty of the appellee to furnish him with such notice for publication. The contention is based on a motion adopted by the county board at a session held in April following its election, to proceed under the act in question. The record of the proceedings at that session, so far as is material now, is as follows: "On motion the printing of the scavenger delinquent tax list was awarded to the 'O'Neill Frontier.'" On the other hand, the appellee invokes the familiar rule anounced in *State v. Bartley,* 50 Neb. 874, that a writ of mandamus will only be allowed where the relator clearly establishes his right, and nothing essential to that right will be taken by intendment. He then states his position thus: "Applying these rules to the facts of the present case the county treasurer, in order to interpret the resolution passed by the county board as a designation, would have to do so by intendment. He would have to interpret the word "award" to mean "designate"; that the words "scavenger delinquent tax list" meant the legal notice referred to in section 7, article IX, chapter 77, Compiled Statutes 1905; that the "O'Neill Frontier" meant the "Frontier."

That the county board did not employ the most apt and accurate language to designate a newspaper to make the publication will be conceded, and if the record on the motion stood alone, and unaided by other points of the record, it would leave room for doubt as to what the county board had in mind. But at the preceding sitting the board had adopted a formal resolution to proceed under the so-called "Scavenger Act" to enforce the collection of delin-

quent taxes. By the use of the term "Scavenger" in the motion in question, the board clearly conveyed the thought that it was taking a step in pursuance of its resolution to proceed under that act. The first step required of the board by that act, after the adoption of such resolution, was to designate a newspaper to publish the notice required by section 7. With the duty of making such designation resting upon it and ripe for performance, the board "awarded the printing of the scavenger delinquent tax list" to a certain newspaper. It is true the statute uses the word "designate" instead of "award," and that the two words are not synonymous. But designate, as used in section 7, means to point out or select, and when the board "awarded" the printing of the list to a certain paper, it clearly pointed out or selected such paper to do the work. And, so long as it did that, whether it used one word or another is immaterial in the eyes of the law. But it is pointed out that section 17, as well as section 7, requires the publication of a delinquent list, and the appellee insists that the language of the motion is equivocal, in that it does not show to which of the two lists or notices it refers. By the provisions of section 7 the list is a part of the notice of the pendency of the suit, and is a complete list of the lands against which there are delinquent taxes and of the amount of taxes due on each lot or parcel of land described. The list required by section 17 is a part of the notice of sale under the decree, and is merely a list of "all lands and lots on which decrees have previously been rendered." The latter list is not the delinquent tax list, within the meaning of the act, nor as the term is generally understood. Besides, the publication under section 7 precedes that under section 17 some months, and it is not to be presumed, nor would one fairly seeking information suspect, that the board passed over a present and certain duty to discharge one which was remote and to a certain extent contingent. Nor do we attach any importance to the fact that the board omitted the term "notice," because by common usage the terms "list," "tax

list" and "delinquent tax list" are understood to refer to the notices or other matters with which such lists are included, and we have no doubt that the language employed by the board conveyed to the average reader that the board was dealing with the notice required by section 7 more clearly than would have been possible by terms technically more correct and accurate. It will be observed that, instead of awarding the publication of the matter, the board awarded the "printing." This is another slight inaccuracy of expression that leaves no one in doubt as to the intention of the board. "Print is familiarly used in the sense of 'publish,' and in that sense the word receives recognition in many if not all of the dictionaries." *Nebraska L., S.-G. & I. Co. v. McKinley-Lanning L. & T. Co.*, 52 Neb. 410; *Aetna Life Ins. Co. v. Wortaszewski*, 63 Neb. 636. It is also urged that the true name of appellant's paper is the "Frontier," while that named by the board is the "O'Neill Frontier." But the testimony shows that the appellant's paper is the only paper published in the county by the name of the "Frontier," and that it is also known as the "O'Neill Frontier." It is not at all probable that any one would be misled by the name used by the board to designate the paper. See *Fairchild v. City of St. Paul*, 46 Minn. 540, 49 N. W. 325. As was intimated in the case just cited, the main object of the statute requiring the designation of a paper is to advise the public where to look for notices like that in question. And we are satisfied that any person really seeking information on that point from the records of the county would not be left in doubt nor led astray by the record of the action of the county board in this case.

The appellee insists that the record of the county board, relied on as showing a designation of appellant's paper, is fatally defective, because it is not a command or direction to the county treasurer or any other person, and is in the past tense and a mere recital of a past transaction. In support of this position he cites *Preuit v. People*, 5 Neb.

377, and *Miller v. Burlington & M. R. R. Co.*, 7 Neb. 227. In the first of these cases the court held that a recital in the record that "thereupon the court sentenced the defendant, William M. Preuit, to be hanged by the neck until dead," etc., was not a proper judgment, but a mere recital of the fact that one had been rendered. The judgment in the second case was open to the same objection. It is hardly necessary to say that judgments of a court of record stand on a very different footing from the acts and proceedings of an administrative body. As to the records of the former, strictness has always been required, but, as to the latter, great liberality has been accorded. As was said in *Bartlett v. Eau Claire County,* 112 Wis. 237:

"All reasonable liberality must be accorded the minor deliberative bodies of the state; notably county boards, town meetings, school district meetings, and the like, where, by reason of the character and vocation of the men comprising such bodies, the technicalities of procedure are not strictly enforced, nor perhaps fully understood. We must not expect nor demand that the records of such meetings should be made up with the accuracy and technicality of those of monetary corporations, conducted under the direction of skilled counsel; nor, indeed, of the legislature itself."

We are satisfied, however, that the court was justified in denying the writ, because it appears to be conceded that it would have been unavailing had it issued, the time being too short after the decision of the district court to take the steps and make the preparation necessary to enable the appellant to publish the list within the time required by law. This condition of affiairs was due largely to the fact that the appellee, by giving the notice and list to the other paper, which had sent it out of the state to be printed, had placed himself in a position where it would have been impossible to obey the writ promptly had it issued. That being true, the appellant's right to publish the list, at the time of the decision in the district court, was a mere abstract right, unattended by any possible

benefit to him, and it is well understood that such a right will not be enforced by mandamus, whatever may be done in some other form of action. *Gormley v. Day*, 114 Ill. 185; *State v. Westport*, 135 Mo. 120; *People v. Fitzgerald*, 13 N. Y. Supp. 663. But the situation was different when this suit was begun. At that time, had the appellee moved promptly to the discharge of his duty, the appellant could have made the publication. But the appellee chose rather to persist in his default until, however the court should decide, the appellant could not publish the list or notice. We are unable to view the conduct of the appellee in any other light than as a wanton disregard of duty and a reckless attempt to thwart the purpose of the governing body of the county. We are of the opinion, therefore, that while the writ was properly denied, under the circumstances, the costs of the proceeding should have been taxed to the appellee.

It is therefore recommended that the judgment denying the writ be affirmed, and the order taxing the costs to the relator be reversed, and the cause remanded, with directions to tax the costs of the proceeding to the respondent.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment denying the writ is affirmed, and the order taxing the costs to the relator is reversed, and the cause is remanded, with directions to tax the costs of the proceeding to the respondent.

JUDGMENT ACCORDINGLY.

J. A. CHAPIN V. SEWARD COUNTY.

FILED FEBRUARY 8, 1906. No. 14,098.

Counties: LIABILITY. Under the provisions of section 23, chapter 50 of the Compiled Statutes, a county is not liable to a complaining witness for an amount equal to one-fourth of the sum collected as fines and paid over to the school fund, where the complaint is for selling liquor without a license.

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

Landis & Schick, Thomas Darnall and *A. G. Wolfenbarger,* for plaintiff in error.

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

JACKSON, C.

The plaintiff brought this action to recover a sum equal to one-fourth the amount of certain fines paid over to the defendant's treasurer by persons convicted of a violation of the provisions of chapter 50 of the Compiled Statutes. The allegations of the petition important to the inquiry are that the plaintiff was the complaining witness in criminal prosecutions for the sale of liquor without license in an incorporated village of the defendant county; that the filing of the complaints terminated in assessing certain fines, which were paid and converted into the treasury of the defendant; that the plaintiff made out and filed with the county board claims for one-fourth the amount of the fines, which were rejected.

A general demurrer to the plaintiff's petition was sustained. He appeals, and bases his right to recover upon section 23 of the chapter in question. This section reads as follows: "All fines and penalties recovered under the provisions of this act shall, when collected, be paid into the proper treasury for the use of the school fund, and

the corporate authorities by whom such license was issued shall pay to the complaining witness in such action, out of the general fund of the county or city, an amount equal to one-fourth of the sum actually collected and paid over to the school fund as aforesaid." Comp. St. 1905, ch. 50, sec. 23 (Ann. St. 7173). The purpose of this enactment evidently was to hold the municipality issuing a license under the provisions of the act, of which it is a part, to some extent responsible for the regulation of the traffic which it might license, and, in the event of a conviction of its licensee for the violation of the provisions of the act, to make some compensation to the complaining witness who brought the fact of such violation to the attention of the public authorities.

It will be observed that the fines shown by the petition in the case at bar to have been collected were not for the violation of the provisions of the act in an incorporated village, but for sales without license. The village therefore is not responsible to the complaining witness, because the village issued no license. The county board was without jurisdiction to issue license, and, while the fines were paid into the county treasury for the benefit of the school fund of the county, yet it is not the receipt of the fine by the municipal authority that makes the municipality liable to the complaining witness. It is clearly the purpose of the statute to make the municipality receiving the license money responsible, and, as no municipality had received license money from the persons paying the fines, no municipality was liable to the complaining witness.

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.

MARTIN TEATS v. GEORGE W. FOX.

FILED FEBRUARY 8, 1906. No. 14,103.

Criminal Law: COSTS: CONSTITUTIONAL LAW. Section 22, chapter, 50, Compiled Statutes of 1905, in so far as it authorizes the taxation of costs against a complaining witness, unless the court shall sustain the finding that there was probable cause for the complaint, is unconstitutional and void.

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

H. M. Sinclair, Warrington & Stewart and *H. D. Rhea,* for plaintiff in error.

E. A. Cook and *Geo. W. Fox, contra.*

JACKSON, C.

The defendant in error made complaint before the police judge of the city of Lexington charging one Gilmore with unlawfully keeping for sale intoxicating liquors. A warrant was issued upon the complaint and the accused taken into custody by the sheriff. Upon motion of Gilmore the complaint was quashed, the proceeding dismissed, and, among other things, it was ordered that the costs be taxed to the complaining witness. Execution was issued for the costs and levied upon the property of the defendant in error, who replevied the same, and upon trial in the district court had judgment determining the right of property and the right of possession to be in him. The plaintiff in error is the officer who had the execution and made the levy, and from the judgment against him in the replevin proceedings he prosecutes error.

The taxation of costs against the complaining witness it is attempted to justify under the provisions of section 22 chapter 50 Compiled Statutes 1905 (Ann. St. 7172). That portion of the section authorizing the costs to be so taxed reads as follows: "If the defendant be discharged

the costs shall be paid by the complaining witness unless the court shall sustain the finding that there was probable cause for the complaint." In *Rickley v. State,* 65 Neb. 841, it was held that section 322 of the criminal code, in so far as it authorizes the question of the good faith of the prosecuting witness in instituting the prosecution to be tried and determined at the same time that the defendant is tried, and the taxation of costs against him, in case it is found that in filing the information he acted maliciously and without probable cause, is unconstitutional and void. The conclusion there reached is based upon the reasoning that a complaining witness in the trial of a misdemeanor is in no sense a party thereto; he exercises no control over the prosecution, is given no voice as to what evidence shall be offered or produced at the trial, in fact, is denied the right to have the question of his good faith in making the complaint investigated and determined, and that to permit the costs of such a proceeding to be taxed against him, and his property seized and sold to satisfy the order taxing the costs, would be to take his property without due process of law.

It is urged in behalf of the plaintiff in error that the conditions here are different; that under the provisions of section 23 of the act in question a complaining witness is, in effect, a party in interest, because, upon conviction and payment of any fine that may be imposed upon the accused, the complaining witness is entitled to receive from the municipality issuing the license a sum equal to one-fourth of the amount of the fine; but in *Chapin v. Seward County, ante,* p. 745, it is held that, where the complaint was for selling liquor without a license, as in this case, no such compensation to the complaining witness could be made.

We are unable to distinguish the case at bar from *Rickley v. State, supra,* and hold that section 22, chapter 50 of the Compiled Statutes 1905 (Ann. St. 7172), in so far as it authorizes the taxation of costs against the complaining witness is unconstitutional and void.

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.

JAMES J. OLSEN V. JOSEPH R. COLLINS.

FILED FEBRUARY 8, 1906. No. 14,125.

Action on Contract: EVIDENCE. In an action for damages on account of an alleged breach of contract, evidence is admissible under a general denial to show that, in fact, no contract existed.

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

John H. Barry, for plaintiff in error.

Simpson & Good, contra.

JACKSON, C.

Plaintiff in error sued for damages on account of the breach of an alleged contract for the purchase of a quantity of potatoes. The answer was a general denial. In the trial court a jury was waived and the case heard before the court, resulting in judgment for the defendant.

The chief complaint of the plaintiff in error is that, over his objections, evidence was admitted for the purpose of proving that the conversation relied upon by him as constituting the contract was had in jest, and therefore not binding upon the parties. This contention cannot be sustained. The denial put the existence of a contract in issue, and under the denial it was competent for the defendant to prove any facts tending to show that no contract was ever made.

The only remaining question is as to the sufficiency of the evidence to sustain the judgment. The court found that no contract was ever entered into between the parties. There is competent evidence in the record tending to show that plaintiff in error in the year 1903 raised a crop of potatoes near the town of Colon, in Saunders county. The defendant is a hardware merchant at that village, and his place of business appears to have been a convenient resort in the evening for residents of the village. On an October evening of the year stated the plaintiff visited this store in company with others, and his potato crop afforded the theme of conversation for the evening. He was the recipient of much friendly advice relative to the care of his crop, and finally the defendant bantered him by offering him a dollar a bushel for the potatoes, and handed him a dollar as an evidence of good faith. The witnesses, as they usually do in such matters, disagreed as to whether the offer was in jest or not, but the circumstances tend to corroborate the defendant and his witnesses in the claim of jest. The defendant is a single man, not engaged in the business of handling vegetables and without use for them.

There is evidence to sustain the finding of the trial court, and we recommend that the judgment 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, EX REL. JOHN H. MICKEY, RELATOR, V. JOHN C. DREXEL, COUNTY CLERK, RESPONDENT.

FILED FEBRUARY 22, 1906. No. 14,419.

1. Taxation: STATE BOARD OF EQUALIZATION: POWERS. The state board of equalization and assessment has general direction and control of county assessors in the performance of their duties, but this does not include the power to direct them in the valuation of property for assessment, nor in determining whether or not a particular item of property is assessable.

2. ———: COUNTY BOARD OF EQUALIZATION: APPEAL. The county board of equalization has jurisdiction to hear and determine contests as to the liability to taxation of property which the law requires the county authorities to assess. An appeal lies from its decision to the district court. The state board of equalization and assessment has no jurisdiction of such appeal.

3. ———: APPEAL: MANDAMUS. The appeal provided by the revenue law from the decision of the county board as to the liability of property to taxation is a plain, adequate, legal remedy, and mandamus will not lie to correct errors of the county board in such decision.

ORIGINAL application for a writ of mandamus to compel respondent to list for taxation the reserve funds of certain beneficiary associations. *Writ denied.*

Norris Brown, Attorney General, and *W. T. Thompson,* for relator.

W. W. Slabaugh and *Brome & Burnett, contra.*

SEDGWICK, C. J.

The relator as a citizen and taxpayer of the state has applied to this court for a writ of mandamus to compel the respondent, who is county clerk of Douglas county, "to insert in and extend upon the tax roll and list of Douglas county, Nebraska, for taxation the assessed value of the personal properties consisting of the reserve funds of the Sovereign Camp of the Woodmen of the World, a fraternal-beneficiary association, commonly known as the

"Woodmen of the World," and also to insert in and extend upon the tax roll and list of Douglas county, Nebraska, for the current year the assessed value of the personal properties consisting of the reserve funds of the Supreme Forest of the Woodmen Circle, a fraternal-beneficiary association commonly known as the "Woodmen Circle." It is alleged in the alternative writ that the property in question was "duly and legally listed and assessed for taxation for the current year by the county assessor of said Douglas county, the listed or real and the assessed valuation being fixed by said assessor as follows:

	Real value.	Assessed value.
Sovereign Camp, Woodmen of the World	$2,036,651	$407,330
Supreme Forest, Woodmen Circle	200,886	40,177"

This allegation is denied in the return to the writ. It appears that these associations in listing their property for assessment in 1905, after listing other property as assessable, stated the amount of these reserve funds held by them respectively and claimed them exempt from taxation.

1. It is contended that these funds are exempt from taxation. This question is involved in another case, now pending in this court and soon to be heard. It does not appear to be necessary to a determination of this case, and we will therefore consider this case upon the theory that such funds are taxable under our statute, leaving that question for further consideration hereafter.

2. It is contended in the brief that the county assessor in the first instance assessed these reserve funds. This contention seems to be so plainly contradicted by the record as to deserve but little consideration. The Woodmen of the World in their return to the assessor listed four items of property:

(1) Furniture, fixtures and supplies	$5,000.00
(2) Credits with banks, after allowing for all outstanding checks	402,189.06

(3) Securities in safety deposit vaults in city of Omaha $2,018,597.55
(4) Gross receipts 33,341.00

And the return of the association to the assessor shows that each of these items is of the value at which it was listed. There was no controversy or question about this. The item "fixtures and furniture" was numbered 82 in the return of the company to the assessor, and the item "gross receipts" was numbered 78. The assessor valued number 78, $33,340, $1 less than the gross receipts returned by the association; and valued the item 82, "office fixtures and furniture, $5,000," the amount returned by the association as item "82, office fixtures and furniture." He extended 20 per cent. of these two amounts as the value to be assessed. In his oral examination the assessor made some attempts at evasion, but this evidence, if competent at all for the purpose, was altogether too indefinite to contradict the record which he had made. The record as to the assessment of the Woodmen Circle is equally conclusive. The return made by these associations to the assessor, the action of the assessor thereon, the proceedings of the state board, and the proceedings of the county board of equalization, all conclusively show that the only question in regard to the assessment of these two associations was the simple legal question as to whether the reserve funds were liable to taxation. The assessor assessed the property listed by these companies as assessable, but did not assess these reserve funds. This matter being brought to the attention of the state board of equalization, that board directed "that the properties aforesaid be listed, assessed and added to the tax rolls of said county for taxation by said county assessor for said year, in the manner provided by law." This was done on the 2d day of August, 1905. The county assessor thereupon added this property to the tax rolls and assessed the same.

3. The next question controverted by the parties arises out of this action. Section 129, article I, chapter 77, Compiled Statutes 1903 (Ann. St. 10528), provides that the

state board of equalization and assessment "shall have general direction and control of the county assessors in the performance of their duties, and shall direct the same," and section 113 of the act (Ann. St. 10512) provides: "The county assessor shall obey all rules and regulations made under this act and the instructions sent out by the state board of equalization and assessment." The question is raised and discussed whether these and other similar provisions in the statute give the state board of equalization and assessment power to control the judgment of the county assessor upon the values of property, or upon the question of the liability of property to assessment; or whether the powers of the state board relate rather to the manner of performing the duties of the assessor and the formalities to be observed by him. "The state board of equalization cannot deal with individual assessments, nor take into consideration inequalities as between individual taxpayers, but it deals only with the values of the taxable property of a county as a whole." *Hacker v. Howe,* 72 Neb. 385.

It surely will not be contended that the state board can direct the county assessor as to what valuation he shall put upon property, and so accomplish indirectly what the board cannot do directly. It has no power to hear complaints that individual assessments are too high or too low. This duty is left to the county board, and its action thereon cannot be reviewed by the state board. When property is listed by the owners, and is claimed by them to be exempt from taxation, the assessor must, no doubt, determine in the first instance whether such property is taxable. The question may at the proper time be presented to the county board of equalization. There can be no doubt of the jurisdiction of that board to determine whether the property is assessable. The clerk may add omitted property to the roll, but it is the duty of the county board to assess the same (Comp. St., ch. 77, art. I, sec. 121, Ann. St. 10520), and its action in that regard cannot be controlled by the state board. It would follow,

then, that the action taken by the state board, as far as this controversy is concerned, was entirely nugatory, and we must treat the action of the county assessor in extending these properties upon the tax list and assessing them for taxation as they would be treated if no such order of the state board had been made.

4. After the county assessor had assessed these reserve funds pursuant to the order of the state board, the associations appeared before the county board of equalization and protested against this action of the assessor, and asked the county board to strike said assessments from the assessment rolls. A hearing was had thereon before the county board and the assessments were stricken from the rolls accordingly. In these protests before the county board is was insisted that these reserve funds were not liable to taxation.

The writer of this opinion was at the argument inclined to the view that, under these circumstances, this action could be maintained; that, since the sole question before the county board was a question of law, the action of that board in striking the assessment from the rolls after the assessor had extended it thereon must be considered as a ministerial act, leaving the duty of the county clerk clear and unequivocal in the premises. It is generally held that the writ of mandamus will lie to compel assessors of taxes to do their duty. "It lies to make them assess all property which is subject to taxation; to extend on the collector's books the taxes according to the increased valuation of property in the county made by the state board of equalization; enter on the assessment book the delinquent taxes of the preceding year; strike an illegal assessment from the assessment roll." Merrill, Mandamus, sec. 127. There can be no doubt that when all the parties interested are before the county board of equalization, and there is no controversy in regard to the facts, no question of ownership of property, or of the amount or value thereof, but simply the legal question as to whether such property is liable to taxation, the action of the board in

determining the legal question would generally be considered as ministerial, and a writ of mandamus would lie to compel them to assess property that was manifestly liable to taxation. Our code, however, provides: "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Sec. 646 of the code.

"Such remedy is adequate when it reaches the end intended, and actually compels the performance of the duty which has been neglected or refused. It must apply to the case, and afford the particular right to which the party is entitled. Anything which falls short of that is not adequate nor complete. * * * The writ has been refused: when the board of supervisors denied the relief desired, because an appeal lay from their decision." Merrill, Mandamus, sec. 53. The question is whether the revenue act has provided a plain and adequate legal remedy. Section 124, article I, chapter 77, Compiled Statutes 1905 (Ann. St. 10523) provides for appeals from a decision of the county board of equalization to the district court. The appeal may be taken within 20 days after the adjournment of the board, and must be taken "in the same manner as appeals are now taken from the action of the county board in allowance or disallowance of claims against the county." The fifth subdivision of section 121, *supra,* requires the county board of equalization to "add to the assessment rolls any taxable property not included therein, assessing the same in the name of the owner thereof as the assessor should have done." It also requires that notice of this proposed action be given to the owner of the property. The statute providing for appeal to the district court requires the court to "hear the appeal as in equity and without a jury, and determine anew all questions raised before the board which relate to the *liability of the property to assessment* or the amount thereof." There is no doubt of the right of one taxpayer to appeal from the assessment of another. So that it appears from these provisions that the statute declares it is the duty of the

county board of equalization to determine when property which has been omitted is taxable, and if it is found to be taxable to place it upon the rolls for that purpose, and to assess it as the assessor should have done. Any taxpayer, the amount of whose taxes may be affected by the action of the county board, may appeal from its decision as to the liability of the property of another to taxation, and upon such appeal the court must determine whether the property in question is liable to assessment. The statute contains ample provisions for carrying out the decision of the court and securing the assessment of such property as shall be found liable to taxation. No sufficient reason has been suggested for supposing that this plain statutory remedy is not adequate, and it follows that this relator, as a taxpayer of the state, had a plain, adequate remedy prescribed by the statute. This remedy cannot be neglected and the extraordinary writ of mandamus resorted to. The writ must therefore be denied.

WRIT DENIED.

IN RE PROTEST OF JOHN D. MACRAE.

FILED FEBRUARY 22, 1906. No. 13,866.

1. **Liquor License:** EVIDENCE: REVIEW. Where an applicant for a liquor license introduces sufficient evidence before a licensing board to show *prima facie* that the signers of his petition possess the necessary statutory qualifications, a finding in his favor on that question will not be set aside on appeal.

2. **Intoxicating Liquors:** SALE TO MINOR. Where a minor purchases liquor, not for his own consumption, but for the use of another, who sent him to buy it, whose money pays for it, to whom it is delivered, and to whom the sale may be lawfully made (the seller being so informed), it is not a sale to a minor within the meaning of section 8, chapter 50, Compiled Statutes 1903, entitled "Liquors."

3. ———: SALE ON SUNDAY: EVIDENCE. When an applicant for a liquor license is charged before the licensing board with having sold

intoxicating liquor on the first day of the week, commonly called Sunday, and the evidence on the hearing is conflicting, the question presented is one of fact to be determined on the weight of such evidence.

4. ———: SCREENS: LICENSE. The purpose of section 29, chapter 50, entitled "Liquors," is to secure to the proper authorities an unobstructed view of the manner in which the business of selling intoxicating liquors is being conducted, and, as the evidence in this case shows beyond question that the applicant so screened the windows and doors of his place of business as to obstruct such view, it was the duty of the board to find him guilty of the violation of that section and refuse to grant him a license.

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

Montgomery & Hall, for plaintiff in error.

W. J. Connell, contra.

BARNES, J.

Charles Metz, the defendant herein, applied to the board of fire and police commissioners of the city of Omaha for a license to sell malt, spirituous and vinous liquors at No. 2705 Leavenworth street, in said city, for the period of one year, commencing on the first day of January, 1904, under the city ordinances and the provisions of chapter 50, Compiled Statutes 1903 (Ann. St. 7150-7184). To this application the plaintiff, John D. MacRae, filed a remonstrance, alleging that the applicant's petition was not signed by 30 freeholders of the ward in which the business was to be conducted; that the applicant had been guilty of a violation of section 8 (Ann. St. 7157) of said chapter 50, in that, during the preceding year, he had sold liquor and intoxicating drinks to minors; that the applicant had been guilty of selling intoxicating liquors on the first day of the week, commonly called Sunday; and that he had been guilty of violating the provisions of section 29 (Ann. St. 7179) of the act in question, in that he failed to keep the windows and doors of his place of busi-

ness unobstructed by screens, blinds, paint or other articles. After a full hearing, the board overruled the protest and remonstrance, and granted the license as prayed for by the applicant. The remonstrator appealed to the district court for Douglas county, where the order of the board was affirmed, and from that judgment he brings the case to this court by petition in error.

1. The plaintiff's first contention is that the court erred in sustaining the finding and judgment of the licensing board that the petition was signed by a sufficient number of freeholders residing in the ward where the business was to be conducted. In order to procure such a license, the applicant must show that the signers of his petition possess the qualifications required by the statute; and, recognizing this rule, the applicant at the outset of the hearing introduced his evidence tending to establish that fact. While this evidence is not very conclusive, yet we are satisfied that it made at least a *prima facie* case, and, as the plaintiff herein introduced no contradictory proof, it was sufficient to sustain the finding of the board on that question.

2. It is next contended that the license should have been refused, for the reason that the applicant had violated the provisions of section 8 (Ann. St. 7157) of the act in question by selling intoxicating liquor to minors. The burden of proving that charge was on the remonstrator, and in order to establish it he showed by one Fred Steinhauser, a minor, that he had frequently obtained beer at the applicant's saloon during the preceding year, but he also stated that he procured it for his mother, and never drank any of it himself. The applicant's bartender testified to the same fact, and added that he delivered the beer to the witness only when he was sent for it by his folks; that he delivered it to him to carry to his mother and sister, who were both adults. This requires a decision of the question whether the sales above described were sales to a minor, and within the inhibition of the law.

It is proper to say at the outset that the authorities

are somewhat divided on this question. In some jurisdictions it is held that a mere delivery of intoxicating liquor to a minor constitutes a sale within the meaning of the statute. But these decisions turn mainly upon the peculiar wording of the statutes on which they are based, and it would seem that they are not sustained by the weight of authority. In Black, Intoxicating Liquors, sec. 420, it is said: "When a minor purchases liquor, not for his own consumption, but for the use of another person, as whose agent or messenger he is acting, and to whom the sale might lawfully be made, the guilt or innocence of the seller will depend upon the disclosure to the seller of the fact of agency, because, so far as concerns the seller, that will determine the person who is to fill the character of purchaser. If the minor informs the liquor dealer that the liquor purchased is for the use of another person, who has sent him to buy it, and with whose money he pays for it, such being in truth the case; or if the dealer knows, from other sources of information, that the real purchaser is an adult and the minor is only his messenger, then the sale takes place between the dealer and the adult, the minor is not concerned in it except as he is merely the conduit by which the money is conveyed to the one and the liquor to the other, and consequently the dealer cannot be convicted of selling to the minor." This doctrine seems to be sustained by *Commonwealth v. Lattinville,* 120 Mass. 385; *O'Connell v. O'Leary,* 145 Mass. 311; *State v. McMahon,* 53 Conn. 407; *State v. Walker,* 103 N. Car. 413; *Monaghan v. State,* 66 Miss. 513; *Wallace v. State,* 54 Ark. 542; *Randall v. State,* 14 Ohio St. 435. In *Monaghan v. State, supra,* it was said:

"To 'sell' liquor to a minor is what is forbidden by the statute. Merely to deliver liquor to a minor, with notice that it is to be carried to an adult, is not a sale within the meaning of the statute. We cannot extend the terms of a criminal statute beyond its clear legal meaning. We cannot construe the word 'sell' in the statute to mean something different from its ordinary legal import. Undoubt-

edly, a minor may be an agent or lawfully go on errands for an adult, and a person may buy through an agent, and in such case, there being no question of the fact of agency, although the dealing is with the agent, and the delivery is to him, in legal effect the sale is to the principal. The law is, that where a person contracts as agent, or he is known to be such, the contract is with the principal, and not with the agent; but where the agent deals in his own name, and the principal is not disclosed or known, the contract is with the agent and he is liable."

Therefore it was proper for the applicant to show that the liquor was drawn and delivered to the minor in pursuance of an agreement with his parent for its purchase and subsequent delivery to her. It has also been held that, as between a seller and an agent who deals with him without disclosing the fact that he acts in that capacity, the latter as well as the principal may be regarded as the purchaser. So it may be possible for a liquor seller who contracts with the minor to be convicted of selling liquor to him, notwithstanding the fact may subsequently be disclosed that the minor acted as the agent for an adult. It would seem to follow that, where liquor is sold and delivered to a minor under the belief on the part of the seller that it is for an adult, yet, if the case should prove to be one where the minor was in fact purchasing it for himself and thus used it, such belief of the liquor dealer would constitute no defense to a charge of unlawful sale to such minor. In other words, a liquor seller who delivers intoxicating liquors to a minor does so at his peril; and, if it afterwards appears that the minor obtained it by a false statement that it was for the use of an adult, the false statement will constitute no defense to a prosecution based on such sale. So we are of the opinion that the evidence in this case failed to show that the applicant was guilty of the sale of intoxicating liquors to a minor as alleged in the remonstrance.

