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The following opinion on rehearing was filed November 22, 1906. *Former opinion, as modified, adhered to:*

1. **Final Order:** REVIEW. An order to be final and reviewable on error or appeal must dispose of the merits of the case, and leave nothing for the further judicial determination of the court.
2. **Corporation as Administrator:** COLLATERAL ATTACK. The appointment of a corporation as executor or administrator is not contemplated or authorized by the laws of this state, but whether such appointment can be collaterally attacked is not determined.
3. **Former opinion herein,** *ante,* **p. 411, as modified, adhered to.**

BARNES, J.

This case is before us on a rehearing. Our former opinion, *ante,* p. 411, contains a full statement of the facts involved in this controversy. It was there held that the order or judgment appealed from was not final in its nature, and the appeal was therefore dismissed. It was further held that an order appointing a corporation administrator of the estate of the deceased plaintiff was void.

It is now contended by the appellant that the order in question was a final order or judgment, such as would support an appeal to this court. For a proper understanding of this question, it is necessary to state that at the May term, 1904, of the district court for Douglas county an order of revivor of a judgment, which had theretofore been rendered, was made in this case. It appears that the order not only revived the judgment, but also assumed to set aside and nullify a judgment of the district court in another and independent case, wherein the original attorney for the plaintiff in this action obtained part payment of the judgment herein by attachment and garnishment proceedings. After the order of revivor was made, an execution was issued and levied on the property of the appellee. Thereupon, at the October term, 1904, of said court, an application was made by the appellee, under the provisions of section 602 of the code, to, first, recall the execution issued on said order of revivor; second, to indefinitely postpone

the sale of the property levied on thereunder; third, to modify the order of revivor, and that all of that portion of said order be vacated which in any manner affected the validity of the proceedings of the court in the other or independent case, known as docket 59, No. 103; and, fourth, for an accounting in the case, and for an order that the judgment so revived be declared fully paid, canceled and ordered satisfied of record. It appears from the transcript that, upon a full hearing of this application, the motion was sustained as to the first, second and third grounds thereof. This is the order appealed from, and as to this order and its final effect upon the judgment there has been no final determination in the district court. It appears that the judgment stands revived and the attempted appeal is from the order opening up the question of the effect of the garnishment proceedings and that question has not been finally determined by the district court. We think the universal rule of this court is that, where there is anything left for the district court to determine in order to dispose of the substantial rights of the parties to an action, its judgments or orders are not final, and an appeal therefrom to this court cannot be maintained. In *Merle & Heaney Mfg. Co. v. Wallace,* 48 Neb. 886, it was said: "There cannot be a review of an order of the district court opening a judgment and permitting an answer to be filed in the case until there has been a further order or judgment in its nature final."

In *Smith v. Sahler,* 1 Neb. 310, it was held: "When no further action of the court is required to dispose of the cause pending, it is final; when the cause is retained for further action, as in this case, it is interlocutory."

In *Bertram v. Sherman,* 46 Neb. 713, it is said: "An order to be final and reviewable on error or appeal must dispose of the merits of the case and leave nothing for the further judicial determination of the court."

In *Rose v. Dempster Mill Mfg. Co.,* 69 Neb. 27, it was held: "An order setting aside a judgment or decree, fixing the time for filing pleadings and setting the cause down

for a new trial, under section 602 of the code, is not a final order from which appeal or error will lie before trial and a final judgment."

Practically the same rule has been announced in *School District v. Cooper,* 29 Neb. 433; *Clark v. Fitch,* 32 Neb. 511; *Browne v. Edwards & McCullough Lumber Co.,* 44 Neb. 316, and other cases decided by this court, too numerous to mention. It seems clear that the case at bar falls within this rule. As the record stands, it appears that an order of revivor has been entered in the district court for Douglas county; that so much of the order as purported to fix the amount due on the judgment sought to be revived has been set aside; and the defendant therein, the appellee herein, has been allowed to file an answer or showing, and thus contest the amount due thereon. That question is still pending and undetermined in the district court for Douglas county, and, until that matter has been disposed of and the rights of the parties finally judicially determined, appeal or error cannot be prosecuted to this court. We are aware that cases may be found which seem to announce a contrary doctrine, but upon an examination it will be seen that they are cases where the order complained of had the force and effect of finally disposing of the matters in litigation. For instance, it is settled beyond question that error or appeal may be prosecuted from an order of the district court, refusing to set aside its former judgment and allow a defendant to answer and defend, because such an order or judgment disposes of the case and finally determines the rights of the defendant. So while, as stated, there is a seeming conflict in the authorities, yet as a matter of fact they can easily be distinguished and no conflict really exists.

As to the second question above stated, it was said by the learned commissioner who wrote our former opinion that its decision was unnecessary for a proper disposition of the case, but, as a guide to the manner of conducting the future litigation, it was stated that, under the laws of this state, a corporation cannot be appointed administrator of

the estate of a deceased person, and that such an appointment can be collaterally assailed. We are satisfied with the former conclusion that the appointment of a corporation as executor or administrator is not contemplated or authorized by the laws of this state, but we find that the question whether such appointment can be collaterally attacked was not raised and insisted upon in the lower court, and we do not find it necessary to determine that question.

As stated above, the record in this case shows that the original judgment stands revived, but the question of the amount due thereon is still pending in the district court for Douglas county for final adjudication. When that matter has been judicially determined, and all the questions in litigation are thus disposed of, the appellant, if dissatisfied with the amount found due on the judgment, or if it shall be determined that the judgment has been in fact paid, may then appeal to this court and have all of the questions contained in the record reviewed, including the order now complained of.

For the foregoing reasons, we approve of the conclusion announced in our former opinion, and that opinion, as modified herein, is adhered to.

JUDGMENT ACCORDINGLY.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. CHARLES L. BUEL ET AL.

FILED APRIL 18, 1906. No. 14,291.

Watercourses: OBSTRUCTION: LIABILITY. In the absence of negligence in the construction of its roadbed across a natural watercourse, a railroad company is not liable for damages done to property on adjacent lands by reason of a flood so unprecedented that it amounts in law to an act of God.

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

M. A. Lowe, W. F. Evans, Billingsley & Greene and *R. H. Hagelin,* for plaintiff in error.

Charles O. Whedon, contra.

EPPERSON, C.

Defendants in error, who were the plaintiffs in the lower court, brought this action for the recovery of alleged damages to their crops and other property caused by the diverting of the water of Salt creek, a natural watercourse. In 1893 the railroad company constructed the railroad running in a northerly and southerly direction through the east half of section 32, township 8, range 6, in Lancaster county, Nebraska, upon which land were two forks of Salt creek, about 80 rods apart, over each of which the railroad was constructed. In the first instance the railroad, which is about 25 feet above the surface of the surrounding land, crossed each branch of the creek upon trestle work, leaving ample space for the flow of the creek. In 1898 the railroad filled the channel of the north branch of the creek with dirt, constructing an embankment of earth under its track in the place of the trestle work, leaving space sufficient only for the Missouri Pacific Railroad, which runs under the defendant's railway near the original north branch of the creek. At the same time defendants constructed an artificial drain, diverting the waters of the north branch of the creek south, along the west line of the defendant's railroad, to the south branch of the creek, and filled in with dirt a part of the space formerly occupied by trestle work where the railroad crossed the south branch of the creek, leaving a space of about 90 feet for the escape of the waters of both branches. In July, 1902, there was a heavy rainfall, increasing the waters of the creek to such an extent that the crops and other property of the plaintiffs west

of the defendant's railroad in said section 32 were damaged. A trial was had, resulting in a verdict and judgment in favor of the plaintiffs, for the reversal of which the defendant prosecutes proceedings in error.