3. The question of the sale of intoxicating liquors on Sunday by the applicant in this case is not free from

doubt. Two or three witnesses testified that they had purchased beer at the applicant's saloon on Sunday within the year next preceding the filing of his application. This fact was denied, however, by the applicant and his bartender, who testified that the witnesses for the remonstrator were not in the applicant's saloon, and that he sold no liquor to them on the occasions mentioned by them. So there was a conflict of evidence on that point, and we are inclined to think that the district court did not err in sustaining the finding of the licensing board on that question.

4. This brings us to the fourth and last contention presented for our consideration. It was claimed by the remonstrator that the applicant had been guilty during the preceding year, of violating the provisions of section 29 (Ann. St. 7179) of the act, which reads as follows: "It shall be the duty of all vendors of malt, spirituous, or vinous liquors, under the provisions of this act, to keep the windows and doors of their respective places of business unobstructed by screens, blinds, paint, or other articles, and any person offending against the provisions of this section thereof shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than $25, or be imprisoned in the county jail not less than ten days, or both, at the discretion of the court, and shall have his license revoked by the same authority granting the same." Considering this section with the other provisions of the chapter of which it is a part, it seems apparent that its purpose was to secure to the proper authorities at all times an unobstructed view of the manner in which intoxicating liquor is being sold, so that, without effort, the persons charged with the enforcement of the law can readily ascertain whether its terms are being violated or not. It seems that it is a violation of the section to place curtains or screens that obstruct the view of the place where the business is being conducted. Black, Intoxicating Liquors, sec. 153; *Commonwealth v. Worcester,* 141 Mass. 58.

The evidence introduced on the hearing by the remonstrator showed conclusively that the front windows of the applicant's place of business have a heavy damask cloth, perhaps 36 to 38 inches wide, stretched across them, and, in addition to this, heavy cloth that covers the lower half of the windows, there are large curtains that pull down, thus completely covering them; that in front of the door there is a kind of screen, with a glass that stands up against the counter; that on Sundays, during the year preceding the filing of the application for a license, the top curtains were pulled down, and from the street one could not see into the applicant's place of business at all; that on week days it was only possible to see inside by climbing up and looking over the screen and curtains. On the cross-examination of the witnesses for the remonstrator it was brought out that the curtains and the screen had, for several years, been in about the same condition. The evidence clearly shows that the curtains, both lower and upper, and the screen, standing some distance inside of the front door, were so arranged as to obstruct the view of the interior of the room in which the applicant's business has been conducted. That this amounts to a violation of the statute, no matter where the obstructions to the view were placed, whether at the windows and doors or some distance away from them, cannot be doubted. *Commonwealth v. Kane*, 143 Mass. 92.

The applicant introduced no evidence to dispute the existence of the foregoing facts, and there was no conflict of evidence on this point. It follows that it was the duty of the board to find that "it was satisfactorily proved" that the applicant had been guilty of a violation of the provisions of section 29, as alleged in the remonstrance, and, for that reason, to refuse a license to the applicant. For the failure of the board to perform its plain duty in that behalf, and for the failure of the district court to so find, the judgment of the district court must be reversed, and the cause remanded. As the license period in question has long since expired, the only thing left for the district court

to do is to reverse the order of the licensing board at the costs of the applicant.

REVERSED.

L. CURK DUNCAN V. STATE OF NEBRASKA.

FILED FEBRUARY 22, 1906. No. 14,242.

A bill of exceptions must be filed with the clerk of the trial court, and if the original bill is to be used in the supreme court it must be authenticated by said clerk. A document attached to a transcript and purporting to be a bill of exceptions cannot be considered, unless it be authenticated as such by the certificate of the clerk.

ERROR to the district court for Cheyenne county: HANSON M. GRIMES, JUDGE. *Affirmed.*

W. P. Miles and *James L. McIntosh,* for plaintiff in error.

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

BARNES, J.

The plaintiff in error, L. Curk Duncan, was convicted of the crime of cattle stealing in the district court for Cheyenne county. He was thereupon sentenced to a term of three years' imprisonment in the state penitentiary, and from that judgment he prosecutes error.

But one question is argued in his brief, and that is that the verdict is not sustained by sufficient evidence. An examination of the record discloses that it contains no legal bill of exceptions. At the close of the transcript we find the following certificate: "State of Nebraska, Cheyenne County ss.: I, R. E. Barrett, clerk of the district court for Cheyenne county, do hereby certify that the fore-

going is a true and perfect transcript of the information, instructions to the jury, as given by the judge of said court, verdict of jury, motion for a new trial, and judge's notes, as shown on the trial docket in the said cause in the above entitled action, as the same remains on file and of record in my office. R. E. Barrett, clerk of the district court. (Seal.)" It will be observed that the certificate does not mention the final judgment, or show that one was rendered against the accused. We would therefore be justified in summarily dismissing the whole proceeding, but as we find what purports to be such a judgment in the transcript we have concluded to further examine the questions presented by the record.

Attached to the transcript is what purports to be a bill of exceptions. It bears no filing marks of the clerk of the district court for Cheyenne county. In fact, it appears that it was never filed in that court. There is no certificate of any kind attached to it, and there is no way by which it can be identified as either the original bill of exceptions in the case or a copy thereof. That the contents of such a document cannot be considered by this court for any purpose is not now an open question.

In *Wax v. State,* 43 Neb. 19, it was said: "A bill of exceptions must be certified by the clerk of the trial court, as being a part of the record in said court, or as being the original bill of exceptions in the cause, in order that the matters therein may be considered by this court."

In *Wood Mowing and Reaping Machine Co. v. Gerhold,* 47 Neb. 397, this court held that a bill of exceptions must be filed with the clerk of the trial court, and if the original bill is to be used in the supreme court it must be authenticated by said clerk. "A document attached to a transcript and purporting to be a bill of exceptions cannot be considered unless it be authenticated as such according to the requirement of the statute, by the certificate of the clerk of the district court." *Coad v. Barry,* 57 Neb. 177. "If there is no bill of exceptions, questions of fact, or the sufficiency of the evidence to sustain the findings of

the court, cannot be considered." *Gay v. Reynolds,* 57 Neb. 194. See, also, *Miles v. State,* 74 Neb. 684.

The attorney general, however, has filed no motion to quash the alleged bill of exceptions, but has been content to attack it on the final hearing. We have therefore concluded to look into it, and upon so doing we find, if it should be regarded as a correct exhibit of the evidence, that the verdict is not unsupported.

It appears that on or about the 2d day of September, 1904, Mrs. Emma Robinson, the wife of the owner of the animal alleged to have been stolen, found the accused driving it from her husband's herd of cattle toward his own place; and when accosted by her he released the steer and made no further claim to it. His explanation to her of why he cut it out of the herd belonging to the prosecuting witness, and why he was driving it toward his own premises, in the light of the other evidence, does not entirely comport with truth or reason, and his subsequent statement to the prosecuting witness and others in relation to the matter is not quite consistent with the theory of an honest mistake in his attempted identification of the animal. Again, the owner of the herd saw the steer but a few days before the accused was interrupted in his attempt to drive it home. It then had horns, its ears were not cut or mutilated, and it had the owner's mark or brand on its jaw. When it was found in the possession of the accused it had been dehorned, the owner's mark had been obliterated by a cross-brand placed over it, its ears had been cut or mutilated, and a bar brand, which the accused admitted was like the one used by him, had been placed on the animal's hip. The attempted explanation of the accused as to how and where this branding and marking might have been done was not consistent with truth and reason, although it is but fair to say that he denied doing it himself. So there was evidence from which the jury could reasonably find that the accused had cut the steer out of the herd belonging to the prosecuting witness, and was driving it away with intent to deprive the owner

thereof, when he was surprised with it in his possession by Mrs. Robinson. So we are unable to say that the evidence does not support the verdict.

The judgment of the district court is therefore

AFFIRMED.

STATE, EX REL. CHARLES S. CONEY, RELATOR, V. WILLIAM H. HYLAND, RESPONDENT.

FILED FEBRUARY 22, 1906. No. 14,596.

1. **Mandamus:** TITLE TO OFFICE. The title to a public office will not be tried in a mandamus proceeding.
2. **Mandamus** will lie to compel an officer whose term has expired to deliver to the person elected to succeed him, who holds the certificate of election and has duly qualified by taking the oath of office and by the filing and approval of his bond, the books, papers, money and other property belonging to the office. Such a *prima facie* right to the office is sufficient ground for the issuance of the writ, even when it is claimed the relator was not eligible to the office at the time of the election.

ORIGINAL application for a writ of mandamus to compel respondent to deliver to relator the records, etc., of the office of county superintendent of schools. *Writ allowed.*

W. W. Young, for relator.

M. F. Harrington and *T. J. Doyle, contra.*

LETTON, J.

This is an original application in this court for a writ of mandamus to compel William H. Hyland, the retiring officer, to deliver to the relator, Charles S. Coney, who, it is alleged, is the duly elected and qualified superintendent of public instruction for Stanton county for the term of two years beginning January 4, 1906, and is now occupying and performing the duties of said office, all books, papers,

records, money and other property belonging to said office, and to vacate and surrender to the relator a certain room in the court house in Stanton, set apart by the county commissioners as the office room of the county superintendent. The respondent admits that the relator received a plurality of the votes cast for said office at the November, 1905, election, received the certificate of election, took the oath of office and gave a bond which was approved, but alleges that prior to the approval the county board had approved a bond given by this respondent, who was holding over his term as county superintendent. He avers that no person was elected to this office at the election held in November, 1905; that the relator was not qualified to hold the said office; and was not eligible thereto, for the reason that at that time he did not hold a first grade county teacher's certificate, and that the respondent, since the 4th day of January, 1906, has been holding over his term, and has duly requalified by taking the oath of office and by giving a new bond; that the question involved in this case is of title to the office of county superintendent, which cannot be determined in this form of action. Upon these issues and the evidence, this cause was submitted to the court.

It appears that the relator received a majority of the votes cast at the November, 1905, election for the office of county superintendent of Stanton county, and that he qualified for said office by taking the oath of office and filing his bond, which was properly approved; that he holds the certificate of election; that he has been recognized as such officer by the state superintendent of public instruction, and that he is now exercising the duties of the office. It is claimed that on election day he did not hold a first grade teacher's certificate, though he has since received one, which has been made to appear as of that date, and it is upon these alleged facts that the respondent bases his right to hold over and retain possession of the property belonging to the office.

The questions presented with reference to the eligibility

of the relator to hold the office at the time of his election, we deem unnecessary to consider or pass upon at this time, since mandamus is not the proper proceeding in which to try the title to office.

Under the facts the relator is *prima facie* the county superintendent, and is therefore entitled to the books, papers and other property belonging to the office and necessary for its proper administration. When the relator presented himself to the retiring officer, armed with the proper certificate of election, and duly qualified by the filing of his oath and the approval of his bond, it was the respondent's duty to deliver to him the property appertaining to the office. The question of whether or not the relator was eligible to the office may properly be tried by *quo warranto* proceedings, and this remedy is open to the respondent. This is not an open question in this state. *State v. Jaynes,* 19 Neb. 161; *State v. Meeker,* 19 Neb. 444; *Cruse v. State,* 52 Neb. 831.

The two principles controlling this and like cases have been clearly set forth by the supreme court of Oklahoma as follows: "As to the writ of mandamus, then, we have two settled rules as to public offices and the effects and belongings thereto: the one that mandamus will not lie to try the title to a public office, and the other, that it will lie to compel the predecessor to deliver to his successor the books, papers, records, moneys, insignia, and paraphernalia thereof when the relator shows an absolute *prima facie* title. No court or lawyer of today would for a moment controvert those two well settled rules of modern jurisprudence." *Ewing v. Turner,* 2 Okla. 94, 35 Pac. 951. High, Extraordinary Legal Remedies (3d ed.), sec. 74; *People v. Head,* 25 Ill. 325; *Crowell v. Lambert,* 10 Minn. 295; *People v. Kilduff,* 15 Ill. 492, *Warner v. Myers,* 4 Ore. 72; *State v. Archibald,* 5 N. Dak. 359, 66 N. W. 234; *State v. Johnson,* 30 Fla. 433, 11 So. 845.

A peremptory writ of mandamus is allowed as prayed for.

WRIT ALLOWED.

CHAUNCEY J. LICHTY, APPELLANT, V. DAN A. BEALE, APPELLEE.

FILED FEBRUARY 22, 1906. No. 13,774.

1. **Homestead**: EXECUTORY CONTRACT: QUIETING TITLE. An executory contract for the sale of a homestead, made by either husband or wife without joinder by the other, is void as to the whole homestead tract, without regard to value, and not only will specific performance of it not be decreed, but a breach of it will not afford a cause of action for damages.

2. **Appeal**: VARIANCE. Sections 138, 139 and 144 of the code, relative to variances and amendments, are applicable to the trial *de novo* in this court of suits in equity on appeal.

APPEAL from the district court for Thayer county: GEORGE W. STUBBS, JUDGE. *Reversed on condition.*

M. S. Gray, Charles H. Sloan and *F. W. Sloan,* for appellant.

F. I. Foss, C. L. Richards and *W. F. Button, contra.*

AMES, C.

On and prior to the 9th day of October, 1902, and continuously since that date, the plaintiff and appellant was and has been the owner of a tract of 160 acres of land in Thayer county in this state, and in the actual occupation and enjoyment of the same, together with his family, as a homestead. During all said time he has been and now is the owner of two additional tracts, of 80 acres each, adjacent to the homestead, and occupied and cultivated in common therewith. On the day named he entered into a written agreement with the defendant, appellee, by which he undertook to convey these lands, subject to a mortgage incumbrance of $5,000 upon the whole of them, in consideration of a conveyance to him by the defendant of certain lands and personal property situated in the state of Colorado and the payment of a sum in cash. His

wife did not join in the agreement, and the defendant at and before entering into it knew of the homestead character of the 160-acre tract. Twelve days after the date of the agreement, the plaintiff having become dissatisfied with his bargain, sent to the defendant through the United States mail the following letter: "Yuma, Colorado, October 21, 1902. D. A. Beale, Hastings, Neb. Dear Sir: This is to notify you that the trade between us is off, as I do not expect to trade for something a man hasn't got, besides, you misrepresented a good many things, that I can prove by Mr. Brown, so you can go ahead with your ranch, as I do not want it. Yours truly, C. J. Lichty." Upon receipt of this letter the defendant caused the agreement to be spread upon the records of the clerk's office of Thayer county; and the plaintiff began this action, alleging that it had been obtained by deceit and fraud, and without adequate consideration, and praying a decree of cancelation and annulment, and removing the record of it as a cloud upon his title. The defendant filed an answer and cross-petition, denying the alleged fraud and circumvention, and the right of the plaintiff to rescind, but electing to treat the letter above quoted as being a breach of the contract by the plaintiff, wrongfully putting an end thereto, and praying compensation in damages in an amount equal to the difference in value between the Colorado property, plus the money payment, and the lands that the plaintiff had agreed to convey to him. Issues were joined by a reply or answer to the cross-petition, and there was a trial, at the conclusion of which the court found that by the agreement above mentioned the plaintiff had agreed to sell and convey to the defendant the Thayer county land for the sum of $16,000, and to receive in payment of the purchase price the Colorado property and $2,100 in money, and that the plaintiff had been guilty of a breach of the contract, excusing the defendant from performance and entitling him to a recovery of damages which the court assessed at the sum of $4,500, and rendered judgment therefor. The plaintiff appeals.

There was a sharp contest at the trial, as there is in the briefs and arguments of counsel, as to the value of all the Colorado land, and as to the title to three quarter sections of it, and as to whether the agreement to convey the latter, which were entered and settled upon as government homesteads by third persons, is not contrary to public policy and void. But, for reasons below given, we think it not necessary to enter upon a discussion of any of these questions.

The price fixed in the contract upon the Thayer county land is not disputed by any one to be adequate to its value, and it has repeatedly been held by this court, so that the doctrine must now be regarded as settled, that a contract for the sale of a homestead, entered into by one spouse alone, is utterly void, not only to the extent that it cannot be specifically enforced, but that a breach of it does not furnish a foundation for an action for damages. *Clarke v. Koenig*, 36 Neb. 572; *Meek v. Lange*, 65 Neb. 783; *Teske v. Dittberner*, 70 Neb. 544. In the last of these cases there is a very elaborate and exhaustive review of the authorities and of the principles involved, by the former Chief Justice HOLCOMB, and the doctrine is emphatically reaffirmed that such a contract is void as to the whole homestead tract, as well as to the reversionary interest, and this in both instances, without regard to value, as was first also announced in the first of the above cited cases. That this conclusion is sound and essential to the protection and preservation of the homestead right and is in accordance with the manifest spirit, if not the strict letter, of the statute, we have not the least doubt, so that we are constrained to hold that the contract in suit, in so far as it treats of the homestead tract of the plaintiff, is wholly void.

The value of the plaintiff's homestead, separate from that of the other half of his farm, is not disclosed either by the agreement of the parties or by the evidence, but as the dwelling house and other buildings are situated thereon, it may, we think, be fairly assumed to be worth at least half the stipulated purchase price, so that, if the plaintiff had performed his contract to the full extent of

its validity, the value of the lands that he would have conveyed to the defendant would not have exceeded $8,000. If, as the trial court in effect found, the Colorado property and the stipulated cash payment are together worth $4,500 less than the contract price of the Thayer county lands, then the value of both is $11,500, or $3,500 more than the defendant could have obtained by specific performance, and he is entitled to compensation in money only for such damages as he has lost by reason of the failure of the plaintiff specifically to perform his contract to the extent that it was obligatory upon him, that is, with reference to the two 80-acre tracts not embraced in the homestead. This, which is the real issue presented by the pleadings, has, however, not been tried and the computation just made rests upon a presumption not supported by the record, and we are of opinion that, under the circumstances, the defendant should be permitted, if he so desires, to have the cause remanded for a new trial; or, if he does not, that the judgment of the district court should be reversed, and judgment in this court should be rendered for the plaintiff, but that, inasmuch as the latter is guilty of a technical breach of the contract, he should be adjudged to pay the costs.

It has been urged that the plaintiff cannot be granted the relief he prays because the petition, although alleging the homestead character of a part of the Thayer county land at the time it was filed, does not aver that it possessed that character at the time the contract was made. But the pleading was not assailed by motion or demurrer, and the facts as above narrated were proved without dispute or objection. The defendant does not appear to have been misled to his prejudice or, indeed, misled at all, so that sections 138, 139 and 144 of the code are precisely applicable. The trial here is *de novo,* and we think this court may properly disregard the variance, but, if the cause should be remanded, the plaintiff should have leave to amend.

LEITON and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed, and that upon motion by the defendant, filed within twenty days from this date, this cause be remanded to the district court for further proceedings conformable to said opinion, the plaintiff having leave to amend his petition, but that, in the absence of such motion within the time aforesaid, judgment for the plaintiff in conformity with the prayer of the petition be rendered in this court and the plaintiff be adjudged to pay the costs of the action.

JUDGMENT ACCORDINGLY.

ZION EVANGELICAL LUTHERAN CHURCH V. ST. JOHN'S EVANGELICAL LUTHERAN CHURCH.

FILED FEBRUARY 22, 1906. No. 14,152.

An action in ejectment, denominated by the code "an action for the recovery of real property," can be maintained only by one who has both a legal estate in and a right to the immediate possession of the demanded lands.

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

L. E. Gruver and *Stewart & Munger,* for plaintiff in error.

Simpson & Good, contra.

AMES, C.

The facts are represented in the brief of counsel for plaintiff in error to be indisputably to the following effect: In 1882, the Omaha and Republican Valley Railway Company conveyed several contiguous lots, constituting a com-

pact body of land in the site of the present village of Yutan, in Saunders county, in this state, to certain natural persons as trustees for the use of the Evangelical Lutheran Church at that place in connection with the general synods of that church for the state and for the United States. Shortly afterwards there was organized a local society of that church under the name of "Zion Evangelical Lutheran Church" which, with the consent of the trustees, went into possession of the land and in due time erected thereon a house of worship and a parsonage or dwelling house for the use of a minister. During the lapse of 20 years the membership of the society gradually increased from less than a dozen to more than 100 persons, to part of whom the English and to part of whom the German speech was the mother tongue, and a controversy sprung up as to which language should be used in the pulpit and in the various devotional and ritualistic exercises of the church. After some time the matter was amicably adjusted by a division of the society, and of the use of the property of which it was in the possession, in this manner: The English speaking members retained the name of the society, and also the exclusive use and enjoyment of the church building and a defined quantity of land surrounding it; and the German speaking members effected a new organization in the name of "St. John's Evangelical Lutheran Church," and retained the exclusive use of the residue of the tract of land and of the parsonage situated thereon. The new society acquired additional land, and erected thereon a church building for their own occupancy and enjoyment. There are and have been no doctrinal differences between the two bodies, and both have at all times been and remained united in faith and fellowship with the general synods of the Evangelical Lutheran Church, of the state and of the United States, having ecclesiastical jurisdiction of the denomination of professed christians to which both belong. This situation of affairs was established in May, 1901, and continued, so far as appears, undisturbed and with satisfaction to all until June, 1904, when this action was begun

in ejectment by the elder society against the younger to recover the possession of the parsonage and adjacent lands and $500 in damages for the use and occupancy of them by the defendant. The petition is in the ordinary form in ejectment, and the answer is a general denial. There was a trial, and a verdict and judgment for the defendant, for the reversal of which this proceeding is prosecuted.

Obviously there is no error. Not only are the lands being used in strict conformity with the trusts expressed in the deeds of donation, and presumably with the expressed or implied consent of the trustees, but the latter, who are alone possessed of the legal title and right of possession, are not parties to the action. It is elementary that an action in ejectment, denominated by the code "an action for the recovery of real property," can be maintained only by one who has both a legal estate in and a right to the immediate possession of the demanded lands. Code, sec. 626; *Morton v. Green*, 2 Neb. 441; *Malloy v. Malloy*, 35 Neb. 224; *George v. McCullough*, 48 Neb. 680; *Bonacum v. Murphy*, 71 Neb. 487.

The plaintiff has neither, and we therefore recommend that the judgment of the district court be affirmed.

OLDHAM and EPPERSON, 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.

W. R. MELLOR V. WILLIAM MCCONNELL.

FILED FEBRUARY 22, 1906. No. 14,161.

Pleading: REPLY. A plaintiff may plead in his reply new matter not inconsistent with his petition and contradictory to or supplementary of facts pleaded as a defense in the answer.

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

W. T. Thompson and *J. W. Long,* for plaintiff in error.

John C. Martin and *W. F. Critchfield, contra.*

AMES, C.

On the 25th day of October, 1902, McConnell executed and delivered to Mellor an ordinary bank check for the sum of $700 payable to the latter on demand. At the same time Mellor signed and delivered to McConnell a receipt in the following words: "Loup City, Oct. 23d, 1902. Received of William McConnell check for seven hundred dollars as earnest to pay the total sum of seventy-six hundred dollars ($7,600) by April 1st, 1903, on the purchase of the southwest quarter of section 33, the S. ½ S. E. ¼ and S. E. ¼ S. W. ¼ sec. 32, all in town 16, range 15, and the E. ½ section 5, town 15, range 15, all in Sherman county, Nebraska, subject to approval by owners of said lands." On the 13th day of November following its date, the check was presented for payment to the bank upon which it was drawn, and payment refused for want of funds, and on the following 5th of December payment on it was demanded of the drawer and also refused. In January, 1903, this action was begun by Mellor against McConnell by a petition, as afterwards amended, setting forth the foregoing facts and further alleging that the plaintiff had obtained the approval of the owners of all the lands mentioned in the receipt. The answer pleaded as a defense the following facts: That at the time the papers were exchanged the defendant had applied for the purchase of land to the plaintiff, who was a real estate agent at Loup City, and who represented himself as agent for the sale of the lands mentioned in the receipt, and that it was part of the agreement and transaction in which the exchange was made that the check should be used only in case the defendant should purchase through the plaintiff, as agent, the lands mentioned in the receipt, and the plaintiff should procure satisfactory written contracts of sale from such

owners within one week after October 23, 1902, in which event the money represented by the check should be applied in part payment of the purchase price, but that otherwise the check should be returned unused to the defendant. It was further pleaded that the plaintiff had failed to procure such contracts within the time specified, and that by reason of such failure the consideration for the check had wholly failed.

To this answer the plaintiff, in the first instance, filed a reply consisting of a general denial of new matter, but he subsequently asked leave to withdraw the same and file an amended reply in which he sought to plead specifically that it was a part of the agreement that the check should be paid immediately upon the securing, by the plaintiff, of the approval of the owners of the lands to the sale thereof, and that in reliance upon said agreement the plaintiff had, upon procuring contracts from such owners, advanced to them $450 of his own money. The motion for leave to amend was denied. We think this ruling was erroneous. The new matter offered to be pleaded is not inconsistent with the petition, and it tends to supplement as well as to contradict the account of the oral agreements and understandings pleaded in the answer.

There was a trial at which the plaintiff's version of the transaction, except so much thereof as was recited in the proposed amended reply, was testified to, and in which it was also testified that the plaintiff procured contracts executed by the landowners and tendered them to the defendant for execution by him before an attempt was made to negotiate or collect the check, and that the defendant repudiated his agreement and refused to examine and approve or disapprove the contracts, and that the plaintiff was himself the owner of one quarter section of the land, which he was and at all times had been ready and willing to convey, or contract to convey, pursuant to the agreement. At the conclusion of the plaintiff's testimony the court instructed a verdict for the defendant, and the plaintiff prosecutes error.

We think there is no merit in the contention of the defendant in error that the agreement between himself and the plaintiff was void under the statute of frauds, and that it is a matter of no significance that the plaintiff was the owner of a quarter section of the land. The defendant, as it appears, was desirous of purchasing a quantity of 640 acres of land lying in a body, and undertook, by means of the check, to entrust the plaintiff with a fund with the use of which the latter was authorized to procure valid contracts for the conveyance of the lands to the defendant for a specified aggregate price, toward the payment of which the amount of the check was to be ultimately applied. That is a contract, and, if the plaintiff has in good faith performed his part of it, he is entitled, at the least, to be reimbursed to the extent of the amount of the check for the moneys he has expended in the undertaking. Whether the defendant could have been compelled to execute the contracts, or accept conveyances of the land and pay the purchase price, or obligate himself so to do, are questions, we think, quite foreign to this record and which we do not undertake to decide.

It is recommended that the judgment of the district court court be reversed and a new trial granted, with leave to the parties to amend their pleadings.

OLDHAM and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted, with leave to the parties to amend their pleadings.

REVERSED.

AUGUST WAGNER V. THEODORE WOLF ET AL.

FILED FEBRUARY 22, 1906. No. 14,115.

Attachment: DISSOLUTION. The subsequent purchaser of lands on which an order of attachment has been levied cannot question the existence of the grounds for the issuance of the writ; to the attachment debtor alone belongs that right. *Meyer, Bannerman & Co. v. Keefer*, 58 Neb. 220, followed and approved.

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

A. M. Post and *August Wagner,* for plaintiff in error.

R. W. Hobart, contra.

OLDHAM, C.

This is a contest between an attaching creditor and a subsequent purchaser of the real estate on which the attachment had been levied. The facts underlying the controversy are that on the 7th day of November, 1903, the attaching creditor, Theodore Wolf, began an action against Martin Luchsinger in the district court for Platte county, Nebraska, by filing his petition and asking for a judgment against the defendant on certain notes and accounts. In aid of said cause of action the plaintiff below caused an order of attachment to be issued against defendant Luchsinger on the ground "that defendant has absconded with intent to defraud his creditors, has left the county of his residence to avoid the service of summons upon him, and so conceals himself that a summons cannot be served upon him, and that defendant fraudulently contracted the debt and incurred the obligation for which suit is brought." On the 12th day of November the order of attachment was levied on the interest of the defendant, subject to certain liens, in the undivided one-fourth part of 480 acres of land in Platte county. The summons was returned "not found." Thereafter, on the 23d and 24th

days of November following, the intervener, August Wagner, as attorney for other creditors, began two other suits against the defendant, and procured orders of attachment on affidavits charging practically the same causes as those contained in the affidavit of plaintiff Wolf. These latter affidavits were verified by the intervener, and each of the subsequent attachments were levied on the defendant's interest in the 480 acres of land above mentioned.

On the 7th day of January, 1904, the intervener, having ascertained that defendant Luchsinger was working at the carpenter's trade in Wayne county, Nebraska, arranged for a meeting with him at Norfolk, Nebraska, and there entered into an agreement with the defendant for the purchase of his interest in the Platte county land. The evidence shows that the intervener paid the defendant $200 in money and agreed to assume and pay certain judgments and liens against the land, as well as some other claims that had not been reduced to judgment. In conformity with this agreement Luchsinger executed and delivered a warranty deed to the intervener for his undivided one-fourth interest in the land. This deed contained the following covenant: "That I am lawfully seized of said interest, that they are free from incumbrance, except judgments and attachments." It is claimed by the intervener that at this interview at Norfolk defendant agreed that he would not enter any appearance in the attachment suit of the plaintiff Wolf, and that he authorized the intervener to appear as his attorney in said cause, and agreed to aid the intervener in defeating Wolf's claim by filing a counterclaim, which would at least reduce the claim of plaintiff to a sum not to exceed $80. Shortly after the execution of the deed plaintiff Wolf discovered the whereabouts of defendant Luchsinger and went, with his attorney, to have an interview with him. The result of this meeting was that defendant signed and verified an answer in which he admitted plaintiff's cause of action and directed plaintiff to file the same for him. After this answer was filed the intervener and his cocounsel, Judge Post,

procured an affidavit from defendant, in which he claimed that he did not understand what he was doing when he filed the answer, and on this showing the court permitted the counsel to withdraw defendant's answer. Thereupon they filed for defendant a motion to dissolve the attachment on the ground, among numerous others, that the statements contained in the affidavit were severally untrue. After the filing of this motion the cause was continued for the purpose of filing counter-affidavits, and plaintiff procured an affidavit from the defendant admitting the causes of the attachment, and denying that he had ever authorized the intervener and Judge Post to appear for him as counsel in the case.

These attorneys thereupon asked leave of the court to withdraw their further appearance for the defendant in the case. Then August Wagner filed an intervening petition, alleging that he was the owner of the premises on which the attachment was levied, and on this intervening petition moved to dissolve the attachment, for the reason that the statements contained in the affidavit of attachment were severally untrue, and for other reasons not necessary to enumerate. The court below permitted the intervention, and intervener's motion to dissolve the attachment was determined, by agreement, on affidavits and counter-affidavits, as well as oral testimony taken before the court. On the hearing of the motion, the attachment was sustained and the defendant's interest in the premises was ordered to be sold for the satisfaction of the plaintiff's lien. To reverse this judgment the intervener brings error to this court.

It is contended in the brief of the intervener that the evidence is not sufficient to sustain the finding of the trial court, viz., that defendant Luchsinger had absconded from his usual place of abode with intent to defeat his creditors at the time the attachment was levied. With reference to this contention, we would say, after an examination of the testimony in the record, that we think the evidence is sufficient to sustain this finding. But,

even if it were not, the intervener would not be in position to avail himself of this defect in the testimony. In *Meyer, Bannerman & Co. v. Keefer,* 58 Neb. 220, certain mortgagees of chattels levied upon in an attachment proceeding were permitted by the court below to intervene and deny the allegations of the affidavit for attachment. In disposing of the question, NORVAL, J., said:

"It is argued that the county court erred in allowing the bank and Nancy J. Keefer to intervene. In our view it is unnecessary to consider this question or venture an opinion thereon. It is obvious that they had no right to move for a dissolution of the attachment, and the sustaining of their motion was clearly erroneous. *Rudolf v. McDonald,* 6 Neb. 163; *Deere v. Eagle Mfg. Co.,* 49 Neb. 385; *Ward v. Howard,* 12 Ohio St. 158; *First Nat. Bank of Madison v. Greenwood,* 79 Wis. 269; 1 Shinn, Attachment and Garnishment, sec. 350. The debtor alone had the right to assail the attachment on the ground that the affidavit on which the writ issued was untrue."

The entire proceeding is valid on its face, and we think that the intervener's personal, as well as constructive, notice of the attachment proceeding and the recitals in his deed should forever close his mouth from complaining of any technical irregularities in the record. We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

ELLA M. ROSE V. DEMPSTER MILL MANUFACTURING COMPANY.

FILED FEBRUARY 22, 1906. No. 14,136.

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

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

G. M. Johnston, for plaintiff in error.

Rinaker & Bibb, Hazlett & Jack and *F. M. Prout, contra.*

OLDHAM, C.

This suit had its origin in an action by the plaintiff below, who is also plaintiff in error, to foreclose a real estate mortgage on certain lands situated in Gage county, Nebraska. The mortgage was executed by defendant Hoyt and wife, and after the execution of the mortgage the property was conveyed subject to the mortgage to the defendant Dempster Mill Manufacturing Company. When the suit to foreclose the mortgage was filed, the petition alleged, in substance, that the defendant Dempster company had assumed and agreed to pay the mortgage as part of the purchase price of the premises. There was personal service on the Dempster company, and Honorable F. N. Prout was employed by the company to defend the action. Promptly after his employment Mr. Prout filed a motion to require plaintiff to give security for the costs, the plaintiff being a nonresident of the county. This motion was filed in vacation, and remained on the files for some time, when it was confessed by the plaintiff without the knowledge of Mr. Prout, and proper security was given. When the court convened, after the filing of the motion, Mr. Prout was in attendance as a member of the state

senate of Nebraska, at Lincoln. It appears from the testimony that he spoke to the Honorable C. B. Letton, the judge of the district court, who was about to hold court in Gage county, and requested the judge not to take any action in any of the cases in which he (Prout) was engaged without giving him notice. In response to this request, Judge Letton said that he would see that no undue advantage was taken of Mr. Prout's absence, and that no orders would be made in cases in which he was interested without giving him an opportunity to be present and to be heard. Relying on this assurance Mr. Prout did not appear at the court in Gage county, and the clerk of the court, by inadvertence, had not entered his name on the docket as attorney for the Dempster company in this case. When the case was reached the defendant was given leave to file an answer, but no notice of such fact was communicated to Mr. Prout because the court was unaware that this was one of his cases. On default of answer a decree was rendered in the foreclosure proceeding, which found, among other things, that the Dempster mill company had assumed and agreed to pay the mortgage as part of the purchase price of the premises. On the coming in of the report of the sale there was a deficiency of nearly $1,700, which was entered as a personal judgment against the defendant mill company.

At a subsequent term of the court the defendant mill company filed its petition under section 602 *et seq.* of the code to set aside the default formerly entered against it and to permit it to defend against its liability for a personal judgment. An answer was tendered with the petition, denying that the defendant had ever assumed or agreed to pay the mortgage in controversy. A hearing on the application to set aside the default was had before the same learned trial judge who had entered the original default, and who was personally familiar with the diligence or laches with which defendant's attorney had attempted to defend the action. On such hearing the application to set aside the default was granted and defendant was permitted

to answer. This order of the district court was afterwards brought to this court for review, but the proceeding was dismissed because the order setting aside the default was not a final order. Thereafter issue was joined on the answer of the defendant denying its liability for a personal judgment in the action. On the hearing of this issue the testimony clearly established the fact that the defendant had neither by the terms of the deed nor in any other manner ever assumed or agreed to pay the mortgage in controversy. On this showing the court rendered its judgment in favor of the defendant, and to reverse this judgment plaintiff brings error to this court.

We have examined the testimony contained in the bill of exceptions, and are satisfied that the evidence fully warrants the conclusion reached by the trial court, and that the judgment rendered is the only one that could be supported by either the law or the conscience of the case. We therefore recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

LETTON, J., not sitting.

CUDAHY PACKING COMPANY V. ROCH WESOLOWSKI.

FILED FEBRUARY 22, 1906. No. 14,150.

1. **Trial:** HARMLESS ERROR. Action of the trial court in the admission of evidence examined, and *held* not prejudicial.
2. **Master and Servant.** The master does not guarantee the safety of his servants. He is not bound to furnish them an absolutely safe place to work in, but is bound simply to use reasonable care and prudence in providing such a place.

3. **Contributory Negligence.** When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous and from which injury results, is not contributory negligence such as will prevent him from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances, make. *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332, followed and approved.

4. **Instructions** examined, and *held* not prejudicial.

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

Greene, Breckinridge & Kinsler, for plaintiff in error.

James H. Van Dusen, contra.

OLDHAM, C.

This was an action for personal injuries sustained by the plaintiff in the court below while in the employ of the defendant packing company. The facts underlying the controversy are that the plaintiff was an employee of the company in the meat canning department of its packing house. His duties were to wheel on a truck cans of meat from the canning room to the cooking room and place them in retorts where they might be cooked. There were two rows of these retorts running north and south in the cooking room, with one kettle and five retorts in each row. The retorts were about five feet in height and three feet in diameter, and stood two feet apart in the rows, the rows being two and one-half feet apart. There were steam pipes leading into the room, and between the two rows of retorts was a pipe leading into each one of the retorts, which supplied the steam for cooking the meat. The retorts, when filled with cans of meat, were covered with metallic tops, fastened to the floor with screws. In the cooking room, west of the rows of retorts and running parallel with them, was a passage way about ten feet wide along which the employees could wheel the trucks holding the cans of meat on entering or leaving the room. At the

time of the injury plaintiff had entered the cooking room with a truck-load of meat cans and had unloaded them into the third retort from the south end in the row on the west side, marked "Retort No. 6" in the diagram admitted in evidence. Two feet south of this retort was retort No. 4, and two and one-half feet east of No. 4 stood retort No. 3, as marked on the diagram. When plaintiff had filled retort No. 6 with cans of meat, he was standing on the southeast side of the retort, fastening the top upon it with a screw, when suddenly the bonnet or valve blew out of the steam pipe between retorts No. 3 and No. 4, and, according to plaintiff's testimony, about three feet from plaintiff, and behind him. When the bonnet was blown out of the pipe, the steam escaped with considerable noise and filled the room with vapor, and plaintiff, acting on the impulse of the moment and fearing injury from the escaping steam, ran forward and fell over the handle of the truck, which had been left near the retort, and sustained serious injuries from the fall, for which he sought to recover damages from the defendant.

The petition, after carefully reciting each fact connected with the injury, alleged that the plaintiff was "injured through the carelessness and negligence of defendant in failing to furnish him a safe place to work, * * * in allowing to be used and remain in said pipe an old and worn out stopcock, and steam shut-off with defective threads thereon, so worn and destroyed as to make the same unable to withstand the pressure of steam within the pipe, and in placing a higher pressure and greater quantity of steam in said pipe than the same was made or intended to withstand or able to hold, all of which facts were well known to the defendant, * * * and all of such facts this plaintiff had no knowledge or information of prior to said injury." In support of this allegation of negligence plaintiff, over the objections of defendant, introduced testimony tending to show that a very short time before the accident the attention of the defendant's superintendent of the cooking and canning rooms was

called to the fact that the steam pipe in controversy was defective; that a plumber, called for that purpose, examined the pipe and called the attention of the superintendent to the fact that the threads on the screw of the bonnet would not resist the pressure of the steam within the pipe; that, with this knowledge, the superintendent, in substance, told the plumber to replace the defective bonnet in the pipe for the rest of the day, as he did not wish to lose the time necessary to get a new bonnet until the next morning, when it could be put in without delaying the work.

The answer to the petition was in effect a general denial, a plea of contributory negligence, and an allegation that, if steam was negligently permitted to escape from the pipe, such negligence was that of a fellow sevant, and not that of the defendant. On issues thus joined there was a trial to the court and jury, verdict for plaintiff, judgment on the verdict; and to reverse this judgment defendant brings error to this court.

There are four allegations of error called to our attention in defendant's brief, and these we will consider in the order assigned.

The first allegation is that "the plaintiff was permitted to prove that he was frightened by the noise of the escaping steam, whereas the claim in the petition is that it was so hot and in such volume as to put his life in jeopardy." This allegation of error in the face of the petition and the very gist of plaintiff's right, if he had any, to recover for his injury might with propriety be passed over as purely specious. Plaintiff's petition, as before stated, had set out with great care and precision each ultimate fact connected with the injury, and, as accounting for plaintiff's action in running forward and falling over the handle of the truck, it had alleged that the discharge of steam from the pipe behind him had put his life in jeopardy, and that the steam had filled the room with mist, so that he could not see the objects around him. It is basic that, having alleged the ultimate facts on which a recovery was predi-

cated, he was entitled to prove the logical and reasonable results arising from such facts; and it seems to us that, having alleged and introduced competent evidence to prove that a large volume of steam was suddenly and violently discharged from the pipe by the blowing out of the bonnet only three feet behind him, the fact that he was frightened by the noise of this explosion was a logical result of such occurrence.

The second allegation of error is as to "the incompetent and irrelevant testimony regarding the conversation between the steam-fitter and the superintendent." We have already set out the purport of this conversation in our statement of the proof offered by the plaintiff. With reference to this allegation it is said in defendant's brief: "The point is that upon plaintiff's theory of this case it makes no difference what the steam-fitter said to the superintendent of this department or what the superintendent said to the steam-fitter about the valve, and that conversation could only be introduced to establish a fact over which there was no dispute, viz., that the valve which blew out was defective." The argument against this contention is that it never was admitted by the defendant that the valve or bonnet was defective, although it is true no evidence was introduced by the defendant in denial of such fact. And again, the answer had pleaded that, if the pipe was defective, the negligence in permitting such defect was that of a fellow servant, and not of defendant. Consequently, the testimony offered was very material to plaintiff's right of recovery for the purpose of showing actual knowledge of the defective condition of the valve by the vice-principal of defendant, who was not a fellow servant of the plaintiff.

The third allegation called to our attention in the brief is that "the testimony discloses no duty from the defendant packing company, the violation of which caused his (plaintiff's) fright and injury." It is true, as said in *Harley v. Buffalo Car. Mfg. Co.*, 142 N. Y. 31, "the master does not guarantee the safety of his servants. He is not bound to furnish them an absolutely safe place to work in, but is

found simply to use reasonable care and prudence in providing such a place." If the steam had escaped because of a latent defect in the bonnet, or from any other purely accidental cause, which ordinary prudence on the part of the defendant's vice-principal could not have reasonably foreseen, there would be much weight in the contention that the proximate cause of the injury was not traced to a duty that the defendant, as a master, owed to the plaintiff, as its servant. But when, as in the case at bar, the fact of actual knowledge of defendant's superintendent of the defective condition of the bonnet is submitted to the jury for a special finding, at the request of defendant, and the jury answer, in substance, that the superintendent did know of the defective condition of the bonnet when he directed the plumber to put in the pipe, we can hardly say, as a matter of law, that the conduct of the master showed reasonable care and prudence in providing for the safety of his employees. If, then, the evidence offered was sufficient to sustain a finding of negligence on the part of the defendant in the use of a defective bonnet in the steam pipe near the plaintiff's place of employment, the question arises as to whether such negligent act is so linked in the chain of causality that resulted in the injury as to constitute the proximate cause thereof. It is plain that either the negligence of the defendant, in putting plaintiff in a place of apparent great peril and thereby causing him to suddenly elect to run away from the apparent danger, was the moving cause of the injury, or the injury was the direct result of plaintiff's own want of care in colliding with the handle of the truck. In *Lincoln Rapid Transit Co. v. Nichols,* 37 Neb. 332, it is said:

"When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is also dangerous and from which injury results, is not contributory negligence such as will prevent him from recovering for an injury, if the attempt was one such as a person acting with ordinary prudence might, under the circumstances, make."

We therefore conclude that, under the evidence in this case, the question of defendant's negligence being the proximate cause of the injury was a question of fact for the determination of the jury.

The last contention urged is that the court, by giving paragraph 4 of the instructions, on his own motion, made "the master an insurer of his servant's safety." This paragraph is as follows: "You are instructed that it is the duty of every master to conduct his business with reasonable care and prudence, so as not to negligently or carelessly subject his servants to any danger not ordinarily incident to or connected with his employment, and it is the duty of the master to furnish his servants with a reasonably safe working place, and if, through the negligence of the master, the place where the servant was required to work is rendered unsafe, and, because thereof, the servant is injured, then the master is liable in damages for such injury, unless the servant was guilty of negligence or want of ordinary care which contributed to such injury." We are wholly unable to understand how this instruction, read as a whole, as it must be, could be fairly interpreted as, in effect, telling the jury that the master is the insurer of his servant's safety. The instruction merely tells the jury that the master owes a duty of using reasonable care and prudence in providing a safe place for his servant, and that it is only when by the negligence of the master the place is rendered unsafe that the master is liable. An instruction that only requires reasonable care on the part of the master is in direct conflict with the idea that the master is an insurer of the safety of his servants.

Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

WALTER W. HACKNEY, TRUSTEE, APPELLEE, V. RAYMOND BROTHERS CLARKE COMPANY, APPELLANT.

FILED FEBRUARY 22, 1906. No. 14,429.

1. **Case Followed.** *Hargreaves Brothers v. Hackney*, 74 Neb. 700, followed and approved.
2. **Trial: HARMLESS ERROR.** Action of the trial court in the admission of evidence examined, and *held* not prejudicial.

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

Wilson & Brown, for appellant.

John S. Bishop and *R. S. Mockett, contra.*

OLDHAM, C.

This was an action by the trustee in bankruptcy of Julius M. Erlenborn to recover from the defendant in the court below the amount of an alleged preference received by it as a creditor of the bankrupt. There was a trial of the issues to a jury in the court below, a verdict for the plaintiff, judgment on the verdict, and to reverse this judgment defendant has appealed to this court.

This case, with the companion case of *Hackney v. Hargreaves Brothers*, is before the court for review a fifth time. A full statement of the issues involved in the controversy is contained in our former opinions. See *Hackney v. Raymond Bros. Clarke Co.*, 68 Neb. 624; *Hackney v. Hargreaves Bros.*, 3 Neb. (Unof.) 676, and the opinion on rehearing of the two cases by HOLCOMB, C. J., in 68 Neb. 633, and the recent decision in *Hargreaves Bros. v. Hackney*, 74 Neb. 700. In these opinions the law of the case has been fully determined, and the fact that the preference was illegal under the provisions of the national bankruptcy law is settled. The instructions complained of in the instant case are of the same nature and effect as those

given in the last hearing of *Hackney v. Hargreaves Bros.*, and held in our last opinion not to have been prejudicial. In fact, there is but one contention in this case that was not urged and determined adversely to the defendant's claim in the recent opinion, and that is as to the alleged errors of the trial court in permitting plaintiff's counsel to refresh the memory of Erlenborn, the bankrupt, by calling to his attention his testimony at one of the former hearings of the case. Erlenborn was plainly a hostile and unwilling witness, and we do not think the court abused his discretion in permitting plaintiff's counsel to lead him and refresh his memory, if possible, by calling his attention to his testimony at a former hearing of the case. It is clear to us that under the law of the case, as determined in our former opinions, no other judgment than the one rendered could be supported by the testimony.

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.

WILLIAM MEDLAND, APPELLEE, V. DAVID VAN ETTEN ET AL., APPELLANTS.

FILED FEBRUARY 22, 1906. No. 14,113.

1. **Tax Certificate: FORECLOSURE: RES JUDICATA.** Where, in an action foreclosing a tax sale certificate, an issue as to the metes and bounds of a certain lot is presented and determined by the court, such an issue is thereby concluded, and a sale of the lot described in the decree of foreclosure will not be disturbed, upon a motion to set the same aside for irregularity in the description.

2. **Decree: DORMANCY.** Section 482 of the code, which provides when a judgment shall become dormant and cease to operate as a lien

on the real estate of the judgment debtor, does not apply to a decree for the sale of specific real property. *Herbage v. Ferree*, 65 Neb. 451.

3. **Tax Liens:** PRIORITIES. Taxes levied and assessed for general revenue purposes constitute a lien superior to the lien of a tax sale certificate issued thereto.

4. **Appraisal:** REVIEW. There being no evidence of fraud, the appraised value of real estate under an order of sale will not be set aside.

5. **Judicial Sale:** OBJECTIONS. One holding the equity of redemption cannot be heard to complain that the purchaser at a judicial sale, who bids as trustee for plaintiff, is not such trustee.

6. ———: ———. The viewing of the property by the judge who decided the motion to set aside a sale thereof is not error.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

David Van Etten, for appellants.

H. P. Leavitt, contra.

EPPERSON, C.

This is an appeal from an order of the district court for Douglas county confirming a sale of real estate made under a decree for the foreclosure of a tax sale certificate. The decree of foreclosure was entered May 2, 1894, and the appellants prosecuted proceedings in error in this court, seeking to reverse the decree of foreclosure, which was, however, affirmed. See *Van Etten v. Medland,* 53 Neb. 569. The mandate then issued commanded the lower court to cause execution to issue, carrying into effect the said judgment in the manner provided by law. On November 6, 1902, an order of sale was issued to the sheriff of Douglas county, who proceeded to sell the property named in the decree, complying with all statutory provisions. The appraisers valued the property at $2,000, and from this deducted the amount of prior liens $701.82, appraising the interests of the appellants at $1,298.18. The property was sold on the 23d of Decem-

ber, 1902, by the sheriff to Florence Leavitt, trustee for the plaintiff, for $900. Prior to the sale appellants filed objections to the appraisement, and immediately after the sale filed a motion to set the same aside. On the first day of August, 1904, the district court overruled the motion to set aside the sale, and granted the appellee's motion to confirm. From this order the defendants appeal.

Several questions are presented which demand separate consideration. First. Appellants insist that the property sold is not the property covered by the lien foreclosed. The petition describes the property as follows: "Sublot thirteen (13) of lot nine (9), Capitol Addition, or more particularly described as follows: All that piece or parcel of land commencing at the point on the south line of Harney street, eighty-one (81) feet west of the west line of C. W. Keyes' land, running thence west forty (40) feet, thence south one hundred and twenty (120) feet, thence east forty (40) feet, thence north one hundred and twenty (120) feet to the place of beginning." In their answer appellants denied that said property was more particularly described as recited in the petition, and alleged that it was more particularly described as follows: "Commencing at a point in the south line of Harney street seventy-four (74) feet west of C. W. Keyes' land, and running thence west on the south line of Harney street fifty-one (51) feet to a stake, thence south one hundred and twenty-six (126) feet to a stake, thence east fifty-one (51) feet to a stake, and thence north one hundred and twenty-six (126) feet to the place of beginning; that said last described land is the only sublot thirteen (13) in lot nine (9) in Capitol Addition to the city of Omaha." The court found that the more particular description of said sublot thirteen (13), in block nine (9), was as alleged in the answer, reciting in decree of foreclosure the description thereof by metes and bounds, and ordered "that the property above described, to wit, sublot thirteen (13) of lot nine (9), in Capitol Addition to

the city of Omaha, be sold, and an order of sale shall issue," etc. It is apparent that the property described in the decree was sublot thirteen (13) of lot nine (9), in Capitol Addition, and that that was the property sold. If an error, the appellants' remedy existed at that time; they had an opportunity then to challenge the trial court's attention thereto in their motion for a new trial, and to present it to this court in their petition in error, in their proceeding then instituted to procure a reversal of the decree of foreclosure. The presenting of this question now, in opposing the confirmation, is in the nature of a collateral attack upon the decree, to which it is not subject. *Logan County v. McKinley-Lanning L. & T. Co.*, 70 Neb. 399. This question goes to the merits of the case, and is not now subject to review. *Thompson v. Purcell*, 63 Neb. 445; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb. 900.

Second. As a further reason for setting aside the sale, appellants claim that the decree had become dormant, and proceedings thereunder barred by limitation. Section 482 of the code prescribing when judgments shall become dormant, and the lien thereof cease to exist upon real estate, does not refer to decrees for the foreclosure of tax certificates. *Herbage v. Ferree*, 65 Neb. 451. Appellants, however, rely upon section 509 of the code, which also, we believe, refers to judgments *in personam* only. But, if otherwise, by express terms it defeats the appellants' contention. It provides, among other things, the following: "But in all cases where judgment has been or may be rendered in the supreme court, and any special mandate awarded to the district court to carry the same into execution, the lien of the judgment creditor shall continue for five years after the first day of the next term of the district court to which such mandate may be delivered." The mandate was filed in the clerk's office July 26, 1898, and the order of sale issued within five years thereafter. The decree has never become inoperative by lapse of time.

Third. It is claimed that, in arriving at the value of appellants' interest, the appraisers deducted from the real value subsequent and not prior liens. The amount deducted as prior incumbrance was the sum of the taxes levied for general revenue purposes for the years 1894 to 1902, inclusive, as shown by the certificates of the county and city treasurers. The lien foreclosed was a certificate for the sale of taxes levied for the year 1886. Taxes levied subsequent to the date of the certificate constituted a lien superior to the lien of the certificate, and the sum thereof was properly deducted from the real value.

Fourth. The appellants, for a further reason, maintain that the property was fraudulently appraised too low. All evidence presented as to the value of the property was by affidavits, and very unsatisfactory. The appraisement of the property November 12, 1902, fixed the amount of the minimum bid which the sheriff was authorized to receive. In support of this allegation appellants introduced in evidence affidavits used at a former hearing, which related to the value of the property in 1891. Counter-affidavits indicated the value in June, 1904. Such proof is not entitled to consideration, as it goes to show the value at times so distant from the date of the appraisal that we cannot reasonably presume that the property did not change in value. A few affidavits were, however, relevant. The appellant David Van Etten himself recites that the buildings upon the premises are of the value of $4,000; and another affiant informs the court as follows: "I unhesitatingly say that any appraisement of said property at $2,000, or any approximate sum, is not only inadequate, but a gross fraud." And C. D. Hutchinson says: "I have no hesitancy in saying that any appraisement of said property for the sum of $2,000, or several times that sum, is not only a fraud, but a gross outrage." No other evidence was given to impeach the appraisement, and the affidavits submitted are insufficient for that purpose. The appraisers were disinterested, and were acting under oath, and their valua-

tion should not be discarded except upon evidence of fraud.

Fifth. It is argued that the sale should be set aside because it is not shown that the purchaser is plaintiff's trustee as she claims to be. The sheriff's return designated the purchaser as trustee for the plaintiff. No other evidence on this point is presented. In an issue joined between the sheriff and the plaintiff, or between the plaintiff and purchaser, this would not be competent evidence, but appellants are not concerned in the relationship existing between the appellee and purchaser, and cannot be heard to complain.

Sixth. Appellants complain that the trial court received evidence in the absence of the appellants, and in support of this contention gave evidence, embodied in an affidavit, that the judge, prior to his decision, and while he had the matter under consideration, in answer to a question asked by the affiant, made the statement: "That he would not make said decision until he went up with a good real estate man to advise him as to the value of said property, and examine it." And further, that the judge was seen in the vicinity, apparently observing the premises, with a companion unknown to affiants. This is insufficient for the purpose of showing that the court considered or heard evidence other than is presented in the bill of exceptions. The viewing of the premises by the judge who heard and decided the motion is not error.

The proceedings in the district court were regular, and we recommend that the judgment 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.

ELLERY R. HUME V. CLARENCE E. MILLER ET AL.
JAMES M. WECKERLEY, APPELLEE, V. GLOBE LOAN & TRUST COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 22, 1906. No. 14,155.

Insolvent Banks: BOND OF OFFICERS. By the execution of a bond to the state as provided by section 34, chapter 8, Compiled Statutes, by the officers of an insolvent bank, conditioned upon the full settlement of all the liabilities of such bank, the officers and sureties assume the burdens of the bank's liquidation, and cannot use the assets in paying the expenses thereof to the prejudice of creditors.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

A. S. Churchill, for appellants.

E. Wakeley and *A. C. Wakeley, contra.*

EPPERSON, C.

The plaintiff obtained a decree for the foreclosure of a tax sale certificate in the district court for Douglas county, which resulted in a judicial sale of the land. The sale was confirmed on the 7th day of April, 1902, and there remained in the hands of the clerk of the court a surplus of $510.93, after paying the amount due plaintiff and the costs of foreclosure. When the suit was begun, the land was incumbered by a mortgage given by the defendants Miller and Jacks to the Globe Loan & Trust Company for an amount greater than the surplus. No part of this mortgage has ever been paid, and the surplus funds must be paid to whomsoever is entitled thereto under and by virtue of the aforesaid mortgage, according to their respective rights and equities. The original parties to the suit are not concerned, and the issues are here presented by interveners. For a full understanding of the claims of the respective parties, a brief review of the history of the Globe Savings Bank from June, 1896, is necessary.

In 1896 an application was made by the attorney general in the district court for Douglas county for the appointment of a receiver for the Globe Savings Bank, hereinafter referred to as the bank. On the 9th day of June, 1896, the Globe Savings Bank, as principal, and Cadet Taylor, David C. Mount, Globe Loan & Trust Company and Henry O. Devries, since deceased, as sureties, executed a bond to the state, and thereby obligated themselves to settle in full all the liabilities of the Globe Savings Bank within three years from June 26, 1896. Upon the execution of this bond the application for the appointment of a receiver was withdrawn, and the assets of the bank, then in the custody of a state bank examiner, were returned, and the settlement of the bank's business was entrusted to Cadet Taylor. Among its assets were the notes and mortgage given by Miller and Jacks, which had been assigned by the Globe Loan & Trust Company to the bank. Some of the debts of the bank had not been paid within the time provided in said bond. About the 1st of November, 1899, a suit was instituted against the bank and the sureties upon the aforesaid bond by Elizabeth J. Dennis. The appellant, the Honorable Arthur S. Churchill, was employed as an attorney at law by the bank, through the agency of Cadet Taylor, to defend the bank in this and other suits that it was then contemplated would be instituted against the same parties. Appellant demanded security for the payment of his fees, and Cadet Taylor, acting for the bank, pledged to appellant the Miller and Jacks notes and mortgage and about $400 in cash. By agreement the property pledged was delivered to W. B. Taylor, who was authorized to pay the money to appellant as his fees were earned, and with the further agreement that the notes and mortgage were to secure appellant for fees earned in excess of the amount of cash thus deposited. The notes and mortgage were afterwards pledged, with the consent of appellant, to one Dunham, to indemnify him against loss on an appeal bond which he signed as surety for the bank in a cause appealed from the county court. The notes and mortgage

were returned to appellant February 20, 1904. Appellant, as an attorney at law, appeared in many suits for the bank, and for Cadet Taylor, and other sureties upon said bond, in actions instituted upon the bond by the bank's creditors, and in other actions in form of creditors' bills. He now claims there is a balance of $500 due to him from the bank, the $400 deposited with W. B. Taylor being exhausted. In his petition for intervention herein filed, appellant claims the surplus funds as pledgee of the Miller and Jacks notes and mortgage. On the 30th day of March, 1901, the appellee, James M. Weckerly, obtained a judgment against the bank and against the sureties upon the bond given to the state for $1,405.19. An execution was issued upon this judgment and returned *nulla bona*. On February 2, 1904, appellee made application to the district court under the provisions of section 532 of the code, to have the surplus funds applied upon his judgment.

At all times herein referred to, the bank was insolvent. The bank's interests in the litigation in which the appellant was employed was managed by Cadet Taylor. He and the other sureties upon the bond were involved in the same litigation, their rights being co-extensive with those of the bank. Appellant was attorney for all of these parties. The bank being insolvent, the sureties upon its bond were the more concerned in the actions instituted by the bank's creditors. Under these circumstances it seems that the bank existed in name only. Cadet Taylor was primarily liable to the attorney employed, he was individually liable, and in the employment of the attorney he acted also for his cosureties, and the pledging of the bank's assets was in the nature of a pledge to secure his personal obligations. The sureties had no greater rights than stockholders to the assets of the bank. "The property and assets of a banking corporation organized under the laws of this state, after it has ceased to carry on a banking business, are a trust fund for the payment of its debts. The rights of the creditors to the corporate property, so far as it is necessary to meet their demands, are superior to those of the stock-

holders, or the assignee of an insolvent stockholder." *State v. Commercial State Bank*, 28 Neb. 677.