Upon the trial, evidence was introduced showing that the heavy rainfall which occasioned the damage was unprecedented, and so unusual that it could not have been reasonably contemplated at the time of the construction of the embankment complained of. Defendant, among other things, alleged that the damages sustained by the plaintiffs were caused by the act of God, and that the embankments were necessarily constructed and improved by the defendant, and with the greatest care, skill and foresight. The court instructed the jury: "It is contended by the defendant that the rainfall at the time of the flood complained of was of so unusual and unprecedented a nature as to amount to an act of God. In this connection you are instructed that, if you find from the evidence that, at the time complained of, there occurred a rainfall so unprecedented in amount and duration in that vicinity, and of such a nature as not to be within reasonable expectation, and if you further find that the defendant's action in no way contributed to the overflow, then, in such case, this would amount to a defense and the plaintiffs could not recover. On the other hand, even though you should find that the rainfall, at the time, was so unprecedented in its nature and duration as not to be reasonably expected, so that it would amount to an act of God, yet, if you should also find that any damages which the plaintiffs suffered were also in part caused by the acts of the defendant in obstructing the flow of the water, then, in such case, this would not amount to a defense."

It is a general rule that the owner of land, through which there is a running stream, may improve his property, with due regard, however, to the rights of his neighbor, and that he is liable to the adjoining landowner only for damages resulting by the diversion of the ordinary waters, or such flood waters as might reasonably be an-

ticipated; and, having constructed such improvements without carelessness, he is not liable for any damages which might be occasioned by extraordinary floods, such as could not reasonably have been contemplated. In other words, the owner of such improvements would not be liable for damages resulting by an act of God, even though necessary improvements made by him were partly responsible for the damage. It follows that, if the defendant in the case at bar constructed the embankment complained of, and the changes made thereby were sufficient to permit the ordinary flow of Salt creek and such flood waters as usually occur, without damage to the plaintiff's property, and the construction and improvement of such embankment were made without carelessness, the defendant would not be liable to the plaintiffs for damages caused by an unprecedented flood, or such as the defendant could not have reasonably contemplated at the time of making the changes, even though the embankment thus erected contributed to the damage complained of. 1 Thompson, Negligence (2d. ed.), sec 72. In *Pittsburg, Ft. W. & C. R. Co. v. Gilleland,* 56 Pa. St. 445, it is said:

"There is no liability on a railroad company for not constructing a culvert so as to pass *extraordinary* floods."

In *Omaha & R. V. R. Co. v. Brown,* 14 Neb. 173, COBB, J., speaking for this court said:

"It was the duty of the railway company, in planning and constructing its bridge, to bring to their execution the engineering knowledge and skill ordinarily practiced in such works, and to see the practical application of such knowledge and skill to the work in hand, among other things, so as to allow of the passage of water and ice, such as is known to pass in the stream annually, or which may reasonably be expected to occur occasionally, without regard to such great or sudden overflows as are often designated as acts of God." This court adhered to that rule in *Omaha & R. V. R. Co. v. Brown,* 16 Neb. 166, and cited it with approval in *McCleneghan v. Omaha & R. V. R. Co.,* 25 Neb. 530.

In reaching this conclusion, we are mindful of the law which holds one liable who, by his negligence, contributes to the act of God in damaging the property of another. But, according to the rule above cited, a railroad company is not guilty of carelessness, if in the construction of its roadbed it sufficiently provides for the passage of such flood waters only as might reasonably be contemplated at the time of such construction. The law requires no more. The objectionable instruction is not a correct proposition of law, because it permitted the jury to assess to the defendant damages inflicted by the elements, if they found that the defendant's lawful acts contributed thereto. The defendant was not liable, unless by its carelessness it aided in bringing about the damage.

Many errors are assigned and argued by the plaintiff in error, which we do not consider necessary to review at this time. The error in the giving of the above instruction was prejudicial, and we recommend that the judgment of the lower court be reversed, and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons appearing in the above opinion, the judgment of the lower court is reversed and the cause remanded for a new trial.

REVERSED.

WABASH RAILROAD COMPANY v. MORTON R. SHARPE.

FILED APRIL 18, 1906. No. 14,274.

1. **Carriers: FREIGHT, INSURERS OF DELIVERY.** The general rule is that a common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God or the public enemy.

2. ———: ———. A common carrier is responsible for injury to goods

where the goods were exposed to injury by the carrier's inexcusable detention, and the carrier cannot in such case plead the act of God as a defense.

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

F. M. Hall, George S. Grover and *C. C. Marlay,* for plaintiff in error.

Mockett & Polk and *O. B. Polk, contra.*

DUFFIE, C.

May 19, 1903, Morton R. Sharpe delivered to the Wabash Railroad Company, at Lafayette, Ind., 5,400 pounds of household goods for shipment to Lincoln, Nebraska. The goods were shipped from Lafayette on the 21st of May, were delayed in Hannibal, Missouri, 24 hours for rebilling, and were delivered to the Missouri Pacific Railway Company, a connecting carrier at Kansas City, on May 26, and held in the yards by the latter company until May 31, where they were practically destroyed by the great flood occurring at that time. The goods finally reached Lincoln June 18, but in such condition as to be useless. This action was brought to recover the value of said goods, and judgment went in favor of the plaintiff for $865.80, from which judgment the company has taken error to this court.

It is claimed by the railroad company that they shipped the goods within a reasonable time, and delivered them to the connecting carrier at Kansas City in good condition. This may all be true, and still it is no answer to the plaintiff's claim. The common carrier of goods insures their safe delivery to the consignee against loss or injury from whatever cause arising, except only the act of God and the public enemy. The delivery of the goods to the carrier in good order, and their arrival at the place of destination in bad order, makes a *prima facie* case against the carrier. It then devolves upon it to show that the loss or damage

was caused by the act of God or some other cause which would exempt it from liability. It may be conceded in the present case that the flood by which the goods were practically destroyed was an act of God, which, under ordinary circumstances, would relieve the company; but we think the rule supported by the weight of authority is that a common carrier is responsible for injury to goods by act of God, if he departs from his line of duty, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God which would not otherwise have produced the injury. Or, as stated in one of the cases, a common carrier is responsible for injury to goods by act of God where the goods were exposed to injury by the carrier's inexcusable detention. *Read v. Spaulding*, 30 N. Y. 630; *Michaels v. New York C. R. Co.*, 30 N. Y. 564. In *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44, it is said:

"And it is held that if the carrier wrongfully delay the transportation of goods, and because of the delay they are injured by a flood, the carrier would be liable," citing *Lowe v. Moss*, 12 Ill. 477, and *Read v. Spaulding, supra.* In the absence of any showing to the contrary, it would seem that a delay of five days or more in the yards at Kansas City was an unreasonable delay, but there is evidence that the officer in charge of the United States weather bureau at Kansas City on May 26, the date that these goods were delivered there, notified the public and all railroad companies of the coming flood and warned them to guard their property in the lowlands, and that this notice continued from day to day until the flood had reached its height. Under this condition of affairs, there can be no doubt of the negligence of the carrier and that this negligence exposed the goods to the injury and damage that they afterwards suffered by the act of God.

It is further claimed by the defendant company that in consideration of a reduced rate given to the plaintiff he released it from all liability in excess of $5 a hundred pounds. Our constitution prohibits a common carrier

from limiting its common law liability, and in *Chicago, B. & Q. R. Co. v. Gardiner,* 51 Neb. 70, it was held: "A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this state, though valid in the state where made, when such attempted restriction of liability is illegal and contrary to the public policy of this state." This rule has been followed in numerous cases since and has become the settled law of the state.

The judgment, in our opinion, is clearly right, and we recommend its affirmance.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

AFFA C. SEELEY, EXECUTRIX, APPELLANT, V. JOHN T. RITCHEY ET AL., APPELLEES.*

FILED APRIL 18, 1906. No. 14,539.

1. **Fraudulent Conveyances: CONVEYANCE TO SON: PRESUMPTIONS.** The rule is well settled in this state that a conveyance made by a father to his son, or other near relative, is presumptively fraudulent as to existing creditors.
2. **Evidence** examined, and *held* not to overcome the presumption of fraud arising from a conveyance by a father to his son.

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

Jesse L. Root, for appellant.

Matthew Gering and *C. S. Polk, contra.*

DUFFIE, C.

This is the fifth time this case has been before us, the question determined being found in 68 Neb. 120, 127, 129,

* Rehearing allowed. See opinion, p. 433, *post.*

and 73 Neb. 164. The action is a creditor's bill to set aside a deed made by John T. Ritchey to his son Edward Ritchey, and subject the land conveyed thereby to the payment of a deficiency judgment entered against John T. Ritchey on the foreclosure of a mortgage in 1897. The land involved is a farm of 240 acres situated in Cass county, and the expressed consideration in the deed from the father to his son is $9,600. This conveyance was made March 15, 1897. The mortgage foreclosure took place in Hayes county, and, while the deficiency judgment was ordered November 23, 1897, it was not entered of record by the clerk until April 16, 1900. A copy of the order directing the deficiency judgment was filed in the office of the clerk of the district court for Cass county in February, 1898, and the transcript of the judgment, after the same had been journalized, was filed in Cass county on August 2, 1900. The debt secured by the mortgage was contracted by John T. Ritchey and one James H. Goodrich in 1894, and the mortgage covered 800 acres of land in Hayes county, the joint property of the mortgagors. In March, 1896, John T. Ritchey conveyed to Goodrich his interest in the Hayes county land, the deed containing an agreement on the part of Goodrich to assume and pay the mortgage debt. The summons in the foreclosure proceeding was served on Ritchey in Cass county on September 11, 1895, by leaving a copy at his usual place of residence. The dates material to be borne in mind are the date of the mortgage, May 12, 1894; the commencement of foreclosure proceedings and service on Ritchey, September 11, 1895; the order for a deficiency judgment, made November 23, 1897; the transcript of the judgment filed in Cass county, September 14, 1900, after the same had been journalized, and the conveyance of John T. Ritchey to his son, March 15, 1897.

It will be seen from the above that the debt was contracted previous to the conveyance sought to be set aside, and the law is well settled that where the indebtedness was contracted before the execution of the deed, and the

grantor and grantee are near relatives, the burden of proof is on the grantee to establish the *bona fides* of the transaction. *Schott v. Machamer,* 54 Neb. 514; *Kirchman v. Kratky,* 51 Neb. 191; *Carson v. Stevens,* 40 Neb. 112. It is conceded by the appellees that the conveyance from the father to his son throws upon them the burden of establishing the good faith of the transaction. The only parties who could know with absolute certainty whether the transfer was *bona fide,* or was made for the purpose of hindering and defrauding the creditors of John T. Ritchey, the father, are the two parties to the transaction, and it is principally from a consideration of their evidence and the undisputed facts in the case that the decree of the district court must stand or fall.

Another transaction between the father and son has some bearing upon this case. One Franklin Walters died seized of 120 acres of land in the neighborhood of the Ritchey farm. Walters had mortgaged this land to Smith. Subsequent to Walters' death, Smith foreclosed his mortgage making the unknown heirs of Walters defendants. Walters died without issue, and his widow, in October, 1892, sold her interest in the land to John T. Ritchey who took possession thereof. Smith either neglected or refused to sell under his decree of forclosure and after Ritchey purchased the widow's interest he tried to buy the Smith decree. Smith would not sell, and Ritchey induced the clerk of the district court to issue an order of sale on the decree. The land was sold and bid in in the name of Edward Ritchey. Smith resisted confirmation of the sale and, in order to get him to withdraw his objections, John T. Ritchey paid him $75. Smith testified that Ritchey told him he desired to have the land sold under the decree of foreclosure "to clear the title from any of the heirs—to cut out the heirs." At this time Ritchey was administrator of the estate of Franklin Walters, and in that capacity he receipted to the sheriff for a small surplus which the land brought in excess of the decree. After obtaining his sheriff's deed to this land, Edward

Ritchey took possession and occupied it, either by himself or his tenants, for three or four years and until a sale to one Henry Bornemeier, made in 1897. It is claimed by defendants and appellees that the proceeds of the sale of this farm were paid by Edward to his father on the purchase of the 240-acre farm, the conveyance of which is assailed in this action, while the plaintiff and appellant claims that this farm, while standing in the name of Edward Ritchey, was purchased and paid for by his father, he being the real owner thereof, and, of right, entitled to the purchase money. The evidence is undisputed that Bornemeier paid $5,000 for the 120 acres sold him. John T. and Edward Ritchey testified that of this sum $4,000 was paid by Edward to his father on the purchase of the 240-acre farm by Edward. The evidence is undisputed that Bornemeier paid $1,000 in cash, assumed a mortgage for $1,300 then on the land, and gave three notes for the balance of the purchase price, two for $1,000 each and one for $708.

Another matter connected with this 120-acre tract might be mentioned. Both John T. and Edward Ritchey testified on the trial that Edward paid $1,500 of his own money on the purchase at sheriff's sale and that John T. Ritchey furnished the balance of the money, making a gift of that amount to his son. Edward was at that time a minor, and his brother William testifies that he had no money. When asked where he got the money, Edward testified that he had $500 in Waters' Bank in Elmwood, and $700 or $800 in Murty's Bank in Weeping Water; that he drew this money out a short time before the sheriff's sale in 1893 and, with other cash he had around home, delivered it to his father who bid for him at the sale. The bankers were produced upon the trial, and testified that Edward Ritchey never had any money to his credit in either bank. Phoebe Ritchey, the mother of Edward, testified that his father made him a gift of the Walters land, and to our minds the evidence is quite conclusive that what money he furnished for the purchase of this land, if any, did not come from the sources claimed.

It is urged with much force by the defendants that John T. Ritchey could have no intent to defraud creditors in transferring the 240-acre farm to his son, inasmuch as there were no debts outstanding against him, except that held by the plaintiff; that, when he conveyed his interest in the mortgaged premises to Goodrich, Goodrich assumed and agreed to pay the whole mortgage debt and that he supposed the debt had been provided for in this way. It is further urged that he had no knowledge of the foreclosure proceedings and no knowledge that a deficiency judgment had been entered against him, until the transcript was filed in Cass county in 1900. It is true that personal service of the summons was not had on him, but service made by a copy left at his usual place of residence. His wife testified that she placed the copy left for him in the organ and forgot to give it to him until about six weeks after the same had been left by the sheriff. The return shows service on September 11, 1895, and if the copy was given him by his wife within six weeks from that date he must have had knowledge of the suit sometime in October, 1895. Again, the deed from Ritchey to Goodrich bears date March 16, 1896, showing that it was made while the suit was pending, and it is improbable that a pending suit against the land would not be considered and discussed between the parties at the time the transfer was made.