The whole difficulty in this case seems to be that, subsequently to the giving of the bond, the sureties themselves became insolvent; at least, executions against them accomplish nothing. It has been held by this court that "directors of an insolvent corporation cannot take advantage of their position to obtain a preference of debts owing by the corporation to themselves" (*Tillson v. Downing*, 45 Neb. 549); and that "a mortgage executed by an insolvent corporation to secure a debt due from it to one of its officers or directors is illegal and void." *Stough v. Ponca Mill Co.*, 54 Neb. 500. And in *Tillson v. Downing*, 45 Neb. 549, it was held that a mortgage given by an insolvent corporation to secure a debt for which its directors are personally bound is likewise void. The same reasoning would extend that rule to a case where, as in the case at bar, the property was pledged to pay the expenses of defeating actions which the directors were personally interested in defeating. Cadet Taylor was not only a surety upon the bond, but also a director and vice-president of the bank. We hold that by the execution of the bond to the state, Cadet Taylor and his cosureties assumed the burdens of the bank's liquidation, and cannot use the assets of the bank in paying the expenses thereof to the prejudice of the creditors.

Appellant claims that the bank had authorized Cadet Taylor to make this pledge, or ratified it, and that the bank could not have maintained an action to recover the surplus funds in controversy, and argues that for this reason the appellee cannot recover. He cites in support of this *German Nat. Bank v. First Nat. Bank*, 59 Neb. 7. It is there decided that a judgment creditor can maintain such action only where the debtor had himself an actionable demand at the time the suit was instituted. In that case the creditor claimed the right to apply upon his judgment money which had been paid to another creditor by the judgment debtor, or by an agent whose act was ratified. By such payment the debtor, of course, lost all dominion over the

funds, and his creditors could not proceed under section 532 of the code. As to the funds in controversy, the bank had not lost all its rights therein, and, had a receiver been appointed, he could have recovered even as against the appellant. The rule in *German Nat. Bank v. First Nat. Bank, supra,* is not applicable.

We recommend that the judgment of the lower court in favor of the appellee be affirmed.

AMES, C., concurs.

OLDHAM, C. I concur only in the conclusion.

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

AFFIRMED.

THOMAS J. SHEIBLEY V. GEORGE L. NELSON.

FILED FEBRUARY 22, 1906. No. 13,895.

1. **Libel.** The title or heading of a published article is a part thereof, and must be considered in determining whether the publication is libelous.
2. ———. Charging a person with being a blackmailer is libelous *per se*, our statute having made blackmailing a criminal offense.

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

George W. Argo, W. E. Gantt and *B. Ready,* for plaintiff in error.

J. C. Robinson, McCarthy & McCarthy, C. A. Irwin and *John V. Pearson, contra.*

DUFFIE, C.

We copy in full the petition in this case as follows: "The plaintiff above named complains of the defendant

and alleges: (1) That on the 31st day of October, 1902, at Hartington, Nebraska, the defendant falsely, wickedly and maliciously composed and published of and concerning the plaintiff, in a newspaper called the 'Hartington Herald,' the false and defamatory matter following, to wit: 'Blackmailers exposed. Fusionists circulate slanderous stories against McCarthy. Sworn affidavits of alleged injured party and ex-marshal McLean of Ponca vindicate McCarthy's character. Because of the persistent efforts of the fusionists of Cedar county to circulate slanderous stories against the character of J. J. McCarthy, republican candidate for congress, it has become necessary for that gentleman's friends to prove the falsehood and blackmailing character of the charges preferred against him by vindictive enemies. Such dastardly tactics by the leaders of the opposition serve to prove the desperate straits to which they have been brought. They had every opportunity to convince themselves of the falsity of the charges, and indeed we are told that no less a personage than John S. Robinson, fusion candidate for congress, himself visited the alleged injured parties, who live only a short distance from Hartington. All the alleged injured parties indignantly deny that they were mistreated or insulted in any way by Mr. McCarthy. Miss Emma Leise, whose affidavit we reproduce below, is the young girl who, while at Ponca, was induced by interested parties to sign an affidavit, the contents of which she was ignorant, which reflected upon the character of Mr. McCarthy. She desires to so far as possible right the wrong done Mr. McCarthy, by cheerfully consenting to the publication of her affidavit. Mr. Leise's affidavit is also self-explanatory. Mr. McLean's affidavit is also self-explanatory, and together the three sworn affidavits are a complete vindication of Mr. McCarthy and expose the malicious character of the charges made against his character.

"'State of Nebraska, Cedar county, ss.: Emma Leise, being first duly sworn, deposes and says that she is 17

years of age, and a resident of Cedar county, Nebraska; that a certain affidavit made by her on the 8th day of October, 1902, while in Ponca, Dixon county, Nebraska, the contents of which I did not comprehend, I hereby make this affidavit to the effect that I did not fully understand the contents of said affidavit and desire to retract the said affidavit made by me. Emma Leise.

"'Subscribed and sworn to before me this 24th day of October, 1902. J. F. Jenal, County Clerk. (Seal.)'

"'State of Nebraska, Cedar county, ss.: Frank W. Leise, being duly sworn, deposes and says that he is a resident of said county, Nebraska, and that he is the father of one Mary Leise; that on the afternoon of September 14, 1902, he was present at the funeral of one Henry Ferber, which took place in the city of Ponca, Dixon county, Nebraska; that on that occasion certain parties, whose names he desires to withhold, approached deponent for the purpose of advising him to make a complaint against one J. J. McCarthy, to effect that J. J. McCarthy had at some remote time in the past made a violent assault upon his said daughter, Mary Leise, with a view of outraging her. Deponent further states that the said parties, whose names he desires to withhold, said he should forthwith make complaint; that deponent refused to do so, stating that so far as his knowledge and information served him, based upon a conversation had with his said daughter Mary relative to the accusations intended to be incorporated into said proposed complaint, Mr. McCarthy was perfectly innocent of any wrong or misconduct toward his said daughter Mary, and that before he would be coerced into instigating or sanctioning such maliciously false and unjustifiable accusations he himself would suffer his entire estate to be used in the defense of the character of his own child and in the interest of justice and right. F. W. Leise.

"'Subscribed in my presence and sworn to before me this 24th day of October, 1902.

"'J. F. JENAL, County Clerk. (Seal.)'

"'State of Nebraska, Cedar county, ss.: Frank McLean, being first duly sworn, deposes and says that he is a resident of Cedar county, Nebraska; that from the 1st day of May, 1901, to the 1st day of January, 1902, he acted in the capacity of city marshal of the city of Ponca, Dixon county, Nebraska; that on the evening of November 4, 1901, and while acting in said capacity, at or about the hour of eleven o'clock P. M., he was approached by one T. J. Sheibley (meaning the plaintiff), who informed him that a great crime had but a few moments since been attempted, in that one J. J. McCarthy had attempted some undue familiarity with one Mrs. Minnie Franz to her great physical and mental injury and extreme mortification, and that he wished the would-be criminal apprehended at once. Whereupon affiant hastened to the scene for the purpose of investigating said alleged wrong, but instead of finding Mrs. Minnie Franz, the supposed wronged woman, sick or suffering any mental distress or physical injury, he found her in an apparently calm and composed attitude, being neither disturbed in body nor mind, and with no accusations to make against the said J. J. McCarthy, and that all the conditions and surroundings, apparently in their normal state, satisfied affiant that the apprehensions of said T. J. Sheibley (meaning the plaintiff) were either misconceived or equivocated, there being absolutly no evidence of the circumstances narrated by the said T. J. Sheibley (meaning the plaintiff), and quoted above, upon which to verify his apprehensions; and this affidavit is made on my own motion and for the sole purpose of vindicating the character of one whom I believe to be innocent. Frank McLean.

"'Subscribed in my presence and sworn to before me this 20th day of October, 1902. W. W. Cooper, Notary Public. (Seal.)'

"That defendant meant by said article that the plaintiff was a blackmailer and that he was guilty of circulating false, malicious and blackmailing stories against the character of the said J. J. McCarthy named in said article.

"(2) That by means of said false and defamatory pub-

lication the plaintiff was injured in his reputation to his damage in the sum of $6,000. Wherefore plaintiff asks judgment against the said defendant for said sum of $6,000 and costs of suit."

The answer consists of "(1) A general denial of all matters except such as are specifically admitted. (2) Admits the publication of the article, but denies that it was published falsely, wickedly, or maliciously, or with any intent to injure or defame the plaintiff; that the defendant was editor and publisher of the Hartington Herald, a newspaper printed and published at Hartington, Cedar county, in the third congressional district of the state of Nebraska; that at the time of publication a canvass for the election of a member of congress from said district was in progress, and one J. J. McCarthy was the regular nominee of the republican party for said office; that the article was published within said district only in good faith, and without malice or ill will toward the plaintiff, and with the *bona fide* purpose of giving to the electors and interested people of the district what the defendant in good faith believed at the time to be truthful information concerning the character and fitness of said candidate, for the purpose of enabling the electors to more intelligently cast their ballots, and in defense of the character of said candidate in response to attacks made upon his character and fitness for said office; that defendant was an elector of said district and was at the time of the publication of said article actively supporting the candidacy of said J. J. McCarthy. (3) For a further defense it is alleged that in so far as the article referred to or applied to the plaintiff the same was in all respects true, and was published in good faith, without malice and with good motives with justifiable ends as stated in the second paragraph of the answer." A reply in the nature of a general denial was filed to this answer.

Plaintiff on his own behalf testified that there was no other person in Ponca, Nebraska, by the name of T. J. Sheibley, and on cross-examination stated that he was

not a fusionist in politics, but that in the year 1902 he voted a split ticket. George L. Nelson, the defendant, was called by the plaintiff and identified a copy of the Hartington Herald published by him, and admitted the publication of the article set forth in plaintiff's petition; that his paper was a weekly, and did not circulate largely outside of the county where published; that he presumed from the affidavits embodied in the article that the publication referred to T. J. Sheibley, the plaintiff; that he wrote the article, except the affidavits which were furnished him by a third party. On cross-examination he stated that he had no acquaintance with plaintiff at the time of the publication; that he had no part in writing or procuring the affidavits set out in the publication complained of. Thereupon the plaintiff rested. The defendant then moved the court to direct a verdict for the defendant upon the following grounds: "(1) The petition does not state a cause of action. (2) There is not sufficient evidence offered to sustain a verdict for the plaintiff nor to authorize a submission of the issues joined in the pleadings, or any of them, to the jury. (3) The evidence does not show or tend to show that the defendant published of and concerning the plaintiff any article which is libelous *per se,* nor is there any evidence of any allegation in the plaintiff's petition of special damages." This motion was sustained, and a verdict for the defendant accordingly directed. A motion for a new trial being overruled, the plaintiff has brought the case to this court on error.

The heading of the alleged defamatory publication is as follows: "Blackmailers exposed. Fusionists circulate slanderous stories against McCarthy. Sworn affidavits of alleged injured party and ex-marshal McLean of Ponca vindicate McCarthy's character." That these headlines designate the parties circulating slanderous stories against McCarthy as blackmailers is clear, and if the headlines are to be taken in connection with the article itself it is certain that the publication is libelous *per se* in alleging that the

parties referred to have violated our criminal code. Section 46*d* of the criminal code makes blackmailing a criminal offense, and it is not controverted that an article charging a criminal offense against a party is libelous *per se*. In 18 Am & Eng. Ency. Law (2d ed.), p. 985, it is said: "The title or heading of an article is a part thereof and must be considered in determining whether or not the publication is libelous; and it has been frequently held in actions based on publications in newspapers that the sting of the libel was contained in the headlines." See also the following: *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. Rep. 318; *Pratt v. Pioneer Press Co.*, 30 Minn. 41; *Petsch v. Dispatch Printing Co.*, 40 Minn. 291; *Landon v. Watkins*, 61 Minn. 137; *McGinnis v. Knapp*, 109 Mo. 131; *Benton v. State*, 59 N. J. Law, 551; *Atkinson v. Detroit Free Press*, 46 Mich. 341. The plaintiff alleges in this petition that this defamatory matter was published of and concerning him and there was evidence sufficient to make that a matter for the jury. The other questions arising in the case as to privilege, etc., have been sufficiently discussed in *Sheibley v. Huse*, p. 811, *post*, and need not be further noticed here.

Because of the error of the court in taking the case from the jury, we recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

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

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.

THOMAS J. SHEIBLEY V. WILLIAM N. HUSE.

FILED FEBRUARY 22, 1906. No. 13,896.

1. **Bill of Exceptions.** The certificate of the presiding judge attached to a bill of exceptions, to the effect that the bill contains all the evidence offered by either party on the trial of the cause, is a sufficient certification that the bill contains all the evidence received or offered.
2. **Libel.** A newspaper article, charging a person with originating and circulating false and malicious reports attacking the character of another, is libelous, and is actionable *per se*.
3. ———: COMPLAINT. Section 131 of the code has abrogated the common law rule requiring facts and circumstances to be stated in the complaint to connect the plaintiff with the defamatory publication. It is now sufficient to allege that the libelous matter was published of and concerning the plaintiff.
4. **Pleading:** AIDER BY ANSWER. A petition, defective in the matter of charging a publication of the alleged defamatory matter, is cured by an answer which admits such publication.
5. **Libel:** DEFENSE. That a libel was copied from another paper is not a defense to an action brought for its publication, but under proper circumstances such fact may be pleaded and shown in mitigation of damages.
6. ———: ———. The publisher of a newspaper may freely expose false and defamatory matter circulated concerning a candidate for a public office, but, in so doing, he may not libel another party, and can defend against such libel only by showing the truth of the publication.

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

George W. Argo and *W. E. Gantt*, for plaintiff in error.

W. M. Robertson, Mapes & Hazen, McCarthy & McCarthy, Allen & Reed, C. A. Irwin and *John V. Pearson, contra.*

DUFFIE, C.

Thomas J. Sheibley, the plaintiff in error, filed his petition in the district court for Madison county asking to

recover from the defendant damages on account of an alleged libel published in the Norfolk News. His petition is in the following language: "The plaintiff above named complains of the defendant, and alleges: (1) That on the first day of November, 1902, the defendant, at Norfolk, Nebraska, falsely, wickedly and maliciously composed and published of and concerning the plaintiff in the said Norfolk News, the false and defamatory matter following, to wit: 'A slanderous falsehood. Fusion desperation prompts vilification. Will prove a boomerang. Affidavits to prove that the allegations are false in every particular in possession of committee. Will increase votes for McCarthy. The publishing of that malicious story from the Homer Echo by the Times-Tribune of this city concerning Hon. J. J. McCarthy has but one interpretation, it means desperation on the part of the fusion candidate and his supporters. They see defeat, sure and certain, staring them in the face, and in their effort to stem the tide they resort to the most despicable tactics known to politics—that of assaulting the good name and the honor of the opposition candidate. McCarthy is not only going to be elected, but he is going to receive the biggest majority from his home county that he has ever known during his previous campaigns, and the counties adjoining Dixon, where the facts are best known, are going to join in swelling that majority to a handsome figure. The returns will prove it, and the opposition knows it. This will prove the best refutation of the malicious slander possible, but at this distance from Mr. McCarthy's home it may be pardonable to explain the true animus of the story. It is one of those stories that are sprung on the eve of election, when it is hoped that there will be no opportunity to counteract the statement and assertions made. Those who circulate it rely on its immediate effect and hope to turn votes that could not be otherwise affected.' The Ponca Journal, published at Mr. McCarthy's home town, has this to say concerning the slander: "Ever since it was known that J. J. McCarthy of this city had aspirations to represent this district in congress,

both before the nomination convention and since the nomination was made, a systematic attempt has been carried on by innuendoes, insinuations and direct accusations to blacken his character and make him appear a criminal of the most contemptible sort. That this has been done by his enemies for vindictive spite work is known to almost everybody in this locality. In other parts of the district it may not be so well known. The true facts, however, have spread almost as rapidly as the false statements, and already a strong reaction has set in which cannot help but result strongly to his advantage." The man who has directed this campaign of slander (meaning the plaintiff in this action) was compelled to cough up to Dixon county the neat sum of $411.76 of misappropriated funds, and Justice NORVAL of the supreme court, in giving his decision, dismissed the matter with the simple statement that judgment might easily have been obtained for a much larger sum. For the truth of this decision we refer to the 85th N. W. Reporter, page 399. Voters all over the country are becoming digusted with the vilifying campaign that has been carried on. The question naturally suggests itself, if McCarthy has been guilty of a crime, why have not the offended parties sought redress at law? Even though we have not had the absolute proofs of the falsity of the charges made, would it not behoove the intelligent thinking public to pause and consider the fact that J. J. McCarthy has lived in Dixon county for the past twenty years, from the time when a boy until he is now well along in years, that he has raised a family, and lived right here in our midst, that no one ever discovered that he was the immoral man that a few of the opposition seek to make out that he is until he aspires to a high and honorable office? Voters, think well of these things. The Newcastle Times, published closer to Mr. McCarthy's home than the Homer Echo, handles the story in this fashion: "The Homer Echo has not only disgraced itself and shown its editor to be a mean, contemptible vilifier and a liar, but it has, in its article of last week upon McCarthy, cast a cloud upon the editorial

profession as well. The Echo editor did what is seldom done by a true newspaper man, that is, at the close of a political campaign, a few days before election, go down into the slums of slander and produce filthy lies, which the editor himself knows to be false. Here is the proof taken from the article: 'The editor of this paper has heard these statements for a number of months, and a few weeks ago went to the nominee's home town to ascertain if the statements were true, and we are informed by a number of reliable persons that there is no question about the facts, and that the same can be proved.' How is that, dear reader, for proof; isn't that evidence for you? Been informed by a number of persons that the statements can be proved. The Times editor has looked over the affidavits of the parties who have been dragged into the lying stories about McCarthy, and those affidavits, copies of which can be seen at the Times office, completely vindicate him. This move on the part of the Echo must react for Mr. McCarthy, as no man is safe to run for office, if just before election he is to be maligned and slandered, and it is said that a lie will travel around the earth while truth is putting on its boots." The republican congressional committee has issued the following statement of the situation which bears the signature of Chairman F. D. Fales and Secretary Jack Koenigstein: "This republican congressional central committee has been informed that a base, slanderous attack is being made by our opponents on the character of Hon. J. J. McCarthy in these closing days of the campaign. The committee have carefully investigated the statements being circulated, and know them to be false in every detail; that they have been prepared for their supposed political effect, and are being used as an attempt to estrange votes from the republican candidate, and to promote the interest of the fusion nominee. This committee is in possession of counter-affidavits showing conclusively that all of the charges against our candidate are absolutely false. J. J. McCarthy has led a clean and honorable life in this district for twenty years and no breath of suspicion as to his

morality was ever hinted at until his political enemies, in their desperation, knowing his strength with the people, conceived the idea of procuring perjured statements with the hopes of thereby injuring his candidacy. Every fair-minded man will condemn this contemptible method of attack, and every lover of justice and fair play will register his protest against this outrage. The animus of this attack originated in a case in which J. J. McCarthy was employed to assist the county in an action brought to recover fees belonging to Dixon county, which T. J. Sheibley (meaning the plaintiff) as county clerk had failed to account for. This case is reported in Northwestern Reporter, Vol. 85, page 399, and since which time T. J. Sheibley (meaning the plaintiff) has been active in originating and circulating false and malicious reports attacking the character of the republican candidate for congress in this district.'"

"(2) That by means of said false and defamatory publication the plaintiff was injured in his reputation to his damage in the sum of $6,000. Wherefore plaintiff asks judgment against said defendant for said amount of $6,000, and for costs of suit."

The defendant answered: "(1) Denying each and every allegation in said petition contained except as hereinafter specifically admitted or otherwise answered. (2) Admits that he published the article substantially as set out and complained of in the plaintiff's petition, but denies that said article was published falsely, wickedly or maliciously; alleges that the said article as aforesaid published by the defendant and set forth and complained of in plaintiff's petition is true, and defendant believed the same to be true at the time of its publication, and published the same in good faith with good motives and for justifiable ends, to wit, for the purpose of advising his readers regarding the character of J. J. McCarthy, who was then a candidate for congress in the third district of this state, which included Madison county, in which said county and district Norfolk is located, and defendant was supporting said J.

J. McCarthy in the columns of the Norfolk News of which he was then editor and publisher at Norfolk, Nebraska, and that he published said article in response to attacks which the plaintiff and others had made upon the character of said J. J. McCarthy." A reply in the nature of a general denial was filed to this answer.

Upon the trial the plaintiff called William N. Huse, the defendant, as a witness, who testified that he lived at Norfolk, Nebraska; that he was publisher of a newspaper, the Norfolk Daily News, and was such publisher on the 1st of November, 1902, and prior to that time. He further testified that he published the article in question in his daily paper which was of general circulation in this state; that he had known Thomas J. Sheibley, the plaintiff, for about 25 years; that he was commonly known as "Tom Sheibley," and that he was at one time clerk of Dixon county. Upon objections made by the defendant, the court refused to allow him to state whether the party referred to in the article was Thomas J. Sheibley, the plaintiff in the action, or whether he was the party referred to in the opinion in the 85th Northwestern Reporter. Huse was the only witness sworn, and after his examination the plaintiff rested. Whereupon the defendant moved the court to direct a verdict in his favor upon the following grounds: "First, because there is not sufficient evidence to authorize the plaintiff to recover; second, because the petition does not state facts sufficient to constitute a cause of action; third, because it is not alleged in the petition that the article, which is a quoted article, was wilfully and maliciously republished by the defendant with a knowledge of its falseness, and with intent to injure and libel the plaintiff." This motion was sustained, and the jury directed accordingly. The plaintiff's motion for a new trial was overruled, and he has brought the case to this court on error.

A motion made by the defendant to quash the bill of exceptions was submitted with the case. The objection urged against the bill is that the presiding judge does not certify that it contains all the evidence offered and re-

ceived, or introduced by either party on the trial. The certificate is as follows: "The foregoing is all the evidence offered by either party on the trial of the above entitled cause, and, on application of the plaintiff, this bill of exceptions is allowed by me and ordered to be made a part of the record in this case." The particular objection urged on argument is that the certificate does not recite that the bill contains all of the evidence received upon the trial, or show that any evidence was received. It is clear that evidence, in order to be received, must be offered by one of the parties, and, when a trial judge certifies that all the evidence offered is contained in the bill to which his certificate is attached, we think it covers all evidence received, as well as that offered, and that it is sufficient.

It is urged with great earnestness, on the part of the defendant in error, that the plaintiff's petition is not sufficient, in that it contains no recital of facts showing that the alleged libelous article referred to the plaintiff, or that he was the party, or one of the parties, against whom the charges made in the article were directed. In the absence of a statute to the contrary, if the defamatory words are indefinite or ambiguous, and extrinsic facts and circumstances are necessary to show that the plaintiff was meant, the petition must set forth such extrinsic facts and circumstances in order to connect the plaintiff with the allaged defamatory matter. This is the common law rule. Section 131 of the code has abrogated that rule. It is as follows: "In an action for a libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him." In a late case before the supreme court of Kansas (*Eckert v. Van Pelt*, 69 Kan. 357, 66 L. R. A. 266), an identical statute was under consideration. The libelous article complained of in that action did not contain the name of the plaintiff, and a demurrer was interposed to the petition, which was overruled. In review-

ing the action of the trial court in this regard the supreme court used this language:

"It is argued that this ruling of the court was erroneous, for the reason that the newspaper article alleged to be libelous did not contain the name of plaintiff below, and because there was no allegation that the public understood the language used to refer to Van Pelt. The averments of the petition expressly charge that defendant published the words 'of and concerning him, the said plaintiff.' The omission of the name of a libeled person in a publication concerning him does not deprive the matter of its libelous character if it be alleged and shown to whom the words used were intended to apply. Whatever may have been the common law rule, it is not now necessary to allege, in order to state a cause of action, that the public understood the words printed to refer to the plaintiff. Section 4559, Gen. Stat. 1901, reads: 'In an action for libel or slander, it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove on the trial the facts showing that the defamatory matter was published or spoken of him.' Counsel for plaintiff in error cite the case of *DeWitt v. Wright*, 57 Cal. 576, which supports their claim for the necessity of an averment that the person or persons who read the article knew that the plaintiff was meant. This case, however, was expressly overruled in *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845, in which it was said that the rule of the former case is not supported by authority, or justified on principle."

As was said in *Kinyon v. Palmer*, 18 Ia. 377: "The statute dispenses with the averment of extrinsic facts (and hence with much of the useless verbiage of a common law declaration in slander or libel), showing that plaintiff was meant by the defamatory matter, it being sufficient to aver, in general terms, that it was published of and concerning him."

We think that under the decisions in all states having a

statute like our own the petition in this respect is sufficient.

It is further argued in support of the action of the trial court that the petition does not fairly charge a publication by the defendant. In his brief it is said: "It is not alleged that the Norfolk News is a newspaper, magazine or other publication having a circulation, or, in other words, that there was a publication of the libel. To simply compose or write an article, however libelous it may be, is not sufficient to constitute a cause of action against the author or to make it actionable. It must be published, that is, it must have been given out or circulated in some way. There is no allegation of a publication or of a circulation of the article, and we are certainly within the safe rule of pleading when we say that this is strictly essential to a recovery, and that the court cannot presume that the Norfolk News is a newspaper, magazine or other publication having a circulation."

In *Hemphill v. Holley,* 4 Minn. 233 (Gil. 166), it is held that, where the defendant, in an action for libel, admits the publication and attempts to justify in his answer, he is estopped from objecting to the complaint on the ground that the publication is not sufficiently alleged. And, while the question is not before us and we do not announce it as a rule to be followed, the authorities are numerous to the effect that, where the defamatory matter is in writing, no direct averment that it has been communicated to a third person is necessary.

It is further urged that the article is not libelous *per se,* and that, as no proof of malice in publishing the same was offered, the court properly directed a verdict for the defendant. It can hardly be claimed that procuring a libel to be published against another is not a criminal offense, and, when the article in direct terms charges the party or parties referred to in the article with procuring perjured statements against the character of J. J. McCarthy, it cannot certainly otherwise appear to the reader than that these parties were guilty of procuring the publication of a libel. Again, in Townshend, Slander and Libel, sec. 176, it is said:

"That language in writing is actionable *per se* which denies 'to a man the possession of some such worthy quality as every man is *a priori* to be taken to possess,' or, which 'tends to bring a party into public hatred or disgrace,' or 'to degrade him in society,' or expose him to 'hatred, contempt, or ridicule or obloquy,' or 'which reflects upon his character,' or 'imputes something disgraceful to him,' or 'throws contumely' on him, or 'contumely and odium,' or 'tends to vilify him,' or 'injure his character, or diminish his reputation,' or which is 'injurious to his character,' or to his 'social character,' or shows him to be 'immoral or ridiculous,' or 'induces an ill opinion of him,' or 'detracts from his character as a man of good morals,' or 'alters his situation in society for the worse,' or 'imputes to him a bad reputation,' or 'degradation of character' or 'ingratitude.'" If the charges made in this publication are true, then the parties referred to, who sought to vilify, to degrade, and to have it understood that Mr. McCarthy's moral character was bad, that they went to the extent of procuring perjured statements in the form of affidavits to support their charges, that they were circulating libelous statements affecting the character of Mr. McCarthy, by such action, would certainly tend to degrade their character in any decent community, aside from the criminal liability which attached to such a course. There can be no doubt that the publication was libelous *per se,* both at common law and under our statute defining libel.

Counsel further insist that the original matter contained in the article is not libelous, and, as to the quoted matter, the defendant did no more than to copy from publications made in other papers, and that this is not sufficient to sustain a charge of libel, and the trial court was therefore justified in directing a verdict. No authorities are cited in support of this position. An examination of the question has convinced us that the rule is well established that it is no defense to show that a defamatory publication was first made by another person or newspaper and was simply copied with proper credit. Under some circumstances

such fact may undoubtedly be considered in mitigation of damages, if pleaded for that purpose, but it is not a complete defense to the action. *McDonald v. Woodruff*, 2 Dill. (U. S.) 244; *Atkinson v. Detroit Free Press Co.*, 46 Mich. 341; *Hotchkiss v. Oliphant*, 2 Hill (N. Y.), 510; *Sans v. Joerris*, 14 Wis. 722; *World Publishing Co. v. Mullen*, 43 Neb. 126.

It is further insisted by the defendant that the matter complained of was privileged, and that being so, the law does not imply malice in its publication, the burden being on the defendant to show malice. The law relating to privileged communications is generally classed as follows: (1) When the author or publisher acts in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests; (2) anything said or written by a master giving the character of a servant who has been in his employ; (3) words used in the course of a judicial proceeding; (4) publications duly made in the ordinary mode of parliamentary proceedings; and a qualified privilege extends to reasonable comment made on the acts of a public official or of one who presents himself as a candidate for a public office. The extent to which the cases go in relation to a candidate for a public office is that, where a person, knowing or believing that a candidate for public office is guilty of conduct affecting his fitness for the position, communicates that knowledge or belief to the electors whose support the candidate is seeking, the publisher, acting in good faith in the discharge of his duty to the public, may make such reasonable comments and give such information as comes to him from a reliable source, and which he believes to be true, for the purpose of informing the voters of the fitness of the candidate. In the case under consideration the plaintiff was not a candidate for office, and there was no moral or legal duty resting upon the defendant to publish to the world defamatory matter affecting the character or reputation of one whose only relation to the public is that of a private citizen, and, as is said in *Morse v. Printing Co.*, 124 Ia. 707:

"If one assumes the responsibility of proclaiming such matter from the housetops, or through the public print, the law affords him no defense except upon proof of the truth of the publication."

It is also urged in argument that the defendant, being the publisher of a newspaper and a supporter of J. J. McCarthy, a candidate for congress in the district where the publication was made, owed a duty to the electors to publish a refutation of the slanderous charges made against the candidate for the benefit of his readers and the voters of that district. In the language of *Morse v. Printing Co., supra:*

"This proposition is without support in principle or precedent. The publisher has no right to publish in his paper matters or statements which he or any other citizen would not be justified in circulating by letter or by posting upon the blank walls of the city. Our constitution guarantees to every person liberty 'to speak, write, and publish his sentiments on all subjects,' but holds him 'responsible for the abuse of that right.' * * * 'Liberty of the press' has never been held to mean 'that the publisher of a newspaper shall be any less responsible than another person would be for publishing otherwise the same libelous matter.' The contrary rule has been affirmed by the courts of this country and England with great uniformity."

Any explanation or exposure of the falsity of the reports concerning J. J. McCarthy, the defendant could undoubtedly publish without being liable to anyone, but when, in justification of the character of a candidate, a publisher libels and defames the character of another, he becomes liable in damages for such breach of the law, unless he can establish the truth of his charge. It is clear to us that the case made by the plaintiff's petition and the evidence introduced was one that should have been submitted to the jury under proper instructions, and that the judgment should be reversed and the cause remanded for another trial.

We recommend a reversal of the judgment and remanding the cause to the district court for further proceedings.

ALBERT, C., not sitting.

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.

THOMAS J. SHEIBLEY V. FRANKLIN D. FALES.

FILED FEBRUARY 22, 1906. No. 13,897.