A further matter for consideration in determining the intent with which the conveyance by John T. Ritchey to his son was made is the question of Goodrich's financial ability to carry out his agreement to pay this mortgage. It is true that John T. Ritchey testifies that Goodrich was solvent and able to meet the obligation, but the fact remained that, as a part consideration for the transfer, Goodrich executed his note to Ritchey for $650, payable November 15, 1896, and that this note has never been paid, and Goodrich, at some time after the giving of this note, took the benefit of the bankruptcy act. If John T. Ritchey could not collect from Goodrich his note for $650, he had

little cause to believe that the plaintiff could collect a claim against him of $2,600 or more. Both John T. and Edward Ritchey testified that the land was paid for in the following manner:

Proceeds of sale to Bornemeier, Walters land	$4,000
Check on Bank of Murdock given by son	150
Cash	150
2,500 bushels of corn at 22 to 25 cents a bushel, estimated	575
1,800 to 1,900 bushels of wheat at 50 cents a bushel, estimated	925
Car load hogs	700
Note	800
Mortgage assumed	2,300
	$9,600

We have already seen that Bornemeier did not pay cash for the 120 acres of land, and neither John T. nor Edward Ritchey pretended that the notes given Edward by Bornemeier were turned over by him to his father. The cashier of the Bank of Murdock was produced, and his testimony given to the effect that Edward never drew a check for $150 on that bank, and there are other matters making it improbable that other items going to make up the consideration were in fact paid. That the testimony of these two men has been flatly contradicted by undisputed facts, and by evidence which cannot be controverted or doubted, is too apparent from the record. The burden was on them to show the good faith of the transaction. We regret to say that a careful examination of the record convinces us that their testimony is unreliable in many particulars. The truth is easily told. The more critically a truthful statement is examined and questioned, the more apparent its truthfulness appears. Witnesses may be, and often are, honestly mistaken in matters attending a transaction, but it is not probable that so many circumstances could be misunderstood or forgotten by truthful witnesses as is apparent here. Our reading of

the record convinces us that a decree should have been entered for the plaintiff below subjecting the land to the payment of her judgment.

We therefore recommend that the decree of the district court be reversed and the cause remanded, with directions to enter a decree in accordance with the prayer of the petition.

ALBERT and JACKSON, CC., concur.

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

JUDGMENT ACCORDINGLY.

The following opinion on rehearing was filed February 21, 1907. *Judgment of reversal vacated and judgment of district court affirmed:*

1. **Fraudulent Conveyances:** EVIDENCE: BURDEN OF PROOF. A transfer of real estate by a debtor to a near relative is looked upon with suspicion, and the burden of proving the *bona fides* of the transaction is upon the grantee. Where, however, the evidence shows that the transfer is made when the grantor's indebtedness is only a small amount compared with the value of his property, and his indebtedness is secured by a mortgage on other land apparently worth nearly, if not quite, as much as the indebtedness, the suspicion is removed, and, a consideration being proved, the *bona fides* of the transaction is established.

2. **Evidence.** Upon a rehearing of this case, it is *held* that the evidence is sufficient to overcome the presumption of fraud in the transfer from the father to the son, and the former opinion, *ante*, p. 427, is overruled.

EPPERSON, C.

This case is before the court on rehearing. A history of the litigation relating to the question now considered may be found in 68 Neb. 120, and *ante*, p. 427. The transaction upon which the action is founded may be restated

in part as follows: In May, 1894, the defendant John T. Ritchey and one Goodrich gave a mortgage to James E. Seeley on 800 acres of land in Hayes county, Nebraska, to secure an indebtedness of $2,650. The Hayes county land was under the control and management of Goodrich who used it as a ranch. September 11, 1895, foreclosure proceedings were begun, and the Hayes county land sold June 21, 1897. On November 23, 1897, a deficiency judgment was announced against the mortgagors for $2,050, and made of record April 16, 1900. For several years prior to the making of the mortgage John T. Ritchey owned and resided upon 240 acres of land in Cass county. On March 15, 1897, he conveyed this land to his son, the defendant Edward Ritchey. This transfer plaintiff alleges was without consideration and made for the purpose of defrauding the creditors of John T. Ritchey.

A former transaction between the father and the son bears directly upon the question of a consideration for the alleged fraudulent conveyance. John T. Ritchey had an interest in the Walters 120 acres which he conveyed to Edward in 1893. This transfer plaintiff also claims was fraudulent. Other interests in this land were transferred to Edward by virtue of a judicial sale. The legal effect of the transaction between the defendants through which the title to the Walters land was placed in the son has considerable bearing on the case. If the Walters land was in fact the property of the son, then the good faith of the transfer assailed is supported in so far as a partial consideration therefor is established. This we consider as having a bearing on the question in the case. It must be borne in mind that the title to this land was placed in the son in June, 1893, and at that time there was no unsecured indebtedness owing by the father. It is true, proceedings were had which resulted in a judicial sale of the Walters land; that the son was the purchaser at such sale; and that such sale was brought about through the efforts of the father.

Edward Ritchey's title to the Walters land is not as-

sailed by the pleadings in this case. Nevertheless, plaintiff contends that the Walters land was in fact the property of the father held in trust by the son; that the selling price thereof belonged, by reason of the sale, to the father, and therefore it did not constitute any part of the consideration for the transfer assailed. Plaintiff's decedent did not become a creditor of John T. Ritchey until after the conveyance of the Walters land. There is no presumption of fraud against the defendants which would cast upon them the burden of proving good faith in that transaction. The burden is upon a creditor, when the debt was contracted subsequent to a conveyance assailed as fraudulent, to prove that such was made and accepted with a fraudulent purpose. *Jansen v. Lewis,* 52 Neb. 556; *Jayne v. Hymer,* 66 Neb. 785. In *Lavigne v. Tobin,* 52 Neb. 686, it was held: "Except as against existing creditors and as against those to whom he contemplates becoming indebted, one may gratuitously convey his property to his wife." This rule as to the burden of proving the title to the Walters land will apply, even though it was not assailed by the pleadings. We do not overlook the apparently false testimony of both defendants herein. It does appear that their testimony that $1,500 was paid by the son to the father in cash as a partial consideration for the transfer of the Walters land is false. But, believing this testimony false, we must conclude that the entire value of the Walters land was a gift from the father to the son. There is no inference deducible that the transfer was in fraud of subsequent creditors. It is immaterial as far as the disposition of this case is concerned to determine whether or not all or only a part of the value of the Walters land was a gift from the father to the son. It is contended by plaintiff that the Walters land was purchased by John T. Ritchey, who caused the title to be placed in the name of Edward Ritchey for the purpose of defrauding the heirs of Walters, deceased. The evidence is insufficient to support this contention. It is not shown that the price paid at

the judicial sale was inadequate, nor is it shown that the heirs in any way suffered loss by reason of the sale of the Walters land in the manner in which it was sold. There is another fact having some weight in sustaining the defendants' contention that the Walters land was a gift to the son. Edward's elder brother received from his parents 66 acres of valuable land as a gift when he reached his majority, so that the transaction here assailed, which we are called upon to denounce as suspicious, seems to be but an equitable advancement by the father to his son. We cannot conclude from the evidence that the Walters land was held in trust by Edward Ritchey for his father.

It being therefore established that Edward Ritchey was the owner of 120 acres of land, which he either farmed or rented for four years prior to the purchase of the land here in controversy, we conclude that his financial circumstances were such that he could finance the transaction now alleged by plaintiff to be fraudulent. In 1897 the Walters land was sold by Edward Ritchey who received therefor in cash and notes maturing within a few months thereafter the sum of $4,000, which defendants testified was paid to John T. Ritchey as a part of the consideration for the land in controversy. This plaintiff contends was impossible because only $1,000 was paid in cash. We entertain no doubt but that the purchase price of the Walters land was delivered to the elder Ritchey. Taking plaintiff's theory that the Walters land was in fact the property of John T. Ritchey, she is not in a position to deny that the elder Ritchey received the money. Therefore, so far as the $4,000 of the consideration paid to the father for the 240 acres of land is concerned, the question must be determined upon the *bona fides* of Edward's title to the Walters land, which, as above shown, is established. Neither can there be any contention as to the mortgage of $2,600 assumed by Edward, nor as to the note for $800 given by him to his father as a part of the consideration. We can say nothing as to the balance of the consideration

paid in addition to what has been said by this court in the opinion reported *ante,* p. 427.