Libel: INSTRUCTION. Where the publication of a libel actionable *per se* is admitted and justification pleaded, it is error to instruct the jury that the burden is on the plaintiff to establish the allegations of his petition.

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

George W. Argo and *W. E. Gantt,* for plaintiff in error.

C. A. Irwin, McCarthy & McCarthy and *J. V. Pearson, contra.*

DUFFIE, C.

The plaintiff in error brought this action in the district court for Dixon county, claiming damage from the defendant in error on account of a publication made by the latter and which is alleged to be libelous. The defendant, in his answer, admitted the publication, and alleged that the same was true and published with good motives and for justifiable ends. A trial resulted in a verdict for the defendant, upon which the court entered judgment, and the plaintiff has brought the case to this court on error.

The first assignment of error to which our attention

is called is a ruling of the court refusing to suppress the deposition of John H. Brown, taken at Denver, Colorado, on March 8, 1904, on behalf of the defendant. The motion to suppress is based upon the fact that the notice given of taking such deposition recited that it would be taken "at the office of Skelton & Morrow, in the Quincy Building, in the city of Denver, county of Arapahoe and state of Colorado." It is urged that the place of taking the deposition is not specific, and that the street upon which the building is located and the number should have been stated in the notice. For many years it has been customary in most of our large cities to designate by some name the principal office buildings erected in the city. In Omaha we have the New York Life, the Bee Building, the Paxton Building, etc. In Lincoln, the Fraternity Building, Burr Block, etc.; and these buildings are as readily, if not more easily, found by the name under which they are known than by giving the street and number of their location. This custom has become so general that we will take judicial notice that an office building thus designated is as definitely pointed out as by giving the street and number. In the absence of a showing that the Quincy Building could not be found on reasonable inquiry, we will presume that it is a building of the character above mentioned, and that the notice was sufficient.

Prior to the opening of the trial the court quashed the regular panel of jurors on the ground that it was illegally drawn. Thereupon the court ordered the sheriff to summon 24 competent jurors from the body of the county. Among the jurors thus summoned were several who had been drawn upon the regular panel. A motion to quash the panel thus summoned, upon the ground that many of the panel were jurors drawn upon the regular panel, was overruled by the court, and, on impaneling the jury for the trial of the case, objection was made to several jurors upon the ground that they had been summoned as jurors within two years, this being based upon the fact that they had been summoned upon the regular panel for the term which

had been quashed on plaintiff's motion. These objections were overruled by the court, and this ruling is assigned as error. The questions raised were fully discussed in *Randolph v. State,* 65 Neb. 520, and it was there held that it was not good ground for challenge that a juror who had been summoned on the regular panel, which had been quashed on a challenge to the array, has again been summoned under a special venire at the same term of court. With this holding and the reasons given we are entirely content, and hold, therefore, that the plaintiff in error has no cause to complain of the ruling of the trial court in this respect.

Exceptions were taken to the twelfth instruction of the court as follows: "You are instructed that in this case the burden of proof is upon the plaintiff, and, before he can recover in this case, it is for him to prove, by a preponderance of the evidence, all the material allegations of his petition, and if the evidence upon any one or more of the material allegations of the petition is evenly balanced or preponderates in favor of the defendant, then the plaintiff cannot recover, and your verdict should be for the defendant." The third and fourth instructions given by the court are as follows: "(3) The jury are instructed that the article complained of in plaintiff's petition is libelous *per se,* and that the law presumes that such a libel is false; that the defendant published the article maliciously, and that the plaintiff has been damaged by such publication. (4) The jury are instructed that the defamatory article complained of in the petition was published of and concerning the plaintiff." The jury must be governed by the instructions given them by the court. The third and fourth instructions informed them that the article complained of was libelous *per se;* that the law presumed it to be false; that the defendant acted maliciously in making the publication, and that the plaintiff had suffered damage therefrom. The defendant had admitted the publication. Under these conditions the plaintiff's case was made. Had the case been submitted to the jury upon the pleadings,

they should have found for the plaintiff for at least nominal damages, as the court had correctly informed them that a libelous article was presumed to be false and injurious to the plaintiff. As the case then stood the burden was upon the defendant to justify the publication, and it was prejudicial error to so instruct as to place the burden of proof on the plaintiff.

Other errors are assigned and argued, but the questions raised have mostly been determined in the case of *Sheibley v. Huse, ante,* p. 811, and need not be further considered.

For the error above pointed out, the judgment of the district court should be reversed and the cause remanded for another trial, and we so recommend.

ALBERT, C., not sitting.

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

REVERSED.

JOHN WIESE V. HERMAN GERNDORF ET AL.

FILED FEBRUARY 22, 1906. No. 14,118.

1. **Instruction.** The trial court told the jury that there was no evidence of certain facts material to the issues in the case, while the record shows evidence sufficient to require the question of the existence of such facts to be submitted to the jury for its finding. *Held,* Error.

2. **Intoxicating Liquors: INJURY: INSTRUCTION.** Under our statute, it is not necessary that the liquors furnished by a defendant be the sole or even the principal cause of an alleged injury to the plaintiff, and an instruction to that effect is erroneous.

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

T. A. Hollister and *Smyth & Smith,* for plaintiff in error.

Jefferis & Howell, contra.

DUFFIE, C.

The plaintiff in error, who was plaintiff in the trial court, is a farm hand, and at the time of his injury was engaged by a farmer a short distance from the town of Millard, Douglas county, Nebraska. On Sunday afternoon, December 7, 1902, he visited the saloons of Gerndorf, Stockman, Seeman and Koch in the town of Millard, where he procured and drank beer and other liquors. Previous to the usual evening meal-time he returned to the farm, fed the cows and horses and did some other chores, ate his supper, and returned to Millard, again visiting some, if not all, of the saloons, procuring and drinking liquors therein. Some time during the night he started for home, and, as is alleged in the petition, being unable to care for himself on account of his intoxicated condition produced by liquors sold him by the defendants, after proceeding about a quarter of a mile, fell to the ground, became stupefied, numb and unconscious, and was unable to arise, and remained in said condition during the remainder of the night, and, when found the next morning, his hands were frozen to such an extent that amputation of all the fingers of both hands and a part of each thumb was necessary. He brought this action against the above named defendants and their bondsmen to recover damages on account of his said injuries. The jury returned a verdict in favor of the defendants. A motion for a new trial was overruled, and judgment entered on the verdict, from which the plaintiff has taken error to this court. The motion for a new trial included all of the defendants, and it follows that, if the verdict was a proper one as to any of the defendants, the motion for a new trial was properly overruled, and the judgment of the trial court must be affirmed. *Lydick v. Gill,* 68 Neb. 273.

It is insisted that there was no evidence tending to show

that the defendant Koch sold to the plaintiff any of the liquors contributing to his intoxication, and if we understand their theory it is this: That Wiese was not intoxicated at the time he left Millard and returned to the farm to do his evening work, and that there is no evidence tending to show that he got any liquor from the defendant Koch on his return to Millard in the evening. In its sixth instruction, the court said to the jury: "There is no evidence that he visited the saloon of the defendant Koch, or that Koch sold him any liquor, or that he drank any liquor in Koch's saloon upon his return to the village after supper." If this was a proper instruction under the evidence, and the jury found that the liquor sold to the plaintiff in the afternoon did not contribute to the plaintiff's intoxication in the evening, if he was intoxicated at that time, then the defendants' contention would have to be sustained, as under these circumstances the defendant Koch was not liable, and the court did not err in overruling the motion for a new trial as to him; but we cannot agree with the trial court that there was no evidence that the plaintiff visited or drank at Koch's saloon during the evening and after his return from the farm. It is undisputed that Koch's saloon was open during the evening, and on cross-examination of the witness Hagerman the defendants themselves called forth the fact that Hagerman left Gerndorf's saloon with Wiese and went with him to Anderson's corner, stopped a few minutes at the corner, when Hagerman went home and Wiese went to Koch's saloon about 10 o'clock in the evening. Again, the witness Dahmke, called by the defendants, testified on cross-examination that Wiese told him, in a conversation between them at the hospital, that he came out of Gerndorf's saloon and went to the corner of Charles Anderson's and that from there he went to Koch's where he had some schnapps. The witness Delfs testified that he saw Wiese in Koch's that night. Under the rule established in *McManigal v. Seaton,* 23 Neb. 549, that proof of the sale of intoxicating liquors may be shown by circumstances, we think that the

evidence was sufficient to go to the jury upon the question of the plaintiff's visiting and drinking intoxicating liquors at Koch's saloon during the evening after his return to the village from the farm.

The seventh and ninth instructions are in the following language: "Seventh. In considering the causes of the injury you will take into consideration all of the evidence in the case, and if you should find that the injury was in fact produced by causes other than the drinking of intoxicants furnished by defendant saloon keepers, then you will find against the plaintiff, and in favor of all of the defendants." "Ninth. The jury are instructed that the fact that the plaintiff did drink beer or whisky, or both, that afternoon and evening, does not in itself establish the fact that the injury which the plaintiff received was the result of such drinking. Before the plaintiff can recover, you must find that the injury which he complains of was the result of the intoxication, if you should find from the evidence that there was intoxication, and not of other causes." These instructions are open to the same objection made to the instruction discussed in *McClellan v. Hein*, 56 Neb. 600. In the latter part of the ninth instruction the jury are plainly told that before the plaintiff can recover they must find that the injury which he complained of was the result of the plaintiff's intoxication. In the words of the opinion above referred to this "is erroneous, in that it states a rule by which there was excluded from the consideration of the jury the intoxication of Edward D. McClellan as a contributing or assisting cause of the accident, and conveyed to that body the idea that the intoxication, if determined to exist, must be shown to be the primary or main and governing cause. This is contrary to the established doctrine in this state. Under the provision of our statute it is not necessary that the liquor furnished by the defendant be the sole or even the principal cause of the alleged injury. * * * *McClay v. Worrall*, 18 Neb. 44; *Cornelius v. Hultman*, 44 Neb. 441; *Gran v. Houston*, 45 Neb. 813; *Sellars v. Foster*, 27 Neb. 118."

Because of the errors above discussed, we recommend a reversal of the judgment and that the cause be remanded for another trial.

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 another trial.

REVERSED.

ADELINE MCPHERSON, APPELLANT, V. DANIEL MCPHERSON ET AL., APPELLEES.

FILED FEBRUARY 22, 1906. No. 14,143.

1. Husband and Wife: TITLE BY PRESCRIPTION. The general rule is that the husband or wife cannot, while living together and in the joint possession of real estate, acquire title one against the other by prescription.

2. ———: ———. In such case both are presumed to occupy the premises in subordination to the title under which possession was taken, in whichever of the parties it may be, and not in hostility to such title.

3. ———: ———. A husband, while living with his wife, held possession of land, claiming title thereto through a tax deed which was void upon its face for want of a seal. Some years after taking possession he caused the same to be conveyed to his wife through a third party, his deed being a quitclaim, and the parties thereafter jointly occupied the land. Some time prior to the running of the statute of limitations in favor of the wife and the vesting of title in her by prescription, the husband bought in the patent title and thereafter, for some years, continued in possession of the premises with his wife, but did not record his deed or assert any title to the premises in hostility to the claim of his wife until the statute had run in her favor. *Held*, that his possession of the land with his wife after acquiring the patent title, without any act or declaration on his part that he was claiming possession under his deed, did not arrest the running of the statute in favor of the wife, and that she acquired title to the land through adverse possession thereof.

APPEAL from the district court for Washington county: LEE S. ESTELLE, JUDGE. *Reversed with directions.*

Jefferis & Howell, for appellant.

Herman Aye and *F. A. Brogan, contra.*

DUFFIE, C.

This action was brought to quiet plaintiff's title to 80 acres of land. In October, 1876, the land was sold at private sale for delinquent taxes by the treasurer of Washington county and purchased by the defendant Daniel McPherson. A treasurer's deed was issued to him in October, 1878, and on the same day he caused the deed to be recorded in the office of the county clerk. It is conceded that the tax deed is void upon its face, for the reason that it does not have the seal of the treasurer impressed thereon. At the time of purchasing this land at tax sale the plaintiff and defendant were husband and wife, and living together on a four acre tract adjoining the land in controversy. In 1887 a public road was established separating the tract upon which the parties lived from the premises in dispute. McPherson took possession of the land at the time of his purchase at the tax sale, and thereafter continued to use and occupy the same for farming purposes, raising crops thereon until January 14, 1884, when he caused a conveyance by quitclaim deed to be made through a third party to his wife, the plaintiff herein, the expressed consideration in the deed being $500. On February 24, 1886, the defendant procured a conveyance by quitclaim deed from the parties holding the patent title to said land, and this conveyance he kept from record until June 16, 1894. From January 14, 1884, the date of the conveyance to his wife, until June 16, 1894, the plaintiff and defendant continued to live together as husband and wife on the four acre tract above mentioned, and the 80 acres in question were worked and farmed by the defendant with the knowledge of the plaintiff, and the

proceeds of said premises were used in the support of defendant McPherson and his family, including the plaintiff, without any specific contract or agreement being made as to the same; and from February 24, 1886, to June 16, 1894, the plaintiff had no knowledge of the deed from the owners of the patent title to the defendant. During all the time from January 14, 1884, until June 16, 1894, the plaintiff and defendant worked together as husband and wife for the mutual benefit and support of each other and family, and the premises in question constituted their only farm lands in connection with their home on the four acre tract upon which they actually resided. From June 16, 1894, until the commencement of this action the defendant farmed said premises and asserted ownership thereof as against the plaintiff. For four or five years prior to the commencement of this suit the defendant McPherson has had the exclusive use and occupancy of said premises. From January 14, 1884, to February 24, 1886, the defendant never made any claim to said premises, and from February 24, 1886, to June 16, 1894, did not specifically or in express terms make any claim to the plaintiff that he was the owner thereof. The above facts all appear from an agreed statement of facts filed by the parties in the trial court. The trial resulted in a decree dismissing the plaintiff's bill, and awarding costs to the defendant. From this decree she has appealed to this court.

From the foregoing statement it will be seen that the defendant's conveyance to his wife was made something more than seven years after his purchase of the land at tax sale, and more than five years after the receipt and recording of his tax deed, and that during this time he was in the actual possession of the land, claiming to own the same. While his tax deed was void, it conferred color of title under which a continued uninterrupted possession for ten years from the date of his entry thereunder would give him good title by prescription. His tax deed, also, under our statute relating to occupying claimants, pro-

tected him in his possession until he should be reimbursed for improvements made upon the land, if any, and for taxes paid thereon, with statutory interest. *Lothrop v. Michaelson,* 44 Neb. 633. His conveyance to his wife vested in her all the rights in the land which he possessed, and her possession could be tacked to his own in support of a claim of title by prescription. *Lantry v. Wolff,* 49 Neb. 374.

The rule is well established that to interrupt the possession an action must be commenced against the claimant by the true owner, or a reentry on the premises made by him. To interrupt the possession by reentry by the owner, the intention to take possession must be sufficiently indicated by words or acts, by express declaration, or by exercise of acts of ownership inconsistent with a subordinate character. 1 Cyc. p. 1,010. As stated in *Burrows v. Gallup,* 32 Conn. 493, 87 Am. Dec. 186, the owner may tread upon his own soil and still be as much out of possession of it there as elsewhere. In other words, the reentry must be in hostility to the possession of the claimant. The party from whom the defendant acquired the patent title could interrupt the plaintiff's possession only by suit commenced for that purpose or by a reentry into the premises under a claim of title. Had he become a boarder in the plaintiff's family, and lived with her upon the premises for any length of time without manifesting his intention of claiming possession in his own right, the possession of the plaintiff would not be thereby interrupted, and we are at a loss to see how by his deed of conveyance to the defendant he could confer on him any greater right than he himself possessed. For eight years after acquiring the patent title the defendant kept the deed from record, and made no claim to the land; at least, he gave the plaintiff no reason to believe that he asserted a claim as against the title and rights which he had conveyed to her. It is true that he was in possession with her, but as long as he asserted no possession in himself and claimed no title to the premises, it must be conclusively

presumed that his possession was in subordination to hers. The case is very different from that of *Hovorka v. Havlik*, 68 Neb. 14, where title was claimed by the husband through a deed from the wife, and also by adverse possession as against her title. The deed was held invalid, and a claim of title by adverse possession was denied, there being no reason to believe that a hostile adverse possession had been asserted against her, or that any claim of adverse ownership by possession could be presumed as long as the parties were occupying the premises as husband and wife. Until, as in the present case, some reason exists for the assertion of a title by the husband or wife, one against the other, the presumption will conclusively obtain that the possession of each is through and on account of the family relation, and not under a claim of ownership adverse to the title under which possession was taken, in whichever of the parties that title may be. It was urged in the argument at bar, and some of the cases support the rule, that the law will not countenance a claim of adverse possession made by one spouse against the other; that public policy, having in view the preservation of the integrity of the marriage state, will not countenance a rule tending to disrupt the peaceful relation of the parties; but this argument, if good, would have equal weight against the maintenance of a suit by husband or wife to recover a debt due from one to the other, or to foreclose a mortgage upon the premises occupied by them for money loaned by one to the other; and it would hardly do for the courts to read into the statute of limitations an exception which the legislature has seen fit to omit, because, in their opinion, the family relations would be better preserved by refusing to enforce it in its entirety between husband and wife. The case we are considering is an exception to any to which our attention has been called, but we are quite clear that when the husband has entered into possession of a tract of land under a void deed, and is asserting title in such a manner as to have the benefit of the occupying claimant's law and the statute

relating to title by prescription, and, while the statute is running in his favor, conveys to his wife, he cannot interrupt the running of the statute in her favor by buying in the legal title, unless he asserts that title to the same effect that his grantor would be required to do.

We recommend a reversal of the decree appealed from, and that the cause be remanded, with directions to the district court to enter a decree in favor of the plaintiff.

ALBERT and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is reversed and the cause remanded, with directions to the district court to enter a decree in favor of the plaintiff.

REVERSED.

F. J. MORIARTY v. H. E. COCHRAN.

FILED FEBRUARY 22, 1906. No. 14,158.

Pleading. A petition declaring on an appeal bond, which contains no allegation showing a breach of its conditions, is subject to demurrer.

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

P. A. Wells and *Fawcett & Abbott,* for plaintiff in error.

H. E. Cochran and *A. S. Churchill, contra.*

DUFFIE, C.

Cochran obtained a judgment against Johnson in a justice's court. Johnson appealed to the district court, and executed the following undertaking with Moriarty as surety: "Whereas, on the 9th day of October, 1902, H. E. Cochran recovered a judgment against John P. Johnson before W. A. Foster, a justice of the peace, for the sum of $65.30, and costs of suit taxed at $6.60, and, whereas, the

said John P. Johnson intends to appeal said cause to the district court for Douglas county, Nebraska: Now, therefore, we, John P. Johnson, as principal, and F. J. Moriarty, as surety, do promise and undertake to the said H. E. Cochran, in the sum of one hundred fifty three and eighty one-hundredths dollars that the said John P. Johnson, appellant, shall prosecute said appeal to effect and without unnecessary delay, and that said appellant, if judgment be adjudged against him on the appeal, will satisfy such judgment and costs. (Signed.) John P. Johnson, F. J. Moriarty."

The trial in the district court resulted in a judgment against Johnson for $102.18. This action was brought against Moriarty as surety upon the appeal bond. The only breach of the bond alleged in the petition is the following: "There is now due the plaintiff, H. E. Cochran, from the defendant, F. J. Moriarty, on said undertaking the sum of $102.18 and interest at 7 per cent. from October 5, 1903, no part of which has been paid." A demurrer to the petition was interposed and overruled by the court, and Moriarty having elected to stand upon his demurrer, judgment was entered against him for the amount claimed in the petition, and he has brought the case here for review.

In our opinion the petition contained no sufficient allegation of a breach of the undertaking sued on. Moriarty's contract was "that the said John P. Johnson, appellant, shall prosecute said appeal to effect without unneccessary delay, and that said appellant, if judgment be adjudged against him on the appeal, will satisfy such judgment and costs." It sufficiently appears in the petition that the appeal was docketed in the district court, that a trial was had, and judgment entered against the appellant Johnson; but there is no allegation to the effect that Johnson has not satisfied said judgment and costs. It is urged by the defendant in error that the statement in the petition "that there is now due the plaintiff from the defendant Moriarty on said undertaking the sum of $102.18 and interest at 7 per cent. from October 5, 1903, no part

of which has been paid," is a sufficient allegation of the nonpayment of the judgment; and it is said that the word "due" is often used in business transactions as synonymous with "owing" or "unpaid." *Fowler v. Hoffman,* 31 Mich. 215, is cited in support of this position. An examination of the cited case shows that it has no application to a rule of pleading. A mortgagor had agreed to keep the mortgaged property insured for the amount due on the mortgage. The trial court held that this stipulation required the mortgagor to insure the property for the amount only which had matured on the mortgage. Judge Cooley, in the opinion, says:

"The judge was clearly in error in holding that the stipulation for insurance, when speaking of the 'amount due,' meant not the whole sum secured, but only the amount that had become presently payable; in other words, the amount overdue. We cannot suppose such to have been the understanding of the parties. The word 'due' is often used in business tranactions as synonymous with 'owing' or 'remaining unpaid,' and no reasonable doubt can exist that it was so used here. The need of insurance to protect the mortgagee would be at least as great before as after the payment fell due."

In the connection in which the word "due" was used in that instance there is no doubt of the correctness of the holding of the Michigan court, but the allegation quoted from the petition is nothing more than a legal conclusion. *Doyle v. Phœnix Ins. Co.,* 44 Cal. 264. The authorities all agree that the statement of a legal conclusion is not admitted by a demurrer. A demurrer admits only facts well pleaded. There being no allegation of a breach of the undertaking, the demurrer to the petition should have been sustained, and we recommend a reversal of the judgment and that the cause be remanded to the district court, with leave to the defendant in error to amend his petition if he be so advised.

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, with leave to the defendant in error to amend his petition if he be so advised.

REVERSED.

WILLIAM BISCHOF, APPELLANT, V. MERCHANTS NATIONAL BANK ET AL., APPELLEES.

FILED FEBRUARY 22, 1906. No. 14,024.

1. **Highways: NUISANCE.** Public highways belong, from side to side and from end to end, to the public, and any permanent structure or purpresture which materially encroaches on the public street and impedes travel is a nuisance *per se;* but in a proper case such obstructions may be authorized by competent authority.

2. **Nuisance: INJUNCTION.** A private person seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to himself, aside from and independent of the general injury to the public.

3. The easement of view from every part of the public street belongs, as a valuable right, to one owning property abutting on the street, and will be protected by the courts against unlawful encroachments.

4. **Nuisance: EQUITY.** Where a nuisance is not permanent, and the damages caused thereby are not recoverable in one action, but would require successive actions, the injured party has no adequate remedy at law.

5. A permanent nuisance is one of such a character, and which exists under such circumstances, that it will be presumed to continue indefinitely.

6. **Permanent Nuisance.** But a structure constituting a nuisance, maintained in violation of a positive statute, which is not necessary to the conduct of any lawful business, and which is not an inseparable nor a necessary part of the unfinished building to which it is attached, will not be presumed to continue indefinitely and is not a permanent nuisance.

7. Evidence examined, and *held* insufficient to show that the plaintiff had consented to the erection of the obstruction constituting a nuisance.

8. Nuisance: INJUNCTION: LACHES. Where a party protests or objects against the erection of a proposed obstruction to the party about to erect it, and the latter proceeds over such protest and objection to complete the obstruction, he cannot complain because the former delayed ten days in bringing suit to restrain the nuisance which had been completed in the meantime.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Reversed with directions.*

Roddy & Bischof, for appellant.

W. F. Moran, contra.

ALBERT, C.

This is a suit for relief by injunction. It appears from the pleadings and the evidence that the plaintiff is the owner of a business lot in Nebraska City, and the defendant bank is the owner of the east half of a like lot, adjoining plaintiff's lot on the west. Both properties front on the principal business street of that city extending east and west. The lots are about 48 feet in width. On the west half of the plaintiff's lot there is a two-story brick building, used for a store building, or for mercantile purposes. The bank's property had been covered by a building used for a bank. Both buildings fronted on the street above mentioned and faced north. Sometime previous to the commencement of this action the bank building was damaged by fire, and defendant bank commenced to rebuild. The plaintiff's building appears to be of brick, with a glass front, and the bank building, as reconstructed, is of brick and stone. The two are separated only by walls, with no space between them, and both are flush with the sidewalk. The entrance to the plaintiff's building is at the middle of the front; that of the bank's at the extreme east of the front, where it joins plaintiff's building. The defendant Wales has charge of the work on the new bank building, and is not otherwise interested in the suit. In the reconstruction

of the bank building, a stone about five inches thick and ten feet long extends outward from the building and upon the sidewalk about two feet ten inches. On this stone, on either side of the entrance to the bank building, are two heavy side bases about three feet high, extending outward from the building about two and one-half feet. On each of the bases there is a stone pillar about 13 inches in diameter at the base and tapering slightly, which extends to the top of the first story of the building. The pillars are surmounted by a cap of solid stone extending outward from the building about the same distance as the foundation stone. The work on that portion of the building just described was commenced on the 4th day of August, 1903, and was completed before the commencement of this suit, which was begun, and the temporary order allowed, on the 13th day of the same month. It appears in evidence, however, that before the work was begun the plaintiff, when informed by the defendant Wales that it was contemplated, told him that he would not permit it. It also appears that he made complaint to the city council, and that a written notice, signed by the mayor, to discontinue the work was served on the bank on the day after the work began. The record contains an ordinance of the city making it unlawful "to obstruct the sidewalks or sidewalk space in said city in any manner."

The plaintiff bases his claim to relief on the ground that the projection of the stone work in front of the bank building is a public nuisance, in that it encroaches upon a public street, and that he sustains special damages, independent of such damages as are sustained by the public at large, because the obstruction cuts off the view to his adjoining building. The contention of the defendant is that the plaintiff has sustained no such special damages as will give him standing in a court of equity, that he has a plain and adequate remedy at law by an action for damages, that he is guilty of laches, and that he stood by and acquiesced in and consented to the obstruction. The court denied the plaintiff relief on the ground that his

damages could be ascertained with reasonable certainty in an action at law. The plaintiff appeals.

That the stone and pillars of the new portico to the bank building, as now remodeled, extend into the public street is conceded; that such an obstruction constitutes a public nuisance is not only the doctrine of the common law, but falls within the statutory definition. Cr. code, sec. 232. Elliott, in his valuable work on Roads and Streets (2d. ed.), sec. 645, says: "Public highways belong, from side to side and end to end, to the public, and any permanent structure or purpresture which materially encroaches upon a public street and impedes travel is a nuisance *per se*, and may be abated, notwithstanding space is left for the passage of the public. This is the only safe rule, for, if one person can permanently use a highway for his own private purposes, so may all, and if it were left to the jury to determine in every case how far such an obstruction might encroach upon the way without being a nuisance, there would be no certainty in the law, and what was at first a matter of small consequence would soon become a burden not only to adjoining owners, but to all the taxpayers and the traveling public as well. Thus, expediency forbids any other rule. But, even if it did not, the rule is well founded in principle, for it is well settled that 'the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler.'" *Nebraska Telephone Co. v. Western Independent L. D. T. Co.*, 68 Neb. 772; *State v. Edens*, 85 N. Car. 522; *Webb v. Demopolis*, 95 Ala. 116; *Field v. Barling*, 149 Ill. 556, 24 L. R. A. 406; *Dill v. Board of Education*, 47 N. J. Eq. 421, 10 L. R. A. 276; *State v. Berdetta*, 73 Ind. 185; *McCloughry v. Finney*, 37 La. Ann. 31; *City of Omaha v. Flood*, 57 Neb. 124; *First Nat. Bank v. Tyson*, 133 Ala. 459, 59 L. R. A. 399; *Codman v. Evans*, 5 Allen (Mass.), 308; *Marini v. Graham*, 67 Cal. 130. Of course, such obstruction may be authorized in a proper case by competent authority. *City of Omaha v. Flood, supra.* But

there is no claim that the obstruction was authorized in this case. On the contrary, the defendants were distinctly warned both by notice and ordinance that it would not be permitted. It is also true that the mere fact that the obstruction constitutes a public nuisance would not entitle the plaintiff to relief by injunction. 1 High, Injunctions (4th ed.), sec. 762, says: "No principle of the law of injunctions is mere clearly established than that private persons, seeking the aid of equity to restrain a public nuisance, must show some special injury peculiar to themselves, aside from and independent of the general injury to the public. And in the absence of such special and peculiar injury sustained by a private citizen, he will be denied an injunction, leaving the public injury to be redressed upon information or other suitable proceeding by the attorney general in behalf of the public." Among the numerous cases cited in support of the text is *Shed v. Hawthorne*, 2 Neb. 179. But the doctrine is so universally recognized that further citations are unnecessary.