In March, 1896, John T. Ritchey sold his one-half interest in the Hayes county ranch to Goodrich, who assumed the mortgage, and, even though it was known to Ritchey in March, 1897, that Goodrich was insolvent, it does not appear that John T. Ritchey had any reason to apprehend that a deficiency judgment for any considerable sum would be rendered against him in the future. The Hayes county ranch consisted of 800 acres, which John T. Ritchey considered worth $4,000. The mortgage indebtedness amounted to $2,650, with interest. The appraised value of the land was $2,000. From this it does not seem that, on the date of the deed herein assailed as fraudulent, John T. Ritchey could have penetrated the future and foreseen a deficiency judgment of $2,050. His subsequent conduct does not indicate that he was attempting to conceal his property from his creditors. After the sale of the land to his son, he continued in the grain and stock business, and built an elevator which he sold for $1,750 two years later. As to one small item going to make up the consideration alleged to have been paid for the land, we are convinced that the testimony given by the defendants was false. This was an item of only $150. It does not appear reasonable that parties would wilfully falsify as to this. It was shown that a larger sum had been withdrawn from the bank by Edward Ritchey at about the time of this transfer, and it seems to us that such a mistake is one that might be made by honest men. The land in question was farmed by the son. He controlled it as owner, employed help and in all respects exercised dominion over his property. Later, upon a sale, he fixed the purchase price, refusing to accept the advice of his father as to the amount.

We are mindful of the rule "that, where the indebtedness was contracted before the execution of the deed, and the grantor and grantee are near relatives, the burden of proof is on the grantee to establish the *bona fides* of the

transaction." Such transfers are looked upon with suspicion, and, were the rule otherwise, a debtor in failing circumstances could easily defraud his creditors by conveying his property to the members of his family. Where, however, the transfer is made when the grantor's indebtedness is only a small amount compared with the value of his property, and where the debt in controversy is secured by a mortgage on a large tract of land apparently worth nearly, if not quite, as much as the indebtedness, the suspicion is removed and, a consideration being proved, the good faith of the transfer is established. Were we to follow our own inclination, instead of the law as we believe it to be, we would incline toward a reversal of the judgment of the district court because of the apparently false testimony of the defendants herein, but we believe the defendants have established the *bona fides* of the transfer assailed, not through their false testimony, but in spite of it. That the Walters land was a gift from the father to the son was sworn to by the mother and the brother, and their testimony was unimpeached. The dates of the several transfers were proved by record evidence. The $800 note given as a part of the consideration for the deed was corroborated by the production of the note. Disinterested witnesses testified as to the acts of ownership exercised by Edward Ritchey. In view of the father's financial circumstances at the time of the transfer, we are convinced that the defendants have successfully overcome the presumption which the law imposes upon them. In *Hill v. Schmuch,* 65 Neb. 173, it is held:

"A conveyance without fraudulent intent, by a solvent man, of lands to his wife or child, is presumed to have been made in consideration of his moral obligation for the support and maintenance of the grantee, and in the absence of evidence of a contrary intent, will be held to have transferred the entire title, both legal and equitable; so that the transaction cannot be successfully assailed by subsequent creditors of the grantor."

In the case at bar, we find that the financial circumstan-

ces of the father, especially at the time the Walters land was transferred to the son, were such that the rule above announced clearly governs. And further, as to the transfer assailed, there is no need of presuming that the consideration rested upon a moral obligation, an actual consideration being established. The judgment of the learned trial court was for the defendants, but this judgment was reversed, *ante,* p. 427. The conclusion there announced seems to be based upon the unreliability of defendant's testimony. As above shown, we cannot agree to the conclusion reached.

We therefore recommend that the former opinion be overruled and the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated and the judgment of the district court affirmed.

JUDGMENT ACCORDINGLY.

DANIEL M. FIKE V. MALINDA OTT.

FILED APRIL 18, 1906. No. 14,244.

1. Petition examined, and *held* good as against a general demurrer.
2. Harmless Error. Assignments based on rulings upon objections to an amendment to the reply and motions directed against the amended reply examined, and *held* that the errors, if any, in such rulings were cured by the charge to the jury.
3. ———. The reception of incompetent evidence tending to establish a certain fact is not prejudicial error when the same fact is conclusively established by competent evidence.
4. The doctrine of the ostensible authority of an agent can be invoked only by such as have dealt with the agent on the faith of his ostensible authority.

5. **Money Loaned: PURCHASE OF LAND: EQUITIES.** The mere fact that one loans money to another, wherewith to buy land, gives the lender no equity in the land bought therewith by the borrower.

6. **Evidence** examined, and *held* sufficient to sustain the verdict.

7. **A transcript** on appeal should contain the judgment or order sought to be reversed or modified, and, in addition thereto, only such matters as may be necessary to present the rulings sought to be reviewed; to include other matters is a useless expense and tends to obscure the real questions presented.

ERROR to the district court for Thayer county: LESLIE G. HURD, JUDGE. *Affirmed.*

V. O. Rewick and *Robert J. Sloan,* for plaintiff in error.

M. S. Gray and *Charles H. Sloan, contra.*

ALBERT, C.

In her petition the plaintiff alleges that she, with her husband, Jenores T. Ott, executed their warranty deed to certain real estate to one John C. Saylor for an agreed price of $320, which deed was placed in the hands of one Whipkey to be delivered to Saylor upon his payment to Whipkey of $320 for plaintiff; that Saylor paid the money and got the deed; that about March 5 the defendant fraudulently induced Whipkey to pay the money to him without authority from plaintiff and fraudulently converted it to his own use and benefit, and though often demanded refused repayment, and prays judgment for $320, and interest at 7 per cent. from March 5, 1901. Demurrer to the petition was overruled, whereupon the defendant answered, denying each of the allegations of the petition, and as an affirmative defense alleged in substance: That, while the legal title to the land at the date of plaintiff's conveyance was in her, she held it in trust for the use of the defendant who had paid the purchase price, and that the conveyance thereof by the plaintiff's said deed to Saylor was in pursuance of an agreement between himself and the plaintiff's husband to the effect that the latter should procure a purchaser for the land and

effect a sale thereof, the proceeds to be paid to the defendant; that after the sale of the premises to Saylor the matters in difference between the plaintiff and her husband and the defendant were submitted to arbitration, that an award was duly made, and the amount awarded the plaintiff was received and accepted by her in full payment of all matters in difference, including the claim in suit. The reply, with an amendment thereto, is voluminous. It contains much that is redundant and immaterial. It was filed over the defendant's objection, and was afterwards assailed by motions, which were overruled by the court. In its charge to the jury the court very properly reduced the reply, as amended, to a single sentence by an instruction in these words: "The plaintiff in reply denies the allegations of the answer, especially the arbitration or payment to her of any proceeds, or that there ever was a settlement, or that she authorized any one to receive same for her or did receive anything for her land." The jury found for the plaintiff, and judgment went accordingly. The defendant seeks to reverse the judgment by proceedings in error instituted in April, 1905.

It is first claimed that the court erred in overruling the demurrer to the petition. The argument in this behalf is based on the omission of the plaintiff to allege that she was the owner of the land conveyed and for which the consideration which came into the defendant's hands was paid. Every material allegation of her petition stands admitted for the purposes of the demurrer. Those allegations show that the money was left with a third party for the use of the plaintiff. It was her money, and whether she had title to the land or gave value received for the money does not concern the defendant whose relation to the transaction, so far as appears from the petition, was that of a mere intermeddler, who wrongfully obtained possession of a sum of money belonging to the plaintiff.

There are assignments based on the rulings of the court permitting the plaintiff to amend her reply, and on the motions made by the defendant assailing the reply, as

amended. As before stated, the reply, as amended, contained much that was superfluous and immaterial. The objections covered by the assignments under consideration are grounded on the superfluous and immaterial matter contained in the reply, as amended, and which were eliminated, as we have seen, by the instructions of the court. On this state of the record, we are unable to see, nor has any attempt been made to point out, how the defendant was prejudiced by the rulings under consideration.

It is next contended that the court erred in admitting a copy of the conveyance mentioned in the petition in evidence over defendant's objection that it was not the best evidence, and that a sufficient foundation had not been laid for the admission of secondary evidence. It is not claimed that the defendant was prejudiced by this evidence in any way, save that by reason of the recital therein as to the amount of the consideration it tended to show the consideration actually paid by Saylor for the conveyance in question. This might have been prejudicial had there been any dispute as to the consideration named in the deed. But there was none. One of defendant's own witnesses testified to the consideration named in the deed, placing it at precisely the same sum as that shown by the copy received in evidence. It is quite clear therefore that whatever technical error there may have been in the admission of the copy in evidence it was error without prejudice.

It is also claimed that the court erred in giving the following instruction: "The jury is instructed that in Nebraska a married woman has the same right to own, control and dispose of both real and personal property as if she were single, and she is entitled to the same protection with relation thereto as are men or unmarried women." The instruction was proper in view of the evidence. Throughout the case the defense sought to bind the plaintiff by certain acts of her husband, while on the other hand she denied the authority of her husband to act for her with respect to the matter in suit. It was very proper to call the attention of the jury to the fact that, notwithstanding the

intimate relation existing between husband and wife, she had a right to control and dispose of her own property. The defendant tendered instructions whereby it was sought to cover the theory that, although the plaintiff's husband had no actual authority to make a sale of the land, adjust the matters incident to the disposition of the proceeds, and to submit the matters in difference between her and the defendant to arbitration, yet his acts in that regard were binding upon the plaintiff because she had clothed him with ostensible authority. The instructions tendered, however, omit one essential element, and that is that the defendant dealt with the plaintiff's husband on the faith of his ostensible authority. The doctrine of ostensible authority is never applied when that element is wanting, because it is grounded on estoppel and without that element there is no estoppel.

Another instruction tendered by the defendant and refused by the court is as follows: "You are further instructed that, if you find from the evidence that defendant furnished the money to pay for the said tract of land and that the said Malinda Ott or no one on her behalf paid said sum to defendant, the defendant then had an equitable interest in said land and in the proceeds of the said land sold to Mr. Saylor, and his coming into possession of said proceeds would not be fraudulent or unlawful, unless you find from the evidence that defendant did actually exercise fraud, deception or misrepresentation in order to obtain possession of said proceeds and did thereby obtain possession thereof." This instruction was properly refused. The evidence shows that the plaintiff's husband borrowed the money to pay for the ten acres, taking the title in his wife's name. The instruction is to the effect that, where one loans money to another for the purchase of real estate, he thereby acquires an equitable interest in the real estate in which the borrower invests the money. No authorities are cited in support of this proposition, and it will be conceded, we think, that none can be found. The instruction was properly refused.

It is also claimed that the verdict is not sustained by sufficient evidence. The evidence covers a wide range, and includes transactions between the defendant and plaintiff's husband extending back for many years. To attempt at this time to review it would extend this opinion to undue length, and would not, as it seems to us, serve any useful purpose. The evidence is conflicting. Reasonable men might well differ as to the side on which it preponderates. A jury has passed upon it, and we are satisfied that their verdict should not be disturbed. As to the amount of the verdict, it is not excessive, if the testimony of the plaintiff and her husband be taken as true. There are corroborative circumstances. The jury believed these portions, as they had a right to do for aught that appears to their discredit. We cannot, therefore, say that the verdict is excessive. The defendant also complains of certain rulings of the court sustaining objections to certain questions asked the plaintiff on cross-examination. By these questions the defendant sought to go into matters not brought out on direct examination. Besides, matters sought to be elicited by these questions were afterwards gone into by the defendant himself while on the stand. His evidence as to such matters stands uncontradicted. Hence, even had the court erred in sustaining the objections to the questions on cross-examination, as the matters were conclusively established by other evidence, he was not prejudiced by such rulings.

The foregoing disposes of this case, but it may not be out of place to add that the record is unnecessarily voluminous. The summons, including the officer's return thereon, a motion for security for costs, with a notice and affidavits pertaining thereto, and many other matters having no bearing on the questions presented to this court are included in the transcript. They serve no useful purpose there, and only add to the expense of the litigants and the labor of the reviewing court. The jurisdictional feature of a transcript filed in this court is the "judgment, decree or final order sought to be reversed, vacated or modified."

Sections 586 and 675 of the code. To this should be added only so much of the remainder of the record below as is necessary to present the questions sought to be reviewed. The fact that the pages are not numbered in this case makes the useless features the more objectionable.

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

JACKSON, C., concurs.

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

AFFIRMED.

WILLIAM N. SKINNER v. LEWIS A. WILSON.

FILED APRIL 18, 1906. No. 14,251.

1. **Errors, Joint Assignment of.** Where several instructions are grouped in one assignment, and there is nothing in the language of the assignment to indicate that the objection goes to them severally, they will be examined only so far as may be necessary to determine whether any one of them was rightly given or refused. *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587, and cases there cited.
2. ———. In the consideration of the assignments—the verdict is not sustained by sufficient evidence, is excessive and is contrary to law—instructions not complained of in such a way as to be reviewable in this court will be taken as the law of the case, and if when tested by such instructions the verdict is not vulnerable to the objections lodged against it the assignments will not be sustained.
3. Evidence examined, and *held* sufficient to sustain the verdict.

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

Halleck F. Rose, W. H. Horton, W. C. Brown and *W. B. Rose*, for plaintiff in error.

Kirkpatrick & Hager and *Lear & Wilhite, contra.*

ALBERT, C.

On the 21st day of May, 1902, the defendant was, and for many years had been, engaged in printing and publishing a newspaper, and conducting a general printing and publishing business in the village of Springview, in Keya Paha county. His newspaper was known as the "Springview Herald," and was the only one printed in that county, and he enjoyed a monopoly of the business in which he was engaged. On the date mentioned, in consideration of the sum of $1,400, he executed a bill of sale to the plaintiff, whereby he transferred the newspaper and printing plant and good will of his said business to the plaintiff. The bill of sale, among other things, contains the following stipulation: "I hereby bind myself that I will not engage in the newspaper or job-printing business within the limits of said Keya Paha county for the next ten years following the date of these presents, in any way, shape or manner, and in case I fail to keep this last understanding, agreed upon by myself with the said Lewis A. Wilson, I further bind myself by these presents to pay the said Lewis A. Wilson in good and lawful money of the United States the penal sum of $2,000 as damages for the nonfulfilment of this said stipulation." The plaintiff went into possession of the property, and at once engaged in the business theretofore conducted by the defendant, and for about two years thereafter likewise enjoyed a monopoly of the business in that county. On the 5th day of May, 1904, another newspaper, called the "Keya Paha County News," and printing plant was established in the same village. From that date until the following September the new plant was ostensibly owned and conducted by the defendant's wife, but the plaintiff avers, and the evidence sufficiently shows, that the defendant was the real owner, and controlled and managed the business. In the month last mentioned a sale of the new plant was made to a third party, who still owns and conducts the business at that place. The plaintiff then brought suit

against the defendant, alleging a breach of the stipulation hereinbefore set out, and laying his damages at $2,000. The answer is a general denial of all the allegations of the petition. The trial court submitted the cause to the jury on the theory that the amount named in the stipulation should be regarded as liquidated damages, which was covered by an instruction directing them to award $2,000 damages in case they found for the plaintiff. The jury found for the plaintiff, and awarded damages as directed, and judgment was given accordingly. The defendant brings error.

One of the complaints now urged by the defendant is that the evidence is insufficient to warrant a finding that he had engaged in the newspaper or job-printing business in violation of his agreement with the plaintiff. The evidence shows that, while the new plant was purchased in the name of the defendant's wife, the defendant himself was concerned in it, and that, although he was engaged in banking in the same town, he negotiated a loan for the purchase price with another bank, signing his wife's note as surety. It also shows that he referred to the new plant as his or "ours," and that he set type, solicited business, made contracts for business for the new plant, wrote for the newspaper, and in many other ways so conducted himself with reference to it as to warrant the jury in finding that he was either the real owner or so concerned in its management as to convict him of a violation of his agreement with the defendant. In fact, his entire transaction with reference to the new plant is of such a character as to warrant the jury in finding that the ostensible ownership and management of the new plant by his wife was a mere device by which he sought to shield himself from the consequences of a violation of his agreement.