This brings us down to the question whether the plaintiff has sustained any special injury peculiar to himself, aside from and independent of the general injury to the public. On this point we derive but little aid from the opinions of different witnesses. That the obstruction in question obstructs the view to the front windows of the plaintiff's building, which is kept for mercantile purposes, is self-evident. The value of the front windows of a mercantile house, for the display of goods and wares for advertising purposes, and of an unobstructed view thereto are matters of common knowledge. The value of a conspicuous business front was not lost sight of by the defendant bank when it planned an ornamental entrance, which extended outwards beyond the sidewalk line, and beyond the front line of adjacent buildings. It requires no evidence to show that any unlawful obstruction that cuts off, to a substantial degree, the view to the front of a business house or renders it less valuable for the display of goods and advertising purposes, is a damage to the

owner of such building, and a damage which is special and peculiar to him, and independent of any damage sustained by the public at large. In *First Nat. Bank v. Tyson, supra,* it was held that the easement of view from every part of a public street, as well as that of light and air, belongs, as a valuable right, to one owning property abutting on the street, and will be protected by the courts against illegal encroachments. See, also, *Dill v. Board of Education, supra; Costello v. State,* 108 Ala. 45; *Trenor v. Jackson,* 46 How. Pr. (N. Y.) 389; *Townsend v. Epstein,* 93 Md. 537; *Hallock v. Scheyer,* 33 Hun (N. Y.), 111; *Story v. New York Elevated R. Co.,* 90 N. Y. 122; *Wyman v. Mayor,* 11 Wend. (N. Y.) 487; *Schulte v. North Pacific T. Co.,* 50 Cal. 592; *City of Denver v. Bayer,* 7 Colo. 113; *Newell v. Sass,* 142 Ill. 104; 2 Dillon, Municipal Corporations (4th ed.), sec. 556; *Haynes v. Thomas,* 7 Ind. 38; *Perry v. Castner,* 124 Ia. 386; *Lahr v. Metropolitan E. R. Co.,* 104 N. Y. 268; *Barnett v. Johnson,* 15 N. J. Eq. 481; *Field v. Barling, supra.*

The defendant cites many cases to the effect that a court of equity will not interfere by injunction to prevent the erection of a building merely because it will obstruct the view of plaintiff's place of business. One of the cases is *Hay v. Weber,* 79 Wis. 587. There the owner of a business building in the city of Oshkosh brought suit to enjoin the erection of bay windows on an adjoining building, extending from 18 to 20 inches into the street. It appears from the statement of the case that it was customary in that city to use a portion of the sidewalk for the display of goods, and that there was an ordinance in effect which provided that it should be lawful for any person to use a portion of the sidewalk, not exceeding three feet in width, for the purpose of setting out and exhibiting goods, either by placing them on or suspending them over the sidewalk. The court reversed the order of the lower court granting an injunction. The plaintiff there claims that bay windows obstructed the view of his premises, and interfered with and damaged his business. The court,

in disposing of that claim, said: "It is difficult to perceive how such obstruction could result in such damage, but, assuming that it would, yet, such damage would be too remote and speculative to constitute the basis of a private action at law or in equity." The decision in that case must be read in the light of the conditions that existed in that city. The use of the sidewalk for the display of goods was allowed by ordinance. The bay windows, which evidently were intended to be used for the display of goods, did not constitute a greater obstruction to the sidewalk than what the ordinances of the city contemplated. We think the opinion shows that the learned court was largely influenced by those considerations. As above intimated, the value of conspicuousness to a building used for mercantile purposes is a matter of common knowledge. The obstruction complained of in this case was constructed to give the bank building that very quality, and was so placed as to render the plaintiff's building less conspicuous and more difficult to distinguish from other buildings in the same locality. This, we think, is an obvious damage to the plaintiff. The other cases cited by the defendant, so far as we have been able to examine, have no reference to public nuisances, or to structures built in violation of some positive statute, but to buildings lawfully erected and erected for a lawful purpose. Cases of that kind rest on an entirely different principle than where the structure complained of constitutes a public nuisance and is maintained in violation of a positive law.

The contention that the plaintiff has an adequate remedy at law can be sustained, if at all, only on the theory that the nuisance is permanent and the plaintiff's damages, including future and prospective damages, may be ascertained with reasonable accuracy and are recoverable in one action. Otherwise, a court of equity would interfere by injunction to prevent a multiplicity of suits. In none of the cases cited, nor in any that we have examined, is there any attempt at an accurate definition of what con-

stitutes a permanent nuisance. In *Cleveland, C. C. & St. L. R. Co. v. King,* 23 Ind. App. 573, 55 N. E. 875, after an exhaustive review of the authorities, the court reaches the conclusion that "the presumption is that a nuisance that can be abated will be abated." That case, and the authorities there cited, suggest the definition that a permanent nuisance is one of such character, and which exists under such circumstances, that it will be presumed to continue indefinitely. In the present case, the obstruction is maintained in violation of a positive statute and city ordinance forbidding the obstruction of public streets. It is not a necessary incident to the conduct of the business of the bank, or any other lawful business. It is not an inseparable nor a necessary part of the building, but appears to have been constructed merely for ornamental purposes. The new erection was not entirely completed when the suit was begun. In view of these facts, the nuisance does not fall within the foregoing definition. As was said in *Hargreaves v. Kimberly,* 26 W. Va. 196, 53 Am. Rep. 121: "Here the cause may be removed, and it is supposed will be by the defendant, rather than submit to having the entire damages recovered against him, for a permanent injury, or to suffer repeated recoveries as long as the cause of the injury continues." We cannot presume that the defendant bank will persist indefinitely in a violation of a public statute, nor that the officers of the law would permit such violation. We hold therefore that the nuisance is not to be regarded as a permanent nuisance, but one which is abatable, and that the court should interfere for the protection of the plaintiff's rights by injunction to prevent vexatious litigation and a multiplicity of suits.

As to the claim that the plaintiff stood by and consented to the obstruction, it is not borne out by the evidence. The defendant Wales himself testified that, when he was about to commence work on the obstruction, the plaintiff told him he would not permit it. It is true, the same witness testified that after the bases of the pillars were laid the plaintiff told him that he could not see that it (the

proposed obstruction) would hurt anything, but this is denied by the plaintiff. The witness further testified that after the work was completed the plaintiff expressed himself as satisfied with it, etc., but this is also denied, and, even if true, was after the work was done and too late to afford a basis for an estoppel by laches. Mere delay in asserting a right will not necessarily preclude relief; there must also be shown a change in the situation of the parties, whereby the one has been put in a worse condition by the delay of the other. *Parker v. Bethel Hotel Co.*, 96 Tenn. 252, 31 L. R. A. 706; *Hall v. Otterson*, 52 N. J. Eq. 522; *Chase v. Chase*, 20 R. I. 202; *Hamilton v. Dooly*, 15 Utah, 280. We find nothing in the record to justify a finding that the defendants were influenced in the slightest degree by any statement or delay of the plaintiff. On the contrary, we think the most reasonable inference from the evidence is that they proceeded with the work over his protest. After he had lodged his protest, a delay of ten days in bringing his suit was not unreasonable and does not constitute laches.

Another contention of the defendants, as expressed in the language of their brief, is: "The plaintiff entirely abandoned the allegations of his petition at the very outset of the trial, and bent all his energies to prove that he was damaged on account of the destruction for advertisement purposes of the west show window of his said building. The court permitted the evidence to go in over the objection of the defendants that the same was incompetent and not within the issues." This contention is unfounded. The complaint in the petition that he was damaged because of the "cutting off and obstructing the light, air and *view*" of plaintiff's building is squarely met by the proof and fully sustained.

We think the plaintiff has shown himself entitled to relief in this suit and we therefore recommend that the decree of the district court be reversed and the cause remanded, with directions to enter a decree enjoining the defendant bank to abate said nuisance, and perpetually

enjoining and restraining the defendants from a continuation, repetition or renewal thereof.

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 to enter a decree enjoining the defendant bank to abate said nuisance, and perpetually enjoining and restraining the defendants from a continuation, repetition or renewal thereof.

JUDGMENT ACCORDINGLY.

AGNES CASSIDY, APPELLEE, V. MICHAEL SULLIVAN ET AL., APPELLANTS.

FILED FEBRUARY 22, 1906. No. 14,031.

1. **Highways: DEDICATION.** Where adjoining landowners place fences and plant trees along the line between their lands in such a way as to leave an intervening space for public travel, and with the intention that it be used for that purpose, and the public enter upon and use the intervening space as a highway and continue in such use and enjoyment thereof for almost 20 years, it will be regarded as a highway by dedication.
2. **Acceptance.** In order to constitute a highway by dedication, it is not necessary that the offer of dedication be accepted by the public authorities, it may be accepted by the public itself.
3. The acceptance by the public itself is shown by its entering upon the land and enjoying the privilege offered by user.
4. Evidence examined, and *held* sufficient to show a highway by dedication.

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

R. R. Dickson, for appellants.

M. F. Harrington and *A. F. Mullen, contra.*

ALBERT, C.

This is an appeal from a decree enjoining the defendants from maintaining a fence on an alleged public road. The defendant Babcock owns the southwest quarter of the northwest quarter of a certain section of land, and his codefendant owns the southeast quarter of the northeast quarter of the section adjoining on the west. The road extends north and south on the section line between the two forty-acre tracts. That the defendants, a short time before the suit was commenced, erected a fence on the road is not disputed; the only controversy being the sufficiency of the evidence to show the existence of a public road. That the county board never made any order for the opening of the road is conceded. It does appear, however, that many years ago the county board entered an order declaring all section lines within the county public roads. But as this amounted to a reiteration of section 46, chapter 78, Compiled Statutes 1905 (Ann. St. 6049), it was mere *brutum fulmen,* and, of itself, has no bearing on the question at issue.

One contention of the plaintiff is that the alleged road is a highway by dedication. The evidence seems to bear out this contention. It appears that for many years the travel to and from the Black Hills country was along trails in the vicinity of this road. It does not appear to have been confined to any particular track, and as the county was largely unsettled section lines were disregarded. Although it was denied by the defendants, it sufficiently appears that almost 20 years ago the defendant Babcock and one through whom the other defendant traces his title, and who then owned the Sullivan forty, for the purpose of inducing the public travel to follow the section line between their respective tracts, built fences and planted trees on their respective sides of the section line, leaving a space about 66 feet wide for public travel, and that thereafter, until about the time of the commencement of this suit, the travel was confined to that space, which has

ever since been used by the public as a highway. Such use has been uninterrupted, save that about a year before this suit was begun one of the defendants placed a fence on the road, but was directed to remove it by the county attorney, and did so. It should be remarked, however, that there is evidence tending to show that the use of the easement was interrupted several years ago by a fence which was maintained for some time. But the evidence on this point is conflicting, and we are not prepared to say that a finding against the defendants thereon is not sustained by sufficient evidence. Taken in its entirety the evidence satisfies us that the owners of the land, more than 15 years ago, dedicated that portion now claimed as a public road to the public, and the public at once accepted the grant, and, practically speaking, have been in the uninterrupted enjoyment thereof ever since. It is true, there is no evidence that the public authorities ever authorized any work on the road, or did any act indicating an acceptance of the grant. But a dedication, in order to become binding upon the dedicator or his privies in estate, need not be accepted by the public authorities, but may be accepted by the general public. The general public accepts, as in this instance, by entering upon the land and enjoying the privilege offered, in other words, by user. *Streeter v. Stalnaker,* 61 Neb. 205; *Attorney General v. Abbott,* 154 Mass. 323, 13 L. R. A. 251; *Rees v. City of Chicago,* 38 Ill. 322; *Alden Coal Co. v. Challis,* 200 Ill. 222.

Considerable stress is laid on the fact that the road in question is connected with no public road at the south, and that it is some 80 rods from the north line of the defendants' lands to a public road with which this road would connect at the north; in other words, that this road is disconnected from all other public roads. In view of the entire evidence, that fact has no special significance. The travel from other public roads to this road is over private property and with the permission of the owners, who, unlike the defendants, are not shown to have dedicated a right of way for the use of the public. When

such permission is withdrawn, if the travel over such lands is merely permissive, the authorities may take the proper steps to establish highways connecting with this road, or, if the road is not required, the proper steps may be taken to relieve the defendants of the burden of the easement. But that has nothing to with this case. The evidence shows that the road is a public highway, and so long as it remains such the defendants have no right to obstruct it.

It is recommended that the decree of the district court 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.

MABEL CHAMBERS, APPELLANT, V. WILLARD E. CHAMBERS, APPELLEE.

FILED FEBRUARY 22, 1906. No. 14,107.

1. **Divorce: ALIMONY: RES ADJUDICATA** An application for a change with respect to alimony in a decree of divorce, made at a subsequent term, must be founded upon facts or circumstances which have arisen subsequently to the decree, and in the absence of such facts and circumstances the matter will be deemed *res adjudicata* between the parties.

2. ———: CUSTODY OF CHILDREN. But, where the circumstances require it, the court may at a subsequent term enter a supplemental decree with respect to the custody of the children, although the original decree contains no provision therefor.

3. **Suit Money: ATTORNEY'S FEES: COSTS.** In a proceeding upon an application of that character, the court may require the husband to pay a reasonable sum to enable the wife to prosecute such application, and when such allowance is for attorney's fees the same may be taxed as part of the costs of the proceeding.

4. **Harmless Error.** Where the court, instead of thus taxing the fees,

enters a judgment therefor in favor of the attorneys by name, it is a mere error of form, and not of substance, and does not constitute reversible error.

5. Evidence examined, and *held* sufficient to warrant the order of the court with respect to the custody of the child of the parties.

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

Frank Heller and *Hall & Stout,* for plaintiff in error.

Baldrige & De Bord, contra.

ALBERT, C.

On the 3d day of March, 1904, Mabel Chambers filed her petition in the district court for Douglas county against Willard E. Chambers, in substance, as follows: That on the 5th day of August, 1901, the plaintiff filed a petition in said court against the defendant, praying a decree of divorce, and the care and custody of a minor child, now about 9 years old; that the defendant appeared personally in said cause, and after due hearing thereof the plaintiff was granted a divorce as prayed, but no order was made with respect to the child; that at the time the decree was obtained it was agreed between the parties to the suit, that the defendant would pay the plaintiff, from time to time, a sum sufficient for the support of herself and the said minor child, and that for some months afterwards the defendant paid her various sums, averaging about $35 a month, but that some months ago the defendant ceased to make further payments to the plaintiff, and she is now without property of her own and without means of support; that the defendant enjoys a considerable income, but as to the amount of which the plaintiff is not informed, is possessed of a considerable amount of real and personal property, and capable of supporting plaintiff; that for some time subsequently to the said decree of divorce she had the care and custody of the child,

but that some months ago the defendant, without authority, took and still retains the custody of the child, and wrongfully deprived the plaintiff of her society. The prayer is as follows: "Wherefore, the plaintiff prays that defendant pay her the sum of thirty-five dollars ($35) a month alimony, and reasonable attorney's fees for prosecuting this proceeding, as well as fifty dollars ($50) suit money, and that she have the care and custody of the minor child, Halcyon, and that said original decree be modified in this respect, and such other and further relief as may be just and equitable."

The defendant answered, admitting that the plaintiff obtained a decree of divorce at the time stated in her petition, but avers that her petition in the suit for divorce contained no allegations nor demand for alimony, and that the final decree therein contains no finding of fact or determination by the court touching, or in any manner relating to, alimony or the custody of the child, nor any order regarding the same, or either of them, and that the questions of alimony and the custody of the child were not reserved by the court for further consideration; that at the time the said decree was entered the defendant owned no property, real or personal, otherwise than household goods of the value of $500, and was not in receipt of any income, save sufficient to meet the current expenses; that said household goods were given by the defendant to the plaintiff, who accepted the ownership and possession thereof, and that since the decree of divorce the defendant has at all times supported and maintained the minor child at his own expense, expending for that purpose about the sum of $20 a month, and that it is his purpose to continue to do so. Then follows certain averments justifying his removal of the child from the custody of her mother, and which it is not necessary to set out in detail. The reply admits, among other averments of the answer, that no order was made in the divorce proceedings touching the question of alimony, or the custody of the child.

The court dismissed the claim for alimony, and made an

order respecting the minor child to the effect that during the school year, with the exception of vacation times, it should be kept at school in Council Bluffs, Iowa, and that her tuition and board at said school, and all expenses incident to her instruction and education therein, should be paid by the defendant; that the plaintiff should have the care and custody of the child from the date of the decree until the 25th day of August, 1904, and that the defendant should have the custody and control of her from that date until the 12th day of September, 1904, which is the opening of the school year; that thereafter the plaintiff should have the care and custody of the child during the first half of her vacation periods, and that the defendant should have the care and custody of her during the latter half of such periods. Each of the parties were given permission to visit the child at school. It was further ordered that the defendant should pay the plaintiff the sum of $3 a week for the maintenance and support of the child, covering the period that she would be in the custody of the plaintiff, and $5 a month, payable on the first day of each month, until the further order of the court, commencing on the first day of August, 1904, to enable the plaintiff to purchase clothing for the child. Then follows this further order: "It is further ordered that the defendant pay the costs of this suit, for which execution is hereby awarded, and $100 attorney's fees to the firm of Baldrige & De Bord for their services in this cause, and it is ordered that said Baldrige & De Bord shall have and recover of and from the defendant herein the said sum of $100, for which execution is hereby awarded." The defendant prosecutes error, and the plaintiff appeals from the decree dismissing her claim for alimony.

It is not thought necessary, in order to dispose of the plaintiff's appeal, to pass on the question whether a wife who has obtained a decree of divorce *a vinculo*, without alimony, may, at a subsequent term, maintain an application for a supplemental decree allowing alimony, because,

while there is some conflict of authorities on that question, our attention has been called to no case, nor have we been able to find one, holding that such application could be maintained without a showing of sufficient ground for not asking and taking a decree for alimony in the original suit. It has been held that an application for a change in the amount of alimony, after divorce, must be founded upon new facts which have occurred since the decree was entered, and that, in the absence of such facts, the matter is deemed to be *res adjudicata* between the parties. *Cole v. Cole,* 142 Ill. 19, 34 Am. St. Rep. 56; *Lawson v. Shotwell,* 27 Miss. 630. It is true, the plaintiff in her application alleges an agreement between herself and the defendant, entered into at the time the decree was obtained, to the effect that the defendant would pay her alimony from time to time. But that is not put forward as an excuse for her failure to include facts upon which a decree for alimony could be based, and a prayer therefor, in her petition, or to have the court reserve the question for future determination, but merely as an agreement which the court should enforce at this time. If the agreement has any force, it merely operated to transmute the rights of the plaintiff, incident to her relationship to the defendant, into a right based upon an express contract, enforceable by ordinary procedure at law, and which cannot be enforced in proceedings of this character.

We come now to the errors assigned and argued by the defendant. It appears to be tacitly conceded that, with respect to the custody of the child, plaintiff's application presented a cause properly cognizable by the district court, and, were it not, we should at least hold that it does. The plaintiff had custody of the child when the divorce was granted. While her petition contained a prayer for her custody, no order was made respecting it. The effect of the decree, then, so far as the child is concerned, was to leave the parties *in statu quo.* Sections 15 and 16, chapter 25, Compiled Statutes 1905 (Ann. St. 5338, 5339), are as follows:

"Section 15. Upon pronouncing a sentence or decree of nullity of a marriage, and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain.

"Section 16. The court may from time to time, afterwards, on the petition of either of the parents, revise and alter such decree concerning the care, custody, and maintenance of the children, or any of them, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children shall require."

The clause "and make a new decree concerning the same," etc., in section 16 seems broad enough to allow the court, at a subsequent term, to enter a supplemental decree affecting the custody of the children, although the original decree contains no provision with respect to them. The question of the custody of the children, unlike that of alimony, is not one which concerns the parties, exclusively, but involves the rights of the children, and, to some extent, concerns the public at large. This, of itself, aside from the statutory provisions quoted, would justify a more liberal rule with respect to the custody of the children than to alimony.

It is claimed, however, that the court erred in rendering a personal judgment againnst the defendant in favor of Messrs. Baldrige and De Bord for their services as attorneys for the plaintiff in this proceeding. Section 12 (Ann. St. 5335) of the chapter referred to above provides: "In every suit brought, either for a divorce or for a separation, the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party, and award execution for the same; or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver."

It will be observed that the statute does not specifically describe to whom payment shall be made. In *Rich v. Stretch,* 4 Neb. 186, the court held that, in cases where the court in its discretion could allow an attorney's fee, such allowance should not be included in the judgment proper, but taxed as an item of costs. See, also, *Rosa v. Doggett,* 8 Neb. 48; *Hand v. Phillips,* 18 Neb. 593. In *Burnham v. Tizard,* 31 Neb. 781, the court appears to recognize the propriety of taxing the attorney's fee as part of the costs. It would seem, then, that the attorney's fees allowed stand on the same footing as the fees taxed in favor of officers and witnesses, and, while it is not usual to enter a formal judgment in favor of witnesses and officers for their fees, yet that is the practical effect of an order taxing costs. Hence, whatever error there may have been in entering a formal order in favor of the gentlemen who conducted the proceeding for the plaintiff, it is an error only to the form, and not to the substance, and affords no just ground for complaint.

It is next urged that, the plaintiff having ceased to be the wife of the defendant, it was error to allow her counsel fees in this proceeding. This proceeding is simply a continuation of the divorce suit and one of its incidents, and we think that the authority of the court to allow counsel fees under the section of the statute last cited continues until the subject matter of the divorce suit is finally settled and determined. See *Brasch v. Brasch,* 50 Neb. 73.

It is next claimed that the court erred in awarding the custody of the child to the plaintiff during one-half of each vacation period. This is a matter largely within the discretion of the trial court and depends, to some extent, at least, on the peculiar qualifications and fitness of the respective parties to have the custody of the child. The evidence touching these matters is somewhat voluminous, and we think it will suffice to say that, after a careful examination, we are satisfied that the discretion of the trial court was not abused.

It is next urged that the decree is erroneous in that it awards suit money out of property which the defendant acquired subsequently to the original decree. Several cases are cited in support of this proposition, none of which are in point. It is also urged at some length that the court erred in requiring the defendant to contribute to the support of the child while she was in the custody of the plaintiff. This is based, in part, on the same ground as the complaint awarding the plaintiff the custody of the child for a portion of the time, and, to that extent, requires no further consideration. It is also based, in part, on the ground that the necessity for such order was an assumption on the part of the trial court, in view of the fact that the evidence shows that the defendant has at all times cheerfully supplied the child with whatever it required. If the defendant is ready and willing to provide for the support and maintenance of the child at all times, the order requiring him to do so works no hardship, because it only requires him to do what he professes to be able and willing to do in any event. But, however ready and willing he may have been to do so, it was eminently proper for the court to define the rights of the parties and foreclose future contention as to the amount required.

We discover no prejudicial error in the record, and we recommend that the decree of the district court 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.

INDEX.

Abatement.

When the sole plaintiff in an action dies, it suspends proceedings until the action is revived. *Street v. Smith*.....434

Adultery. See CRIMINAL LAW, 35.

Adverse Possesseon. See HUSBAND AND WIFE, 8-10.

Agriculture.

1. On appeal by a taxpayer from an order of the county board allowing aid to an agricultural society under sec. 12, art. I, ch. 2, Comp. St., appellee's plea *held* sufficient. *Sheldon v. Gage County* 485
2. A certificate of the amount paid into the treasury of an agricultural society, *held* to comply with sec. 12, art. I, ch. 2, Comp. St. *Sheldon v. Gage County*..... 485

Alienation. See HUSBAND AND WIFE, 5, 6.

Alimony. See DIVORCE.

Appeal and Error. See CRIMINAL LAW. EXCEPTIONS, BILL OF. HOMICIDE 5. TRIAL.

1. On appeal in equity the supreme court will examine the evidence and arrive at an opinion, uninfluenced by the conclusion of the trial court. *Roe v. Howard County*..... 448
2. Secs. 138, 139 and 144 of the code relative to variances and amendments are applicable to trials *de novo* in the supreme court on appeal. *Lichty v. Beale*..... 770
3. A case appealed to the district court must be tried on the issues presented in the lower court. *North & Co. v. Angelo*, 373
4. While a case must be tried in the district court on appeal on the issues tried in the lower court, an issuable fact not alleged below can be pleaded in the district court if the identity of the cause of action is preserved. *North & Co. v. Angelo* 381
5. Questions not raised by the pleadings cannot be considered on appeal. *Bankers Union of the World v. Landis*..... 625
6. An order removing a special administrator is a final order and appealable under sec. 42, ch. 20, Comp. St. *In re Estate of Pope* 550
7. An order overruling a motion to deny confirmation of a judicial sale is not final or appealable. *Hall v. Moore*..... 693

Appeal and Error—*Concluded.*

8. While a decree in forecolsure finding personal liabilities is to an extent interlocutory, yet as to findings on issues properly pleaded it cannot be reviewed on objections to a deficiency judgment. *Parratt v. Hartsuff*..... 706
9. Where a case was on a first appeal remanded generally for a new trial, on a second appeal the appellate court is not bound to follow opinions on questions of law presented on the first appeal. *Eccles v. Walker*..... 722
10. Rulings of the supreme court on a first appeal settle definitely all questions adjudicated. *Estate of Korff v. Bueker* 60
11. A judgment will be reversed for error at the trial unless it is alleged in the petition in error and shown by the record that the court erred in overruling the motion for a new trial. *Beckwith v. Dierks L. & C. Co*..... 349
12. Where a party relies on an order of the district court which the record does not disclose, he must apply to that court for a correction of the record. *Barker Co. v. Central West I. Co*..... 43
13. In an action for personal injuries admission of evidence *held* not prejudicial. *Cudahy Packing Co. v. Wesolowski*..... 786
14. An instruction that there was no evidence of certain facts, the record showing evidence sufficient to submit the existence of such facts to the jury, *held* erroneous. *Wiese v. Gerndorf* 826
15. Instructions in an action for damages on a building contract, *held* prejudicial. *Havens v. Robertson*..... 205
16. One who fails to object to an instruction is conclusively presumed to be satisfied with it. *Beckwith v. Dierks L. & C. Co*..... 349
17. It is not error to refuse an instruction not based on either the pleadings or the evidence. *Harvey v. Harvey*..... 557
18. It is not error to refuse to submit a defense not supported by evidence. *Havens v. Robertson*..... 205
19. Where a verdict is the only one that can be supported under the evidence, errors in rulings are without prejudice. *In re Estate of Nelson*..... 298
20. A verdict on conflicting evidence will not be disturbed except for specific error. *Douglas v. Smith*..... 169
21. A verdict unsupported by evidence will be set aside. *Shoemaker v. Commercial Union Assurance Co*..... 587

Arbitration.

An unexecuted agreement to arbitrate will not be recognized by courts. *Havens v. Robertson*..... 205

Attachment.

A subsequent purchaser of attached lands cannot question the grounds for the issuance of the writ. *Wagner v. Wolf*..... 780

Bailment.

The measure of damages for use of property by a bailee is the value of the use and damage to the property; if the use amounts to a conversion, it is the value of the property. *State v. State Journal Co*..... 275

Bankruptcy.

The right of action given by sec. 11, ch. 91*a*, Comp. St., is for injury to business, employment or property, and under the national bankruptcy act passes to the assignee in bankruptcy. *Cleland v. Anderson*..... 273

Banks and Banking.

1. By the execution of a bond under sec. 34, ch. 8, Comp. St., by the officers of an insolvent bank the officers and sureties assume the bank's liabilities and cannot use the assets in paying expenses to the prejudice of creditors. *Hume v. Miller* 800
2. Due diligence in the presentation of a check for payment does not require the holder to present it at other than banking hours. *Temple v. Carroll*..... 61
3. Where the failure of a bank, holding a check as indorsee, to present it for payment is due to the omission of its agent, it is not excused by the agent's ignorance of the existence of the check. *Temple v. Carroll*..... 61
4. Instructions in an action for negligence in failure to present a check for payment criticised. *Temple v. Carroll*..... 61

Bastardy.

In a bastardy proceeding, *held* error to refuse to instruct as to credibility of complainant in accordance with sec. 5, ch. 37, Comp. St., so far as applicable. *Stoltenberg v. State*.....631

Beneficial Associations.

Where power to fix fees of officers of a beneficial association is vested in an executive committee, a proposition made to a convention of the association by a candidate for office, relating to his fees, if elected, is not binding on him when elected. *Burdick v. Sons & Daughters of Protection*..... 460

Bills and Notes.

1. In an action on a note by a *bona fide* purchaser, where the defense is fraud in its procurement, evidence of similar frauds by the agent of the payee, *held* inadmissible. *Hunt v. Van Burg*..... 304
2. Evidence in action on note *held* to sustain judgment. *Walsh v. Lunney* 337

Bonds. See OFFICERS, 3.

Bridges.

1. One has a right to assume that a bridge, a part of a highway, is reasonably safe. *City of Central City v. Marquis*.... 233
2. Secs. 102*a* and 102*b*, ch. 78, Comp. St., do not repeal that portion of sec. 77, art. I, ch. 14, pertaining to the liability of counties, cities and villages for the construction and repair of bridges. *City of Central City v. Marquis*.....233
3. The term "bridges," in sec. 77, art. I, ch. 14, Comp. St., does not include the approaches thereto. *City of Central City v. Marquis* 233

Carriers.

1. Evidence *held* sufficient to submit to jury question of negligent delay in the operation of a stock train. *Union P. R. Co. v. Thompson*..... 464
2. A provision in a stock shipping contract limiting liability for loss or detention of stock, *held* void. *Union P. R. Co. v. Thompson* 464

Chattel Mortgages.

1. A defective description in a chattel mortgage *held* immaterial as between parties. *So. Omaha Nat. Bank v. Stewart*, 716
2. An imperfect description in a chattel mortgage *held* immaterial as against a subsequent purchaser or mortgagee who fails to show good faith and want of notice. *So. Omaha Nat. Bank v. Stewart*..... 716

Checks. See BANKS AND BANKING, 2-4.

Commerce.

The allowance by railroad companies of certain charges, as elevator charges, to terminal elevators on shipments of grain from points in this state to points without the state is an incident of interstate commerce, and a state court has no jurisdiction to limit or control the same. *State v. Omaha Elevator Co.* 654

Conspiracy. See JUDGMENT, 15.

Constitutional Law. See COSTS.

Ch. 35, laws 1891, creating a state board of health, *held* not void because it provides for compensation of its secretaries by fees, not to be accounted for to the state treasury. *Munk v. Frink* 172

Contempt.

1. The district court has jurisdiction to punish contempt by fine or imprisonment, or both. *Back v. State*..... 603
2. The affidavit or information in a proceeding for contempt

Contempt—*Concluded.*

must state the acts constituting the offense with as great certainty as is required in criminal proceedings. *Back v. State* 603

3. If in a prosecution for constructive contempt the information is amended in matter of substance, it must be reverified. *Back v. State* 603

4. In a prosecution for constructive contempt for violating a restraining order, the affidavit or information must set forth the acts constituting the violation. *Back v. State*..... 603

Continuance.

A motion for a continuance is directed to the discretion of the court, and its decision will not be reversed unless there has been an abuse of discretion. *City of Lincoln v. Lincoln Street R. Co*..... 523

Contracts.

1. Before one contract is merged in another, the last contract must be between the same parties and embrace the same subject matter, and must have been so intended by the parties. *Walsh v. Lunney* 337

2. A subsequent oral contract, superseding one the statute of frauds requires to be in writing, will be upheld, if executed. *Lucas v. County Recorder* 351

3. Where a vendee of personalty assumes an indebtedness of the vendor to a third person, the creditor may enforce the obligation against both. *Butler v. Bruce & Co*..... 322

4. In an action for breach of contract, evidence *held* admissible under a general denial to show that no contract existed. *Olsen v. Collins*..... 749

5. Contract and transaction set out, *held* not to constitute an assumption of liability to plaintiff by one who purchased the interest of a person with whom plaintiff had contracted. *Gammel Book Co. v. Paine*..... 683

6. Instructions in an action on contract against one member of a firm *held* not erroneous. *Gammel Book Co. v. Paine*..... 683

Corporations. See INSURANCE, 4.

Costs.

Sec. 22, ch. 50, Comp. St., so far as it authorizes costs against a complaining witness, *held* unconstitutional. *Teats v. Fox* 747

Counties and County Officers.