The principal contention of the defendant is that the court erred in submitting the cause on the theory that the amount named in the stipulation was to be regarded as liquidated damages. The only exception taken by the defendant to the charge of the court was to the instruction covering that theory. That exception was made in the

form of a written objection, which was allowed by the court and filed with the clerk. Afterwards, and before the jury had returned a verdict, the defendant, by leave of court, withdrew his exception. After verdict he filed a motion for a new trial, in which he grouped this instruction and five others, some at least of which are clearly right. It has become a settled rule of practice in this state that when several instructions are grouped in one assignment, and there is nothing in the language of the assignment to indicate that the objection goes to them severally, they will be examined only so far as may be necessary to determine whether any one of them was rightly given or refused. This rule was applied in *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587, and the several cases there cited. It is invoked by the plaintiff in this case, and there seems to be no escape from it, save by overruling the long line of cases in which it has been applied, which we are not disposed to do. The rule is perhaps technical, but it is not to be condemned solely on that ground. The orderly and economical administration of justice necessitates rules of practice, and, however liberal such rules may be, there must still be somewhere a dividing line between doing and not doing, compliance and noncompliance. This of necessity gives rise to what are commonly called technicalities, and they are unavoidable under any system for the administration of justice according to law. But the defendant contends that whether the amount named in the stipulation should be held to be liquidated damages, or merely a penalty, is sufficiently raised by the assignments that the verdict is not sustained by sufficient evidence, is excessive and contrary to law. As we have seen, the instructions cannot be reviewed at this time. They must be regarded, therefore, as the law of the case. *World Mutual Benefit Ass'n v. Worthing, supra.* By one of them the jury were instructed to the effect that, in case they found for the plaintiff, the sum named in the stipulation would be the measure of his damages. In awarding $2,000 damages the jury merely followed that instruction, which, in view

of the record, must be regarded as the law of the case as to the measure of damages, and a verdict that responds to it cannot be regarded as excessive nor as contrary to law.

Ordinarily, technical rules are applied with some reluctance, but in this case it does not appear that to do so will work any injustice. The defendant at the time of the sale to the plaintiff was an experienced newspaper man and printer, and had conducted the plant sold to the plaintiff for a number of years. The plaintiff was without experience. When he bought the plant he also bought and paid for the good-will and immunity from defendant's competition within the county for a period of ten years. Within two years the defendant entered the field as a competitor. The fact that he was a banker and an experienced newspaper man who had formerly occupied the field made him a formidable rival. His transfer of the new plant to a third party necessarily carried with it a portion of the good-will which he had transferred to the plaintiff for a consideration. Had he been dealing with tangible property his conduct would be called by an ugly name. By the violation of his contract he inflicted substantial losses upon the plaintiff, and set in motion certain forces which will cause him losses for some time to come. The extent of such losses are unascertainable. While we may be morally certain that they have resulted or will result, evidence from which they could be computed with any degree of certainty could not be obtained. The case then presents this dilemma: If the amount named be regarded as liquidated damages, the defendant is liable to suffer injustice; if it be regarded as a penalty, the plaintiff by reason of the inherent difficulty of proving his damages is liable to suffer loss. Confronted by such a dilemma, there should be no complaint if the loss be allowed to fall on the head of the wrongdoer, who made his agreement voluntarily, and was pressed by no hard necessity to violate it.

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

DUFFIE, C., concurs.

JACKSON, C., not sitting.

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

AFFIRMED.

FRANK F. ROBY V. STATE, EX REL. FARMERS GRAIN & LIVE STOCK COMPANY ET AL.

FILED APRIL 18, 1906. No. 14,267.

1. **Railroads: SIDE-TRACKS: HIGHWAYS.** A side-track constructed and used by a railroad company, and which connects with its main line and occupies a portion of the public streets of a city under a grant from the city to such company, will be presumed, in the absence of evidence to the contrary, to be a part of the public highway system of such company, and a public highway within the meaning of section 4, art. XI of the constitution.
2. **The term railroad includes all side-tracks necessary or convenient for the transaction of the company's business.**
3. **Evidence examined, and *held* sufficient to sustain the finding and order of the trial court.**

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

E. C. & H. V. Calkins, for plaintiff in error.

Warren Pratt, C. A. Robinson, Edson Rich and *John N. Baldwin, contra.*

ALBERT, C.

The Farmers Grain and Live Stock Company applied to the district court for a writ of mandamus to compel the Union Pacific Railroad Company to furnish cars on a cer-

tain side-track for the shipment of grain from the relator's elevator. Frank F. Roby intervened for the purpose of resisting the application. The district court allowed the writ and the intervener brings error.

A somewhat extended statement of the facts is necessary to a proper understanding of the case. In 1886 the Kearney Milling Company built a flouring mill in the city of Kearney, and induced the respondent railroad company to construct a side-track, extending eastward from its connection with the main track to and across certain lots owned by the milling company, upon which its mill stood. In order to reach the mill property, the track was constructed for some distance on a public street, and across certain other streets and alleys of the city, and also across the corner of a lot belonging to a third party. This side-track extended east and west immediately north of the mill, and a warehouse and elevator were afterwards erected by the milling company immediately north of the side-track. Afterwards the milling company moved its elevator to two lots, belonging to it, lying east of the premises just mentioned, and just across one of the alleys of the city, and the side-track, in order to accommodate the elevator in its new location, was extended eastward across the alley and across a lot belonging to the milling company. In 1898 proceedings were brought to foreclose a mortgage covering the milling company's property, and the property passed into the hands of a receiver appointed in said proceedings. The receiver leased the elevator on the lots east of the mill to certain third parties, and such lessees leased certain lots belonging to other parties lying east and just across a public street from the elevator, and for the better accommodation of the elevator induced the respondent railroad company to extend the side-track across such street and one of the lots east of the elevator property. The mortgage was foreclosed, and the intervener became the purchaser thereof at foreclosure sale, obtaining possession thereunder in March, 1899. Early in the summer of 1901 he inclosed the mill property with a fence, placing gates

across the side-track, securing them by locks. At that time, however, service on the side-track was not required beyond the west line of the intervener's property, save for the accommodation of the intervener himself. In 1903 the relator bought the two lots lying across the street from the elevator, and across one of which the side-track had been extended, and erected thereon a grain elevator for the storage and shipment of grain. The relator's elevator was so placed that it could be easily accommodated by the side-track in question. When the relator got ready to ship grain from its elevator, the intervener refused to permit the respondent to move cars over the side-track across his premises, claiming that such track had been constructed solely for the accommodation of his grantors, and that the occupancy of his premises by the respondent, with its track, was merely by virtue of a license, and not by virtue of any easement in such premises for a right of way. The evidence is somewhat meager as to the arrangement between the milling company, the intervener's predecessor in estate, and the respondent railroad company for the construction of the side-track in the first place. One witness who was president of the milling company during the negotiations for the side-track and who took part therein, when examined as to such arrangement, testified as follows: "My recollection is they insisted we should give them the right of way, and there was a lot west of the mill. They sent a man out here at that time; there was some question as to whether the city would let us down through there, and they sent a man out to see whether they could get to the mill. He reported that he would have to go across that lot that was right across there west; and that he would have to cut off the corner of it, if he crossed, there would be a short curve, that the curve would be too sharp; and they insisted, in case there was any damage, that the milling company would have to pay the railroad company whatever damage there was to that lot. That is my recollection. Q. Was the milling company to get any damages or anything for the right of way across this prop-

erty? A. I don't think so; of course that is a long time ago."