1. A county is not liable to an individual for negligent diversion of surface water in the improvement of highways. *Hopper v. Douglas County* 329

Counties and County Officers—*Concluded.*

2. Under sec. 23, ch. 50, Comp. St., a county is not liable to a complaining witness for one-fourth of the sum collected as fines for selling liquor without a license. *Chapin v. Seward County* 745
3. An action on a county warrant may be maintained when money to pay it has been collected and wrongfully applied to other claims. *Thurston County v. McIntyre*..... 335
4. A county is not liable for negligent acts of its officers, unless made so by statute. *Hopper v. Douglas County* 329
5. Under ch. 72, laws 1905, in counties of more than 25,000 inhabitants the salary of county clerk is fixed at $2,500 a year, and he is entitled to one deputy at $1,000 a year. *State v. Drexel* 614

Courts.

1. The court of one state connot by its decree directly affect the title to lands in another state, but, if all parties interested are before the court, its decree establishing their equities in the land is conclusive upon them. *Fall v. Fall*.. 104
2. A court of chancery has power to compel a conveyance of land situated in another state. *Fall v. Fall*..... 120
3. A judgment on appeal from county court *held*, proper, though it includes interest during pendency of the action in district court, the judgment thereby exceeding the jurisdiction of the county court. *Butler v. Bruce & Co*..... 322
4. The original jurisdiction of the district court over a suit to quiet title is not affected by the fact that the construction of a will is involved. *St. James Orphan Osylum v. Shelby*.. 591
5. By sec. 260 of the code a judge at chambers may enforce obedience of an injunction or restraining order, whether allowed by the court or judge, but he cannot punish a violation of such order, as a criminal offense, by imprisonment. *Back v. State* 603
6. Where the record shows an adjournment of court to a future day, and judicial proceedings in the interval, it will be presumed, if necessary to jurisdiction, that the adjournment was vacated. *Back v. State* 603

Creditors' Suit.

Evidence in a creditors' suit *held* sufficient to sustain the decree. *City of Red Cloud v. F. & M. Banking Co*..... 437

Criminal Law. See FORGERY. HOMICIDE. JURY. WITNESSES, 1-3.

Evidence.

1. On a trial of one charged with the crime of rape, evidence of an attempt of the accused to commit a similar crime is inadmissible, *Nickolizack v. State*..... 27

Criminal Law—*Continued.*

2. Where the accused was a witness and the prosecutor on cross-examination asked him if he had not been guilty of a like offense on another, and thereafter called the person named for the purpose of not only impeaching the accused, but of proving him guilty of such independent offense, *held* such conduct was prejudicial. *Nickolizack v. State*..... 27

3. Admission of a certain conversation as tending to show an admission of guilt, *held* error. *Powers v. State*..... 226

4. Objection to a question as leading and calling for a conclusion does not raise the question of its competency. *Sweet v. State* 263

5. Admission of incompetent evidence *held* error without prejudice, where the fact is otherwise established by competent evidence. *Sweet v. State*..... 263

6. Evidence of good character *held* admissible to be considered with other evidence. *Sweet v. State*..... 263

7. Evidence on a trial for arson of identification of shoes of defendants, *held* sufficient. *Krens v. State*..... 294

8. One of two persons jointly charged with a crime, and tried separately, cannot prevent introduction of evidence because it tends to establish the guilt of his codefendant. *Krens v. State* 294

9. Evidence describing comparisons made between the shoes worn by the accused and footprints near the place where the crime was committed, *held* proper. *Krens v. State*..... 294

10. Though a witness is designated on an information by the wrong christian name, if the accused is not misled thereby and is aware of his identity, such mistake affords no ground for the exclusion of his evidence. *Reed v. State*..... 509

11. Where an objection to a question is sustained, and the testimony is brought out by the one succeeding it, such ruling, if erroneous, is without prejudice. *Reed v. State*..... 509

12. Insanity cannot be proved by hearsay or reputation. *Reed v. State* 509

13. The rule permitting nonexpert witnesses to testify as to one's sanity does not allow them to testify that at a certain date he knew the difference between the right and wrong of an act committed by him. *Reed v. State*..... 509

Insanity.

14. Under sec. 6, ch. 105, laws 1901, it is the duty of the warden, if a convict under sentence of death appears insane, to give notice thereof to a judge of the district court for the county in which the penitentiary is situated, and a jury

Criminal Law—*Continued.*
must be summoned to inquire into such insanity. *Barker v. State* 289
15. The jurisdiction of the judge of the district court to inquire as to the sanity of a convict under sentence of death does not depend on the giving of notice by the warden. *Barker v. State* 289
16. Upon proper application that a convict under sentence of death is insane, and that the warden unjustifiably refuses to give the statutory notice, it is the duty of the judge to investigate whether there are such appearances of insanity as will justify summoning a jury to try the question. *Barker v. State* 289
17. If the judge, on an investigation as to the sanity of a convict under sentence of death, is satisfied that there are no substantial appearances of insanity, the application will be dismissed. *Barker v. State*..... 289
18. If, on investigation of an application to have the sanity of a convict under sentence of death determined, the judge finds that the convict appears to be insane, a jury should be impaneled to try the question of insanity. *Barker v. State*.... 289
19. Jurisdiction to investigate the question of the sanity of a convict under sentence of death is in the judge of the district court for the county in which the penitentiary is situated. *Barker v. State*..... 289

Instructions.

20. An instruction that, if the jury believe a witness has testified falsely as to any material fact, they may reject all or any portion of his testimony, *held* correct. *Titterington v. State* 153
21. Where such an instruction is tendered, it is error to refuse to give it because it does not contain the qualifying words "unless corroborated by other competent proof." *Titterington v. State*..... 153
22. Noninstruction on the question of good character, in the absence of a proffered instruction correctly stating the law, is not reversible error. *Sweet v. State*..... 263
23. On a trial for assault with attempt to commit rape, refusal to give certain requested instructions, *held* not prejudicial. *Sweet v. State* 263
24 Refusal of an instruction concerning evidence of good character, *held* proper. *Sweet v. State* 263
25. Errors assigned but not argued will be considered as waived. *Sweet v. State*..... 263
26. Where two persons charged jointly with a crime are

Criminal Law—*Continued.*

accorded separate trials, an order refusing the request of the one on trial for the presence of his codefendant will not be reviewed, in the absence of any showing of prejudice. *Krens v. State* 294

27. In construing instructions, all that is said in the entire charge on any question should be construed together. *Reed v. State* 509

28. Refusal to instruct, "If any witness for the state has wilfully testified falsely as to any material fact in the case, you are at liberty to disregard the entire testimony of such witness, unless corroborated by other evidence," *held* error. *Barber v. State* 543

29. An instruction that disagreement of witnesses in minor points does not necessarily militate against the candor of any of them, approved. *Barber v. State*..... 543

Jury.

30. The guaranty of the constitution (art. I, sec. 11) that in criminal prosecutions the accused shall have the right of trial by an impartial jury cannot be limited by the legislature. *Lucas v. State*..... 11

31. Under sec. 468 of the criminal code one is not competent as a juror who has an opinion as to the guilt or innocence of the accused, unless he says on oath that he feels able, notwithstanding such opinion, to render an impartial verdict, and it must affirmatively appear from the whole evidence, upon a fair examination, that he is impartial. *Lucas v. State*..... 11

Review.

32. The defendant in a criminal trial is not prejudiced by the denial of a continuance on the ground of absence of material witnesses, if the matters to be proved by the absent witnesses are established by other witnesses and not controverted by the state. *Lucas v. State*..... 11

33. Misconduct of the county attorney in the argument of a case will work a reversal, where it is reasonably apparent that such misconduct worked prejudice to the defendant. *Powers v. State*..... 226

34. It is error for the judge to absent himself from the court room during the argument of a case, unless by consent of the parties. *Powers v. State*..... 226

35. Commenting on the refusal of a married woman to testify in a trial for adultery, *held* prejudicial error. *Powers v. State* 226

Criminal Law—*Concluded.*

Venue.

36. Under sec. 11, art. I of the constitution, one charged with crime is entitled to a change of venue, where there is such prejudice in the county against him or such a firm conviction of his guilt that there is well-founded reason to believe he cannot obtain a fair trial therein. *Lucas v. State* 11

37. The determination of the trial court on an application for change of venue will not be disturbed, unless it appears from the record that its conclusion is wrong. *Lucas v. State* 11

38. A motion for a change of venue is addressed to the discretion of the court. *Sweet v. State*..... 263

39. Showing on motion for change of venue, *held* to support a denial of the motion. *Sweet v. State*..... 263

Verdict.

40. In criminal trials, the verdict of guilty is not supported by the evidence, unless each element of the crime charged is proved beyond a reasonable doubt. *Lucas v. State*..... 11

Damages. See BAILMENT. HUSBAND AND WIFE, 6.

Deeds.

1. As between the parties thereto, or where purchasers without notice are not affected, a deed will be corrected to cover the premises intended to be conveyed. *Austin v. Brown*.. 345
2. Where property was conveyed in consideration of support, a decree canceling the conveyance *held* proper. *McIntire v. McIntire* 397
3. In a suit by representatives of a decedent to set aside a conveyance for mental incompetency, an answer filed in a suit by the deceased in his lifetime is inadmissible. *Ames v. Ames* 473

Depositions.

1. Depositions cannot be used as evidence against parties who were not notified of the time and place of taking the same, and did not participate therein. *State v. Omaha Elevator Co*..... 654
2. Motion in district court to suppress depositions read by agreement in the county court, *held* properly denied. *Union P. R. Co. v. Thompson*..... 464

Dismissal.

1. A court has no power on dismissing a cause without prejudice to a new action, to adjudge that a new action shall not be subject to the defense of the statute of limitations. *Linton v. Cooper*..... 167

Dismissal—*Concluded.*

2. Where neither plaintiff nor his attorney are in attendance when a case is reached for trial, a judgment of dismissal should not be set aside, in the absence of a showing of due diligence. *Poggensee v. Feddern* 584

3. Evidence on motion to set aside dismissal of a case, *held* insufficient to show due diligence. *Poggensee v. Feddern*.. 584

Divorce.

1. An application to change a decree for alimony at a subsequent term must be founded on facts arising subsequently to the decree. *Chambers v. Chambers*..... 850

2. Authority to grant a divorce carries with it authority to adjust rights of the parties to personalty within the jurisdiction. *Hays v. Hays*..... 728

3. Alimony of $1,000 *held* not excessive. *Hays v. Hays*..... 728

4. When alimony cannot be placed at a lump sum without injustice, it is proper to provide a stated sum at fixed periods. *Hays v. Hays*..... 728

5. Evidence *held* to justify decree of divorce for extreme cruelty, and an order giving plaintiff custody of the children. *Hays v. Hays* 728

6. Evidence *held* to warrant order for custody of a child. *Chambers v. Chambers* 850

7. A court may at a subsequent term enter a supplemental decree as to custody of children, though the original decree contains no provision therefor. *Chambers v. Chambers*.... 850

8. On an application at a subsequent term for custody of children, the court may require the husband to pay a reasonable sum as costs to enable the wife to prosecute such application. *Chambers v. Chambers*..... 850

9. Entering a judgment for attorney's fees in favor of the attorneys by name *held* not reversible error. *Chambers v. Chambers* 850

10. Evidence *held* to sustain decree of divorce for desertion. *Bascombe v. Bascombe* 495

Easements.

1. An easement by prescription can be acquired only by adverse user for ten years, dating from the time when the cause of action from adverse user accrues. *Roe v. Howard County* 448

2. The easement of view from every part of the public street will be protected against unlawful encroachments. *Bischof v. Merchants Nat. Bank*..... 838

Ejectment.

Ejectment can be maintained only by one who has both a legal estate and a right to immediate possession. *Zion E. L. Church v. St. John's E. L. Church*..... 774

Election of Remedies.

1. One may treat title to property as having passed, and sue in assumpsit, or, on the theory that title never passed, he may sue for the wrong, but he cannot do both. *Turner v. Grimes* 412
2. The doctrine of election of remedies applies where one who has two inconsistent remedies, with knowledge of such fact, proceeds to enforce one of them. *Turner v. Grimes*..... 412
3. Where a petition is both legal and equitable in character, plaintiff may elect to proceed at law, but a mere demand for a jury to try the issues of fact is not conclusive that plaintiff has abandoned his claim to equitable relief. *Ames v. Ames* 473

Eminent Domain.

1. Where a railway company fails to make all persons interested parties to condemnation proceedings, it takes the land subject to such liens as are prior to the rights of the parties to the proceedings. *State v. Missouri P. R. Co*..... 4
2. All parties having an interest in land condemned are "owners," and a lien for taxes is an interest in land. *State v. Missouri P. R. Co*..... 4

Equity. See COURTS, 2. NEW TRIAL, 2-5.

1. Courts of equity have inherent power to refuse relief after inexcusable delay. *Hawley v. Von Lanken*..... 597
2. In applying the doctrine of laches the inquiry should be whether the adverse party has been prejudiced by the delay and whether a reasonable excuse is offered. *Hawley v. Von Lanken* 597
3. Equity will not enforce against a vendee a technical forfeiture of an executory contract for the sale of land, if the defendant offers to do equity. *Yeiser v. Portsmouth Savings Bank* 690

Estoppel.

One who participates in a meeting cannot attack its validity. *Burdick v. Sons & Daughters of Protection*..... 460

Evidence. See BILLS AND NOTES. CRIMINAL LAW, 1-13. DEEDS, 3. DISMISSAL, 3. DIVORCE, 5, 6, 10. HIGHWAYS. WILLS, 2, 4.

1. Courts will take judicial notice of changed conditions during the past 38 years as affecting values of realty, and of the probability that during that time many witnesses have

Evidence—*Concluded.*

either died or permitted ordinary events to pass from their memory. *Hawley v. Von Lanken*..... 597

2. That a physician prescribed certain drugs used in mental disorders is not competent evidence to establish the insanity of the patient. *Ames v. Ames* 473

3. The opinion of an expert witness on the question of insanity, which assumes the point in dispute, is valueless. *Ames v. Ames* 473

4. A principal is not bound by admissions of an agent, unless made during the transaction of business for the principal, and within the scope of the agency. *Shoemaker v. Commercial Union Assurance Co*..... 587

5. Evidence in an action on a contract for insurance *held* insufficient to sustain verdict. *Shoemaker v. Commercial Union Assurance Co*..... 587

6. Evidence in an action on account *held* not to support the verdict. *Blanke T. & C. Co. v. Eager*..... 562

7. Evidence *held* insufficient to show that plaintiff had consented to the erection of an obstruction constituting a nuisance. *Bischoff v. Merchants Nat. Bank*..... 838

8. Evidence *held* to show gift of a life estate in land. *Merriman v. Merriman* 222

9. Evidence in a suit to cancel deed, *held* to warrant decree for plaintiffs. *Lucas v. County Recorder*..... 351

10. Evidence in foreclosure suit *held* to sustain decree for defendants. *Rose v. Dempster Mill Mfg. Co*..... 784

11. The burden of proof of an issue does not shift. *Vertrees v. Gage County* 332

Exceptions, Bill of.

1. The certificate of the presiding judge attached to a bill of exceptions, that it contains all the evidence, is sufficient. *Sheibley v. Huse*..... 811

2. Under sec. 587*a* of the code, where there is presented what purports to be a bill of exceptions in two detached volumes, but one volume of which is certified, and the contents of this volume show that there was other material evidence, and there is nothing by which this court can determine whether the volume not certified contains the omitted evidence, the bill will be quashed. *State v. Paxton*.....214, 219

3. A bill of exceptions must be filed with and authenticated by the clerk of the trial court. *Duncan v. State*..... 764

4. A bill of exceptions will be quashed where it is not properly certified and identified. *State v. Paxton*.....214, 219

Execution.

1. The title of a purchaser at execution sale depends on final confirmation of the sale and a conveyance in pursuance thereof. *Westerfield v. So. Omaha L. & B. Ass'n*..... 53

2. The owner of real estate sold on execution retains the legal title and is entitled to the possession, rents and profits until final confirmation of the sale. *Westerfield v. So. Omaha L. & B. Ass'n*..... 53

Executors and Administrators. See APPEAL AND ERROR, 6. WITNESSES, 4, 6.

Ch. 28, laws 1891, providing when claims against an estate are barred, has no application to claims pending before its enactment. *Estate of Korff v. Bueker*..... 60

Fees. See OFFICERS.

Forcible Entry and Detainer.

To authorize an action for forcible entry and detainer, the relation of landlord and tenant must exist. *Gies v. Storz Brewing Co*..... 698

Forgery.

To charge the crime of having possession of a forged deed, with intent to utter the same as true, with intent to defraud, as defined in sec. 145 of the criminal code, the words "knowing the same to be false," or their equivalent, must appear in the information. *Newby v. State*..... 33

Habeas Corpus.

Habeas corpus will lie to relieve relator from arrest for violation of a void municipal ordinance. *In re McMonies*..... 702

Highways.

1. Where adjoining landowners place fences so as to leave space for public travel, and the public use the space as a highway for almost twenty years, it becomes a highway by dedication. *Cassidy v. Sullivan*..... 847

2. Dedication of a highway may be accepted by the public. *Cassidy v. Sullivan*..... 847

3. Acceptance of dedication of a highway by the public is shown by user. *Cassidy v. Sullivan*..... 847

4. Evidence *held* to show a highway by dedication. *Cassidy v. Sullivan*..... 847

5. Evidence *held* to show the establishment of a public road by dedication. *Eldridge v. Collins*..... 65

6. Evidence in a suit to enjoin the obstruction of a highway, *held* to justify the finding and decree. *Eldridge v. Collins*.. 65

7. Courts will not presume that commissioners to assess dam-

Highways—*Concluded.*

ages to the owners of land over which a road runs considered it necessary to divert water and discharge it in such manner as to damage plaintiff, or that plaintiff was allowed damages therefor. *Roe v. Howard County*..... 448

Homestead. See MORTGAGES, 1. WILLS, 3.

1. Where there is a mortgage on a homestead less than $2,000 in value, and it is paid from the proceeds of a new mortgage thereon, and the homestead is sold, a judgment entered while the first mortgage was in force does not become a lien on the premises. *Goble v. Brenneman*..... 309
2. An executory contract for the sale of a homestead, made by either husband or wife without joinder by the other, is void. *Lichty v. Beale*..... 770

Homicide.

1. Self-defense is extended to the defense of the person and the domicile, and an instruction correctly defining the elements of such defense is sufficient. *Reed v. State*..... 509
2. The opinions of nonexpert witnesses on the question of the insanity of one charged with a crime are entitled to little regard, unless supported by facts. *Reed v. State*..... 509
3. An instruction that, if deceased and accused were engaged in a scuffle, and while so engaged a revolver was accidently discharged killing deceased, defendant was not guilty, *held* as favorable to defendant as the evidence warranted. *Reed v. State* 509
4. Where the court on his own motion has correctly instructed on all the issues, it is not error to refuse instructions requested by defendant. *Reed v. State*..... 509
5. Where, by a supplemental motion for a new trial, the competency of a juror on account of bodily infirmity is put in issue and determined, the finding will not be set aside on appeal, unless clearly wrong. *Reed v. State*..... 509

Husband and Wife.

1. A husband may fix in good faith a domicile, and it is the duty of the wife to live with him there. *Price v. Price*.... 552
2. A husband must support his wife, and, when without just cause he fails to do so, she may enforce reasonable maintenance, unless by abandonment or otherwise she has forfeited her right thereto. *Price v. Price*..... 552
3. To defeat a wife's claim for support on the ground of abandonment, it must be established by cogent proof. *Price v. Price* 552
4. Evidence in a suit for maintenance *held* not to establish abandonment of the husband. *Price v. Price*..... 552

Husband and Wife—*Concluded.*

5. In an action by a wife for the alienation of the affections of her husband, evidence of the earning capacity and financial condition of the husband is admissible. *Harvey v. Harvey*.. 557

6. In an action for alienation of husband's affection, $3,000 damages *held* not excessive. *Harvey v. Harvey*..... 557

7. The contract of a married woman can only be enforced against the separate estate which she possesses at the date of the contract. *Parratt v. Hartsuff*..... 706

8. The husband or wife cannot, while living together and in joint possession of real estate, acquire title one against the other by prescription. *McPherson v. McPherson*..... 830

9. Husband and wife are presumed to occupy premises in subordination to the title under which possession was taken. *McPherson v. McPherson*..... 830

10. Where a husband claiming title to land under a void tax deed quitclaimed to his wife and they jointly occupied the land, the husband thereafter buying the patent title, but not asserting title in hostility to his wife until the statute had run in her favor, *held* that the wife acquired title by adverse possession. *McPherson v. McPherson* 830

Indictment and Information. See FORGERY.

Injunction. See COURTS, 5. NUISANCE, 1, 3. TRADE MARKS AND TRADE NAMES. WATERS, 1.

1. The district court can vacate an order of injunction after the term, when the cause upon which it was granted has been removed. *Lowe v. Prospect Hill Cemetery Ass'n*..... 85

2. Jurisdiction to vacate an order of injunction does not rest on the statutory provisions for vacating judgments after the term. *Lowe v. Prospect Hill Cemetery Ass'n*..... 85

3. Relief against an injunction may be given in a summary proceeding on motion to vacate where the facts are undisputed. *Lowe v. Prospect Hill Cemetery Ass'n*..... 85

4. Where, in an action to enjoin defendants from using certain land for burial purposes, it is determined that such land is not a part of an established cemetery, a resolution of the city council that such ground is a part of the cemetery affords no basis for a vacation of the injunction. *Lowe v. Prospect Hill Cemetery Ass'n*..... 85

5. Evidence in a proceeding to vacate an injunction, *held* to show no such change in conditions since the rendition of the original decree as would justify the vacation of the injunction. *Lowe v. Prospect Hill Cemetery Ass'n*..... 85

6. A question determined in an action in which a perpetual

Injunction—*Concluded.*

injunction is allowed cannot be relitigated on a motion to vacate the injunction. *Lowe v. Prospect Hill Cemetery Ass'n* 85

7. Where a defendant seeks the vacation of a perpetual injunction, the burden is on him to show that the threatened injury has been overcome. *Lowe v. Prospect Hill Cemetery Ass'n* 85

8. Injunction will not lie where there is an adequate remedy at law. *Mohat v. Hutt*..... 732

9. Where a party protests against the erection of a nuisance to the party about to erect it, and the latter disregards the protest, he cannot complain because the former delayed ten days in bringing suit to restrain the nuisance. *Bischof v. Merchants Nat. Bank*..... 838

Insane Persons. See CRIMINAL LAW, 14-19. EVIDENCE, 2, 3.

Instructions. See APPEAL AND ERROR, 14-18. BANKS AND BANKING, 4. BASTARDY. CONTRACTS, 6. CRIMINAL LAW, 20-29. HOMICIDE, 1, 3, 4. INTOXICATING LIQUORS, 6. MASTER AND SERVANT, 9. MUNICIPAL CORPORATIONS, 4. TRIAL, 3-6.

Insurance.

1. Where a member of a beneficial association agrees to be bound by subsequently enacted by-laws, such contract will be upheld when the by-laws are reasonable and legally enacted. *Lange v. Royal Highlanders*..... 188

2. A by-law providing for the forfeiture of a benefit certificate when death is occasioned by suicide *held* reasonable. *Lange v. Royal Highlanders*..... 188

3. A by-law of a beneficial association providing for a forfeiture will be strictly construed, and, if passed in contravention of the statute governing such associations, will be held void. *Lange v. Royal Highlanders*..... 188

4. Where the exercise of corporate power has been regulated by statute, the corporation cannot change the mode of the exercise of this power. *Lange v. Royal Highlanders*..... 188

5. Under sec. 91, ch. 43, Comp. St. 1903, a fraternal-beneficial association must have a representative form of government, which requires that directors or other officers who manage its affairs shall be chosen by the membership thereof. *Lange v. Royal Highlanders*..... 188

6. An attack on an illegal by-law of a beneficial association is not a collateral attack on the right of the society to do business. *Lange v. Royal Highlanders*.....188, 196

7. Where a fraternal-beneficial association has not complied

Insurance—*Concluded.*

with the provisions of sec. 1, ch. 43, laws 1897, and adopted a representative form of government, its governing body is without power to adopt a by-law changing the terms of a beneficial certificate theretofore issued. *Lange v. Royal Highlanders* 196

8. Suicide will not defeat recovery on a beneficial certificate not procured with the intention of committing suicide, unless the contract so provides in express terms. *Lange v. Royal Highlanders* 196
9. An insurance policy on the life of one 14 years of age, not to be in force until the insured is 15 years of age and is examined, and the examination approved, *held* valid. *Security M. L. Ins. Co. v. Miller*..... 257
10. In an action on a life insurance policy, *held* that a medical examination was waived. *Security M. L. Ins. Co. v. Miller*.. 257
11. Under sec. 110, ch. 43, Comp. St. 1903, the auditor is not authorized to issue a certificate of organization to a society whose name so resembles a name already in use as to mislead the public. *Knights M. O. W. v. Searle*..... 285
12. Where the name of a beneficial insurance company contains a descriptive word by which the society is known, a proposed new company cannot incorporate that word as the characteristic word in its name. *Knights M. O. W. v. Searle* 285
13. It is for the jury to determine whether an injury to the hand constitutes a total loss of the hand within the meaning of a by-law of a beneficial association. *Beber v. Brotherhood of R. T.*..... 183
14. Where plaintiff pleads payment of an insurance premium, and the court instructs the jury that such payment must be proved, the requirement is not satisfied by evidence tending to establish a waiver or postponement of time of payment. *Shoemaker v. Commercial Union Assurance Co*..... 587
15. The mere delivery by an agent of an insurance policy, in the execution of which he did not participate, *held* not to show authority to modify the contract. *Shackleford & Dickey v. Indemnity Fire Ins. Co*..... 680

Intoxicating Liquors. See COUNTIES AND COUNTY OFFICERS, 2.

1. Where an applicant for a liquor license shows *prima facie* that the signers of his petition are qualified, a finding thereon in his favor will not be disturbed. *In re MacRae*.. 757
2. Where a minor purchases liquor for another, who sent him to buy it, it is not a sale to a minor under sec. 8, ch. 50, Comp. St. *In re MacRae*..... 757

Intoxicating Liquors—*Concluded.*

3. Where an applicant for a liquor license is charged before the licensing board with having sold liquor on Sunday, and the evidence is conflicting, a finding in his favor will not be reversed. *In re MacRae*..... 757
4. Where the evidence shows that an applicant for a liquor license so screened the windows and doors of his place of business as to obstruct the view, *held* the licensing board should have refused him a license. *In re MacRae*..... 757
5. The board of fire and police commissioners of a metropolitan city may, for good reason, refuse a license to sell liquors, though no protest be made. *In re Jorgensen*..... 401
6. In an action for damages from the sale of liquors, it is not necessary that the liquors furnished by defendant be the sole or even principle cause of an injury to plaintiff, and to so instruct is erroneous. *Wiese v. Gerndorf*..... 826

Irrigation. See WATERS.

Judgment. See INJUNCTION, 6.

1. In a divorce suit, a decree of a court of a sister state, whose laws authorize it, decreeing title to lands in Nebraska, *held* conclusive in this state. *Fall v. Fall*..... 104
2. Where the courts of a sister state having jurisdiction of the parties, and of their equitable rights in property owned by one or both, by its decree determines those rights, such decree must, under the provisions of the federal constitution, be given full faith and credit by the courts of this state. *Fall v. Fall*..... 104
3. If no action is taken by one decreed to convey land, the decree can in no manner affect title to land in another state. *Fall v. Fall*..... 120
4. A decree to convey land in another state acts only on the person and cannot affect the title to the land. *Fall v. Fall*.. 120
5. The clause of the constitution of the United States requiring full faith and credit to be given in each state to judicial proceedings of other states does not prevent an inquiry as to jurisdiction of the subject matter. *Fall v. Fall*..... 120
6. A judgment on the merits is a bar to a subsequent action on the same demand as to any admissible matter offered or which might have been offered. *Lowe v. Prospect Hill Cemetery Ass'n*..... 85
7. A question once decided becomes the law of the case, binding on the parties and those claiming under them in all stages of the litigation. *Lowe v. Prospect Hill Cemetery Ass'n*..... 85

Judgment—*Concluded.*

8. The defense of *res judicata* is only available as to matters in issue and determined. *Douglas v. Smith*..... 169

9. A decree fixing the status of a series of notes secured by a single mortgage is binding on one who, in a subsequent suit, attempts to avoid its effect. *Preston v. Morsman*..... 358

10. A proceeding cannot be maintained to vacate a decree of foreclosure, based on an allegation of fact which was in issue and determined in the trial which resulted in such decree. *City of Lincoln v. Lincoln Street R. Co*..... 523

11. A judgment by a district court in conformity with a permissible interpretation of an ambiguous mandate from the supreme court is not subject to collateral attack. *Clark v. Parks* 676

12. One claiming title to personalty under attachment sale in justice's court must show notice to defendants of the pendency of the action and that the property claimed was attached therein. *Beckwith v. Dierks L. & C. Co*..... 349

13. Where there is personal service, a default confesses every material allegation well pleaded. *Parratt v. Hartsuff*..... 706

14. In an action to recover money, in case of default, judgment can be rendered for no greater sum than is indorsed on the summons. *Elmen v. Chicago, B. & Q. R. Co*..... 37

15. Where several defendants are sued as conspirators in committing a tort, actionable if committed by one alone, a judgment against one or more may be sustained without proof of a conspiracy among all. *Harvey v. Harvey*..... 557

16. Sec. 482 of the code, which provides when a judgment shall become dormant, does not apply to a decree for the sale of specific real property. *Medland v. Van Etten*..... 794

17. Where a district judge adjourned a term of court, the day to which court was adjourned, being the first day the judge was present and the court ready to transact business, was the first day of the term, as applicable to the lien of judgments rendered during the term. *Parrott v. Wolcott*..... 530

Judicial Sales. See APPEAL AND ERROR, 7.

1. Where, in foreclosure of a tax certificate, an issue as to the description of a lot is determined, a sale will not be disturbed upon motion to set it aside for irregularity in the description. *Medland v. Van Etten*..... 794

2. Objections to appraisal of property sold at judicial sale should be filed before the sale, except where fraud is charged. *Lewis v. Morearty* 316

3. Where no injury is shown, a judicial sale will not be set

Judicial Sales—*Concluded.*

aside for irregularity in selecting a tenant as one of the appraisers. *Brockway v. Pomeroy*..... 704

4. Where there is no evidence of fraud, the appraised value of real estate under an order of sale will not be set aside. *Medland v. Van Etten* 794

5. One holding the equity of redemption cannot complain that the purchaser at a judicial sale, who bids as trustee for plaintiff, is not such trustee. *Medland v. Van Etten*..... 794

6. The viewing of property by the judge who decided the motion to set aside a sale thereof, *held* not error. *Medland v. Van Etten* 794

7. Notice of judicial sale of lands must be published for 30 days next preceding the sale and must appear in all regular issues of the paper. *Stevens v. Naylor*..... 325

8. One who purchases at a judicial sale, without questioning the validity or priority of an apparent lien, deducted by the appraisers, is estopped from so doing. *State v. Several Parcels of Land*..... 497

9. During appeal from confirmation of a judicial sale, the supreme court has jurisdiction to entertain an application to redeem. *Thesing v. Westergren*..... 387

Jurisdiction. See COURTS.

Jury. See CRIMINAL LAW, 30, 31.

1. Where the regular panel of the petit jury has been discharged, it is not error, in a criminal case, to summon a new jury under sec. 664 of the code. *Barber v. State*..... 543

2. Ch. 176, laws 1905, which prescribes the method of selecting juries in counties having less than 30,000 inhabitants, is invalid because impossible of execution. *State v. Reneau*.. 1

3. Where, after conviction, the competency of a juror is challenged because he has been convicted of a felony, the fact that counsel for the accused failed to examine as to his incompetency in that respect is a waiver of such objection. *Reed v. State*..... 509

Justice of the Peace.

1. In an action of forcible entry and detainer a specious claim of ownership will not oust the jurisdiction of a justice. *Clark v. Tukey Land Co*..... 326

2. The taking of fees by a justice for services for which no fee is allowed is actionable under sec. 34, ch. 28, Comp. St. *Leese v. Courier P. & P. Co*..... 391

Landlord and Tenant.

1. Parol agreement between landlord and tenant, *held* a valid lease for four months. *Schickedantz v. Rincker*..... 312
2. Notice served by a landlord, after making a parol agreement for a new lease for four months, notifying a tenant that, if he held over his first term, he would be taken as occupying for another year, *held* inoperative to set aside such parol lease. *Schickedantz v. Rincker*..... 312
3. A tenant cannot, while occupying premises, deny his landlord's title thereto. *Gies v. Storz Brewing Co*..... 698
4. Where a tenant from month to month makes default, after such default he is a tenant at sufferance, and such tenancy may be terminated by the statutory notice. *Clark v. Tukey Land Co*..... 326
5. The statute of limitations of an action of detainer against a tenant at sufferance begins to run on the termination of the tenancy. *Clark v. Tukey Land Co*..... 326

Libel and Slander.

1. Where the publication of a libel actionable *per se* is admitted and justification pleaded, it is error to instruct that the burden is on plaintiff to establish the allegations of his petition. *Sheibley v. Fales*..... 823
2. A newspaper article, charging a person with originating and circulating false and malicious reports attacking the character of another, is libelous *per se*. *Sheibley v. Huse*..... 811
3. Under sec. 131 of the code it is sufficient to allege that the libelous matter was published of and concerning plaintiff. *Sheibley v. Huse* 811
4. That a libel was copied from another paper is not a defense, but it may be shown in mitigation of damages. *Sheibley v. Huse* 811
5. The publisher of a newspaper may expose false and defamatory matter circulated concerning a candidate for public office, but he may not libel another. *Sheibley v. Huse*... 811
6. The title of a published article is a part thereof, and must be considered in determining whether the publication is libelous. *Sheibley v. Nelson*..... 804
7. Charging a person with being a blackmailer is libelous *per se*. *Sheibley v. Nelson*..... 804

Limitation of Actions. See LANDLORD AND TENANT, 5.

Where, in an action to recover money, the summons bore no indorsement of the amount for which judgment would be taken if defendant failed to appear, the issuance and service

Limitation of Actions—*Concluded.*

of an alias summons, *held* not to relate back to the time of the original summons, so as to stop the running of the statute of limitations. *Elmen v. Chicago, B. & Q. R. Co.*..... 37

Literary Property.

1. The unauthorized use of the literary production of another furnishes no ground for the recovery of damages except through the federal copyright laws. *State v. State Journal Co.* 275
2. The unauthorized use of literary property of the state, not protected by copyright, and its manufacture into books will not give the state title to the books, so as to enable it to enjoin their sale, or entitle it to an accounting. *State v. State Journal Co*..... 275

Mandamus.

1. Where an ordinance of a village required the proprietors of billiard-halls to pay an occupation tax on the second Tuesday of May, a tender on the first Tuesday in May *held* premature, and an application for a writ of mandamus to compel its acceptance properly denied. *State v. McMonies*..... 443
2. Mandamus will be denied, when it would be unavailing if allowed. *State v. Cronin*..... 738
3. Mandamus will not lie to correct errors of the county board of equalization as to the liability of property to taxation. *State v. Drexel* 751
4. Title to public office cannot be tried by mandamus. *State v. Hyland* 767
5. Mandamus will lie to compel an officer whose term has expired to deliver to the person who holds the certificate of election and has qualified the books, papers, money and other property of the office. *State v. Hyland*..... 767

Married Women. See HUSBAND AND WIFE.

Master and Servant.

1. A servant, though an infant, who from experience is presumed to know the hazards of a business, is not entitled to the same notice of dangers as one inexperienced. *Central Granaries Co. v. Ault*..... 249
2. The master is required to provide only such facilities for the operation of machinery as are in general use. *Central Granaries Co. v. Ault*..... 249
3. Whether a master is negligent in providing a place for a servant to labor is a question for the jury. *Central Granaries Co. v. Ault*..... 249
4. The test of negligence in methods, machinery and appli-

Master and Servant—*Concluded.*

ances is the usage of business. *Central Granaries Co. v. Ault* 255

5. That a chain on which plaintiff and other workmen were pulling broke, *held* not conclusive that it was not adapted to the purpose for which furnished. *Standard D. & D. Co. v. Harris* 480

6. While it is the duty of an employer to see that appliances are reasonably safe, this does not relieve the employee from the exercise of his own judgment in their use. *Standard D. & D. Co. v. Harris*..... 480

7. The master does not guarantee the safety of his servants, but is bound simply to use reasonable care in providing a safe place to work. *Cudahy Packing Co. v. Wesolowski*.... 786

8. Where one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is dangerous and from which injury results, is not contributory negligence. *Cudahy Packing Co. v. Wesolowski* 786

9. Instruction as to duty of master *held* not prejudicial. *Cudahy Packing Co. v. Wesolowski* 786

Mechanics' Liens.

In a proceeding to foreclose a lien for materials, a general denial *held* sufficient to put the materialman on proof of the amount due for materials furnished. *Lee v. Storz Brewing Co.* 212

Monopolies. See STATUTES, 5, 9.

1. In a suit under ch. 162, laws 1905, *held* under the facts that the presumption obtains that the suit, brought soon after the act took effect, to enjoin a continuation of the association and restrain the defendants from carrying out its purposes, was necessary and proper for the enforcement of the act. *State v. Omaha Elevator Co*.....654

2. In a suit under ch. 162, laws 1905, relating to monopolies, to restrain violations of the act, *held* that the court is not authorized, in the first instance, to declare a forfeiture of the charters of corporations found to have violated the act. *State v. Omaha Elevator Co*..... 654

Mortgages. See APPEAL AND ERROR, 8.

1. A promise by a creditor to a husband, who is sole debtor and owner of the title of a mortgaged homestead, will not discharge the lien because not concurred in by the wife. *McKinley-Lanning L. & T. Co. v. Johnson*..... 50

2. Under sec. 677 of the code prior to the amendment of 1903,

Mortgages—*Concluded.*

the purchaser at a foreclosure sale could not recover for the use of the premises where the order of confirmation was superseded pending an appeal. *Westerfield v. So. Omaha L. & B. Ass'n* 58

3. The word "defendant" in sec. 477*b* of the code, relating to a stay of an order of sale, applies to the mortgagor or his privies and not to cross-petitioners seeking to enforce a lien or to parties having a contingent interest in the property. *Clark v. Pahl* 161

4. A mortgagee may, by agreement, fix the rights of his assignees to the mortgage security. *Preston v. Morsman* 358

5. The grantee of a purchaser at foreclosure sale *held* not liable to a junior incumbrancer for rents and profits, where such junior incumbrancer does not seek to redeem. *City of Lincoln v. Lincoln Street R. Co* 523

6. A sheriff's deed takes precedence from date of its record of all unrecorded conveyances and incumbrances by the mortgagor, of which the purchaser had no actual notice. *Getchell v. Roberts* 688

7. The better practice is not to decree a deficiency until after the report of the foreclosure sale. *Parratt v. Hartsuff* 706

8. The cause of action for a deficiency judgment does not accrue until the coming in of the report of the sale. *Parratt v. Hartsuff* 706

9. Application for a deficiency judgment may be heard on motion after report of the sale. *Parratt v. Hartsuff* 706

10. Evidence in a foreclosure suit *held* to support the decree. *Cathers v. Linton* 420

11. Evidence in a foreclosure suit *held* to sustain decree for defendant. *Gilman v. Crossman* 696

Municipal Corporations. See MANDAMUS, 1.

1. Under the Omaha charter of 1893 (Comp. St., ch. 12*a*, sec. 118) a cause of action on an award of damages for property taken for a street did not accrue until a lapse of time sufficient for the creation of a special fund to pay such damages. *Rogers v. City of Omaha* 318

2. In an action against a city for damages for injuries, where the petition does not show the filing of a notice complying with sec. 36, art. I, ch. 13*a*, Comp. St. 1889, it is demurrable. *Nothdurft v. City of Lincoln* 76

3. Evidence in an action against a city for personal injuries, *held* sufficient to sustain a finding of constructive notice of the defective condition of a bridge. *City of Central City v. Marquis* 233

Municipal Corporations—*Concluded.*

4. In an action against a city for personal injuries resulting from a defective bridge, it is not error to instruct that actual notice to the municipality is not necessary, where the defects are such or have existed for such a length of time that they might by the exercise of ordinary diligence have been discovered and repaired. *City of Central City v. Marquis* 233
5. A city of the metropolitan class cannot petition itself for improvements in a street improvement district. *Herman v. City of Omaha*..... 489
6. The power conferred on cities of the first class to sue and be sued carries with it the power to compromise suits. *Farnham v. City of Lincoln*..... 502
7. The provisions of sec. 4, art. IX of the constitution, relating to release of taxes, do not apply to special assessments, and municipal authorities can compromise suits involving the validity of such special assessments. *Farnham v. City of Lincoln* 502
8. The law authorizing the incorporation of villages does not contemplate including in the corporate limits remote territory or agricultural lands. *State v. Clark*..... 620
9. Agricultural lands cannot be included in a village to obtain a sufficient number of residents to incorporate, without the consent of the owners. *State v. Clark*.....620
10. Evidence *held* to show less than the required number of residents within a village necessary to incorporate. *State v. Clark* 620
11. The charter of villages confers on the trustees power to regulate billiard and pool-halls, but not to suppress them. *State v. McMonies*..... 443
In re McMonies 702

New Trial.

1. A new trial will not be granted to allow newly discovered evidence on an issue established in one's favor, or on an immaterial issue. *Kidder v. Maynard*..... 246
2. A court of equity will grant a new trial, if application is made when a court of law cannot, but a court of equity will grant such relief only for newly discovered evidence, surprise or fraud, or circumstances beyond one's control. *Bankers Union of the World v. Landis*..... 625
3. Where one has not used diligence in making his defense he will be denied a new trial. *Bankers Union of the World v. Landis*..... 625

New Trial—*Concluded.*

4. In an application in equity for a new trial, plaintiff must plead and prove that he has a valid defense. *Bankers Union of the World v. Landis* 625
5. Evidence in a proceeding in equity for a new trial *held* to sustain the decree. *Bankers Union of the World v. Landis* .. 625
6. Where all the codefendants join in a motion for a new trial, which is not good as to all, the motion should be overruled. *Harvey v. Harvey* 557
7. The statement by a juror in the jury room of his knowlege of a fact not material to the issues is not misconduct requiring a new trial. *Douglas v. Smith* 169

Notice. See JUDICIAL SALES, 7. VENDOR AND PURCHASER, 4.

Nuisance.

1. Injunction will lie to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances *per se*, if their erection will work special or irreparable injury to individuals or their property. *Bangs v. Dworak* 714
2. Any permanent structure which encroaches on a public street and impedes travel is a nuisance *per se*, unless authorized by competent authority. *Bischof v. Merchants Nat. Bank* 838
3. A private person seeking to restrain a public nuisance must show special injury to himself. *Bischof v. Merchants Nat. Bank* 838
4. Where a nuisance is not permanent, and damages are not recoverable in one action, the injured party has no adequate remedy at law. *Bischof v. Merchants Nat. Bank* 838
5. A permanent nuisance is one presumed to continue indefinitely. *Bischof v. Merchants Nat. Bank* 838
6. A structure constituting a nuisance, not an inseparable part of a building, *held* not a permanent nuisance. *Bischof v. Merchants Nat. Bank* 838

Officers. See MANDAMUS, 4, 5.

1. A public officer must perform his duties for the compensation fixed by law. *Power v. Douglas County* 734
2. Where the compensation of a public officer depends on fees of his office, he must look to such source alone. *Power v. Douglas County* 734
3. The surety on the official bond of an officer is not liable for the penalty of $50 imposed by sec. 34, ch. 28, Comp. St., for exacting fees in excess of those prescribed by statute. *Eccles v. Walker* 722

Partnership.

1. The record of a certificate provided for in sec. 27, ch. 65, Comp. St., is not the only evidence by which a partnership may be established. *Houfek v. Held & Co*..... 210
2. When a parol contract of partnership to deal in land is fully performed by a sale of the land, an action for an accounting may be maintained against the partner who held title. *Norton v. Brink*..... 566
3. Evidence of a parol contract of partnership to deal in land must be clear and satisfactory. *Norton v. Brink* 566
4. A parol agreement between two persons to purchase a tract of land together, where the purchase is made by one, who pays the purchase price and takes the title, *held* not to create a partnership. *Norton v. Brink*..... 575

Payment.

While a creditor may apply a payment, where the debtor fails to do so, there is an exception to this rule where money is received from a third party whose property will be liable for the debt in case the money is not applied on the third party's liability. *Lee v. Storz Brewing Co*..... 212

Physicians and Surgeons.

1. Under sec. 580 of the code the district court has jurisdiction to review an order of the state board of health revoking the license of a physician. *Munk v. Frink*..... 172
2. A complaint filed before the state board of health to procure an order revoking the license of a physician, *held* sufficient. *Munk v. Frink*..... 172
3. An instruction in a prosecution for practicing medicine without a license directing a verdict of not guilty, *held* erroneous. *State v. Walker*..... 177

Pleading. See AGRICULTURE, 1. APPEAL AND ERROR, 2, 4. MUNICIPAL CORPORATIONS, 2.

1. A petition stating facts entitling plaintiff to both legal and equitable relief, *held* equitable. *Ames v. Ames*..... 473
2. If, after leave to file an amended petition, another petition containing no new allegations is filed, *held* proper to strike it. *Loghry v. Fillmore County*..... 158
3. A petition declaring on an appeal bond, which contains no allegation showing a breach of its conditions, is subject to demurrer. *Moriarty v. Cochran*..... 835
4. A petition in an action for libel, defective in charging a publication thereof, is cured by an answer which admits such publication. *Sheibley v. Huse*..... 811

Pleading—*Concluded.*

5. A plaintiff may plead in reply new matter not inconsistent with his petition, and contradictory to or supplementary of facts pleaded in the answer. *Mellor v. McConnell*.. 776

6. Where there is a provision in a contract exempting one from fulfilling it if a certain condition may arise, he must, when sued, plead the condition to have advantage thereof. *Omaha Feed Co. v. Rushforth*..... 340

7. Where a petition shows laches, objection may be taken by demurrer. *Hawley v. Von Lanken* 597

Principal and Agent. See EVIDENCE, 4.

Where the act of an agent is one which requires authority in writing, those dealing with him are charged with notice of that fact and of limitations in such written authority, and a contract beyond the scope of such authority is not binding on the principal. *Frahm v. Metcalf*..... 241

Process.

1. The return of an officer may be impeached by extrinsic evidence. *Goble v. Brenneman*..... 309

2. A mistake in the date of the return and answer days of a summons may be amended by the district court. *Barker Co. v. Central West I. Co*..... 43

Quieting Title. See COURTS, 4.

Where a purchaser of land has procured a deed by false representations, the grantor may rescind, and have the deed canceled, and the title quieted in him. *Reynolds v. Rickgauer* 163

Quo Warranto.

Quo warranto will lie to determine the validity of an order incorporating a village. *State v. Clark*..... 620

Rape. See CRIMINAL LAW, 1, 2.

Real Estate Agents.

1. A written contract between the owner of land and a broker for its sale does not contemplate an exchange thereof. *Lucas v. County Recorder*..... 351

2. Allowance of $300 as commission for services in exchange of properties, *held* compensatory. *Lucas v. County Recorder* 351

Receivers.

The appointment of a receiver is an ancillary proceeding. *City of Lincoln v. Lincoln T. Co*..... 619

Reference.

1. Where there has been a fair hearing before a referee, and there is no evidence of accident or surprise preventing a full investigation of the facts, nor that further evidence can be furnished to change the result, a motion to recommit will be denied. *State v. Omaha Elevator Co*..... 654
2. The report of a referee will not be set aside if the evidence supports his findings. *State v. Omaha Elevator Co*..... 654

Sales.

1. Where one by reason of false representations agrees to extend credit to a buyer, he may, on discovering the fraud, repudiate the agreement. *Omaha Feed Co v. Rushforth*... 340
2. Where one repudiates an agreement to extend credit because of false representations, and the agreement is so changed as to require cash on delivery, it becomes a new agreement, requiring no new consideration. *Omaha Feed Co. v. Rushforth* 340

Schools and School Districts.

1. The records of school district meetings should be construed so as to give effect to the intention of the voters. *Quisenberry v. School District*..... 47
2. Resolutions of a school district *held* to vest the officers of the district with power to sell a schoolhouse and build a new one on a designated site. *Quisenberry v. School District*... 47

Sheriffs and Constables.

1. Sec. 42, ch. 28, Comp. St., not only limits the salary of the sheriff, but requires him to look to the income of his office for such salary and the salaries of his deputies. *Power v. Douglas County* 734
2. Persons summoned by the sheriff under his authority to summon the power of the county are not deputies, and the sheriff is not liable to them for compensation. *Power v. Douglas County* 734

Specific Performance.

In a suit to enforce performance of a contract to sell real estate which it is claimed was entered into on behalf of a corporation by its officers in their individual names, it is incumbent on plaintiff to show that the corporation authorized or ratified the contract. *Parmele v. Heenan & Finlen*..... 535

Statute of Frauds.

1. Equity protects a parol gift of land, if accompanied by possession and the donee has made valuable improvements. *Merriman v. Merriman*..... 222
2. The authority of an agent for the sale of real estate, if not

Statute of Frauds—*Concluded.*
in writing, is void under the statute of frauds. *Frahm v. Metcalf* 241

3. A writing that neither names the parties to a contract nor describes them is not sufficient under the statute of frauds. *Frahm v. Metcalf*..... 241

4. An oral contract for the sale of goods for a price exceeding $50 is void, unless in compliance with the statute of frauds, Comp. St., ch. 32, sec. 9. *Orr v. Hall*..... 548

5. A contract within the statute of frauds will be enforced when executed. *Norton v. Brink*..... 566

6. A parol agreement between two persons to purchase land, *held* void under the statute of frauds. *Norton v. Brink*.... 575

Statutes. See BRIDGES, 2.

1. All statutes upon the same general subject are regarded as a part of one system, and later statutes are supplementary of those preceding them. *State v. Omaha Elevator Co.* 637

2. Statutes *in pari materia* should be construed together. *State v. Omaha Elevator Co*.....637

3. In construing a statute, the intention of the lawmakers will prevail over the literal sense of the words used. *State v. Drexel* 614

4. Unless it appears from its terms that an act applying to a certain class of persons is meant to cover all regulations affecting them, a later general act will not be held to except the persons embraced in the former act from the operation of the later. *State v. Omaha Elevator Co*..... 637

5. The anti-trust act of 1897 (laws 1897, ch. 79) was repealed by implication by the act of 1905 (laws 1905, ch. 162), except as to the first section thereof defining trusts. *State v. Omaha Elevator Co*..... 637

6. Where the legislature has passed two statutes upon the same subject, if the later does not embrace a material portion of the first, it will not repeal so much of the first as is not included within its scope. *State v. Omaha Elevator Co.* 637

7. Repeals by implication are not favored, and, where two acts are repugnant, they should be so construed, if possible, that the latter may not repeal the former. *City of Central City v. Marquis*..... 233

8. Where a statute is incomplete the court cannot supply defects to give validity to the act. *State v. Reneau*..... 1

Statutes—*Concluded.*

9. Ch. 114, laws 1887, and ch. 80, laws 1897, prohibiting combinations by grain dealers to fix the price of grain, do not except such dealers from the operation of the general anti-trust acts of 1897 (laws 1897, ch. 79), and 1905 (laws 1905, ch. 162), applying to all illegal combinations to fix prices. *State v. Omaha Elevator Co*..... 637

Taxation. See MANDAMUS, 3.

1. The remedy, in the first instance, of one who conceives that his property is excessively valued for taxation is to apply to the board of equalization to correct the error. *Hall v. Moore* 693
2. On appeal from a board of equalization, the cause must be tried on the questions raised by the complaint before that tribunal. *Nebraska Telephone Co. v. Hall County*..... 405
3. Manner to determine the value of the tangible property of express, telephone or telegraph companies for taxation pointed out. *Nebraska Telephone Co. v. Hall County*..... 405
4. The general control given the state board of equalization and assessment over county assessors, *held* not to include the power to direct them in valuations, nor in determining whether property is assessable. *State v. Drexel*..... 751
5. The county board of equalization has jurisdiction to determine the liability to taxation of property which the law requires the county authorities to assess. *State v. Drexel*.. 751
6. The failure of the county clerk in making up the tax list to prepare a statement of lands on which taxes are delinquent does not void the lien of the taxes. *State v. Missouri P. R. Co*..... 4
7. Public parks of a city of the metropolitan class are not taxable property under subd. III, sec. 110, ch. 12*a*, Comp. St. *Herman v. City of Omaha*..... 489
8. Taxes levied and assessed for general revenue purposes constitute a lien superior to the lien of a tax sale certificate issued prior thereto. *Medland v. Van Etten*..... 794
9. A railway company in condemning land is not the agent of the state, making the land exempt from taxation. *State v. Missouri P. R. Co*..... 4
10. One against whose property a default decree on constructive service has been rendered in a tax suit under Comp. St., ch. 77, art. IX, is not entitled, as a matter of right, to have the same opened after the term, either under sec. 82 of the code, or the general equity powers of the court. *State v. Several Parcels of Land*..... 538

Taxation—*Concluded.*

11. Under Comp. St., ch. 77, art. IX, one may have the validity of a tax determined before he is deprived of his property; but he may be required to wait until confirmation is applied for to litigate that question. *State v. Several Parcels of Land* 538

12. Evidence *held* sufficient to show a designation by the county board of a newspaper to publish the notice required under the "Scavenger" act, Comp. St., ch. 77, art. IX, sec. 7. *State v. Cronin* 738

13. In a tax suit under the "Scavenger" act, the disregarding of an unauthorized appearance of an attorney purporting to answer for all defendants in default, *held* proper. *Several Tracts of Land v. State*..... 633

14. A mortgagee is not a necessary party to an action against the owner of the fee to foreclose a tax lien. *Hall v. Moore* 693

15. An appeal from a decision of the county board of equalization lies to the district court, and not to the state board of equalization. *State v. Drexel* 751

16. Where the description of property ordered sold by decree of foreclosure is such that its identity can be ascertained, the decree will not be vacated for uncertainty. *City of Lincoln v. Lincoln Street R. Co*..... 523

17. Sec. 3, art. IX of the constitution, granting the owner of real estate sold for taxes a right of redemption for two years from the date of sale is self-executing, and a junior lienholder is not entitled to a decree ordering the sale of such property without the right of redemption. *City of Lincoln v. Lincoln Street R. Co*..... 523

Trade Marks and Trade Names.

1. Where a mercantile company has acquired a trade name in a locality, it is entitled to protection against a competitor using a name of similar import. *Regent Shoe Mfg. Co. v. Haaker* 426

2. It is an infringement on a trade name to use in the same locality and in the same line of business a name so similar that customers will not distinguish between them. *Regent Shoe Mfg. Co. v. Haaker*..... 426

3. To constitute an infringement on a trade name, the two places of business must be in actual competition with each other. *Regent Shoe Mfg. Co. v. Haaker*..... 426

4. When the owner of a trade mark seeks to restrain a competitor from injuring his property by false representations

Trade Marks and Trade Names—*Concluded.*
to the public, he must not in his trade mark or advertisements be guilty of misleading representations. *Regent Shoe Mfg. Co. v. Haaker*..... 426

5. A mere exaggerated puff of one's goods is not such a false representation as will prevent relief in equity. *Regent Shoe Mfg. Co. v. Haaker*..... 426

6. Evidence in a suit to enjoin the use of a trade name, *held* not sufficient to fully sustain the decree. *Regent Shoe Mfg. Co. v. Haaker*..... 426

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. An assignment of causes for trial, not fixing a day certain, is subject to change as may be required to meet contingencies. *Poggensee v. Feddern*..... 584

2. In the absence of special circumstances, one cannot complain because his case is advanced on the assignment of cases for trial by a continuance of a case preceding it. *Poggensee v. Feddern*..... 584

3. A party has a right to have his theory of the case submitted to the jury, when there is competent evidence to support it. *Colgrove v. Pickett*..... 440

4. An instruction which authorizes a verdict upon a finding of certain facts, *held* erroneous, unless it includes every essential fact. *Standard D. & D. Co. v. Harris*..... 480

5. An instruction, complete in itself, which omits an essential fact is not cured by other instructions. *Standard D. & D. Co. v. Harris*..... 480

6. Where evidence is received without objection on a question not in issue, the trial court cannot exclude it by an instruction, nor can the party on appeal urge that it was not an issue. *Union P. R. Co. v. Thompson*..... 464

7. Where a case is tried on an agreed stipulation of facts and oral and written evidence, the jury should consider all the evidence, though part of it may be inconsistent with the statement of facts. *Hunt v. Van Burg*..... 304

8. Though evidence is uncontradicted, if diverse inferences of fact are warranted thereby, the fact is for determination by the jury. *Allen v. American B. S. Co*..... 423

9. In an action for damages for an injury, where the undisputed evidence is that plaintiff's negligence was the proximate cause of the injury, the question is one of law for the court. *Chicago, B. & Q. R. Co. v. Schwanenfeldt*..... 80

10. A nonexpert witness having given conversations and described the conduct of a grantor alleged to be mentally in-

Trial—*Concluded.*

competent, it is for the court to draw inferences therefrom. *Ames v. Ames* 473

11. Action of the trial court in the examination of a hostile witness, *held* not prejudicial. *Hackney v. Raymond Bros. Clarke Co.* 793

Trusts. See MONOPOLIES.

1. To create a fiduciary relation by contract, consent of the trustee to assume that relation must be expressed in the contract, or derived therefrom by necessary implication. *State v. State Journal Co* 275

2. Merely reposing confidence in another does not of itself create a trust, nor make a trustee of the one in whom confidence is reposed. *State v. State Journal Co* 275

3. Where two persons agree orally to purchase land, and one pays the price and takes title, no resulting trust arises in favor of the one who contributes nothing. *Norton v. Brink* 575

Vendor and Purchaser. See EQUITY, 3.

1. To conclude a binding contract for the sale of land, the offer must be accepted substantially as made. *Frahm v. Metcalf* .. 241

2. A contract affecting real estate is not void for uncertainty, if the land can be identified with the aid of parol evidence. *Hiskett v. Bozarth* 70

3. A sale is a transmutation of property or a right from one person to another, in consideration of a sum of money, as opposed to barters, exchanges and gifts. *Lucas v. County Recorder* 351

4. Possession of land is notice of equities; and a purchaser of land from one not in possession takes it subject to the equitable right of one in possession thereof. *Fall v. Fall* .. 104

Venue. See CRIMINAL LAW, 36-39.

In a prosecution for contempt the judge may refuse to transfer the cause to another judge, unless it appears that a fair trial cannot be had or some other statutory ground exists. *Back v. State* 603

Waters.

1. Where an appropriator of water does not beneficially use the amount diverted, and there is enough water, if economically used, to supply him and certain riparian owners, he cannot enjoin the use of the water by such owners. *Court House Rock Irrigation Co. v. Willard* 408

Waters—*Concluded.*

2. Where water flows in a well-defined course, its flow cannot be interfered with by a landowner nor by public authorities to the injury of neighboring proprietors. *Roe v. Howard County* 448

Wills.

1. Where lands were devised to a daughter with a limitation over contingent upon her dying within a term of years without surviving issue, and the daughter died within the term leaving such issue, the latter succeeded to the estate in fee simple. *Yoesel v. Rieger*..... 180
2. Evidence *held* to establish testamentary capacity. *In re Estate of Nelson* 298
3. Under sec. 17, ch. 36, Comp. St., a homestead, the separate property of the wife, at her death, vests in her surviving husband for life, and the wife cannot dispose of the life estate by will. *Brichacek v. Brichacek* 417
4. Parol evidence is admissible to explain a latent ambiguity in a will. *St. James Orphan Asylum v. Shelby*..... 591

Witnesses.

1. Where a defendant in a criminal case offers himself as a witness, he is subject to the same rules of cross-examination as other witnesses. *Nickolizack v. State*..... 27
2. A witness cannot be cross-examined as to any fact collateral to the issues, for the purpose of contradicting him by other evidence if he should deny it. *Nickolizack v. State*..... 27
3. Where the state's attorney, on cross-examination of the accused asks him if he has not been guilty of a similar offense, he is concluded by the answer. *Nickolizack v. State*..... 27
4. In a suit by a married woman against the representatives of a deceased person for specific performance of a contract with the deceased, the husband of the plaintiff is a competent witness in her behalf. *Hiskett v. Bozarth*..... 70
5. An expert witness will not be permitted to usurp the functions of the jury. *City of Central City v. Marquis*..... 233
6. A party is not prohibited from testifying by sec. 329 of the code, unless his adversary represents a deceased person in the issue being tried. *North & Co. v. Angelo*..... 381