Cross-examination: "Q. They wanted a switch to the mill so that they could load and unload? A. Yes. Q. They wasn't seeking to get it for any other purpose excepting the accommodation of the mill? A. That was all. Q. Any talk of it being used for anything else? A. So far as I can recollect there was not. Q. There was no agreement that it was not to be used for any purpose but for your mill, was there? A. I have no recollection of anything being said." It also appears that, when the milling company moved its elevator to the lots east of the mill, the respondent agreed to extend the track and pay for moving the elevator. In each instance it laid the track and furnished the material. Before the side-track was constructed the city granted the respondent a right of way over and across such of the streets and alleys as it traversed or crossed.

These facts, we think, warrant an inference that the respondent constructed the side-track across the intervener's premises under at least an implied grant of a right of way from the intervener's privies in estate, the then owners of the premises, and that such track now constitutes a part and parcel of the respondent's railroad system, open alike to all requiring service thereon. Section 4, art. XI of the constitution is as follows: "Railways heretofore constructed, or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." The term railroad includes all side-tracks necessary or convenient for the transaction of the company's business. *Township of Rock Creek v. Strong,* 96 U. S. 271; *Black v. Philadelphia & R. R. Co.,* 58 Pa. St. 249; *Town of Mason v. Ohio River R. Co.,* 51 W. Va. 183; *State v. Stone,* 119 Mo. 668. The side-track in question is connected with the respondent's main line. In the absence of evidence to the contrary, taking into account the fact that it crosses the property of third parties and occupies a portion of the

public streets of the city under a grant from the city, the presumption would be that it is a part of the respondent's railroad system, and a public highway within the meaning of the constitutional provision above quoted. That presumption is not rebutted by the evidence in this case, but rather strengthened. The evidence shows that before constructing the road the respondent, in its negotiations with the milling company, the intervener's predecessor in estate, insisted on a right of way. It is true, it was built at the instance of the milling company and for years was used almost, if not quite, exclusively for its benefit, but that appears to have been because there were no other persons who could be acommodated thereby. It is also true that the intervener, after the track had been laid almost 15 years, put gates across it and inclosed his premises with a fence, but at the time there were no persons beyond his premises who required service on the side-track and the gates therefore were no restriction on general traffic.

It seems to us that the finding of the district court is fully sustained by the evidence, and that the writ was properly allowed. It is recommended that the order allowing the writ be affirmed.

JACKSON, C., concurs.

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

AFFIRMED.

S. OLIN COLE, APPELLEE, V. WILLIAM H. MANNERS ET AL., APPELLANTS.

FILED APRIL 18, 1906. No. 14,290.

1. **Injunction:** IRREPARABLE INJURY. An injury which cannot be measured by any pecuniary standard, or which because of its nature or the financial condition of the wrongdoer cannot be adequately compensated in dâmages, is irreparable within the meaning of

the law, and one for which, ordinarily, there is no adequate remedy at law.

2. **Joint Obligors:** DEFENSE OF INFANCY. The general rule that a valid defense as to one of two joint obligors inures to the benefit of both is subject to the exception that, when such defense is infancy, the infant may be discharged and a recovery had as to his co-obligor; and this exception applies although the obligee knew of the infancy when he took the obligation.

3. **Lease:** INJUNCTION: DEFENSE OF INFANCY. Ordinarily, a lease may be avoided by a tenant on the ground of infancy; but while in possession thereunder the plea of infancy is not available in a suit brought to restrain him from making use of his possession to inflict irreparable injuries upon his landlord.

4. **Pleadings and evidence** examined, and *held* sufficient to sustain the decree.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

Matthew Gering, for appellants.

Byron Clark, contra.

ALBERT, C.

In what follows we shall refer to the appellee as the plaintiff, and to the appellants as the defendants, that being the relation in which they respectively stood to the record in the court below. In 1893, by an instrument in writing, the plaintiff leased certain of his lands to the defendants for the term of one year, beginning on the first day of March, 1904, reserving as rent two-fifths of all crops grown upon the cultivated land during the term and $3 an acre for the pasture land; the share rent to be delivered to the plaintiff in cribs or granaries on the premises, the cash rent to be paid October 1, 1904. By the terms of the lease the plaintiff also reserved to himself and his employees the right to enter upon the land for the purpose of cultivating, harvesting or doing anything necessary to preserve the crops or promote the growth; the expense in that behalf to be a lien on the defendant's share of the crops. A like

reservation was made for the purpose of making inspection of the premises, improvements thereon, and to plow for future crops. The lease also contains a provision requiring the defendant to destroy all cockle burrs on the premises before they produced seed. The following is also a part of the lease: "And it is further covenanted and agreed by and between the parties hereto that the parties of the second part shall secure the performance of the terms and conditions of this lease on their part by giving to the first party, on demand, a chattel mortgage upon all or any part of the crops growing or gathered on said premises during the said term, and if the said second parties shall refuse or neglect to give such chattel mortgage upon demand, or if they shall at any time give or attempt to give any other person or persons any lien upon said crops, or any part thereof, then this lease shall thereby terminate, and the said party may at once recover possession of said premises and all crops thereon, and the said second parties shall in that event be held and considered to have planted and cultivated said crop for the benefit of the said first party, and shall be paid for such services as follows: Said first party may sell said crop and the unexpired term for cash at a private sale, or he may, at his option, procure said crops to be further cultivated, or gathered and sold in such market as he may see fit, and in either event the proceeds thereof shall be applied, first, to the payment of expenses incurred by the said first party in the premises, including the time spent by him in connection therewith; second, to the payment of said rent; third, the remainder, if any, shall be paid to the second parties for their services in planting and tending said crops, and seed furnished by them."

In September, 1904, the plaintiff filed his petition against the defendants, in which he set forth the lease; that he had performed his part thereof; and further alleged, in substance, that the defendants refuse to permit him to enter upon the premises for the purposes mentioned in the lease, and will continue to do so unless restrained by the

court; that they have neglected and refused, and still neglect and refuse, to execute a chattel mortgage on the crops as required by the terms of the lease, although demand therefor had been duly made by the plaintiff, and have neglected to destroy the cockle burrs growing upon the land, and have refused to permit the plaintiff to enter upon the premises for that purpose; that they have threatened to remove their share of the crops from the land, leaving the plaintiff's share unharvested and uncared for, making it necessary for the plaintiff to enter upon said premises and to harvest the same at his own expense; that the defendants are insolvent and the plaintiff has no adequate remedy at law for their failure to keep and peform their part of the said lease. The prayer is for an injunction restraining the defendants from preventing plaintiff's entry upon the lands for the purposes mentioned in the lease and for specific performance.

A temporary order was allowed, after which the defendants answered. The answer admits the execution of the lease, the refusal of the defendants to execute the chattel mortgage therein provided for, but, as their reasons for such refusal, it is alleged that plaintiff's demand therefor fixed no amount for which the mortgage should be given, and that the defendants had complied with all the conditions of the lease, and had delivered to the plaintiff his share of the crop, except such as at the commencement of the suit were not matured. All allegations in the petition not admitted by the answer are denied. The defendant Lewis G. Manners alleges in avoidance of the lease that he is a minor under the age of 21 years. The plaintiff filed a reply which may be called a general denial.

The court found generally for the plaintiff, but also found that the liability to him under the lease would not exceed $175; that the same would be sufficiently secured by a lien on 500 bushels of the corn on the premises, and that the defendant Lewis G. Manners was a minor under the age of 21 years. A decree was entered enjoining the defendants from interfering with the plaintiff's entry upon

the land for the purposes mentioned in the lease, from disposing of the 500 bushels of corn, and requiring the defendant William H. Manners to execute a chattel mortgage thereon to the plaintiff as the security mentioned in the lease. The defendants appeal.

The principal contention of the appellants amounts to this, that the pleadings and the evidence are not sufficient to entitle the plaintiff to relief by injunction. This contention is based on three propositions, the first of which is that the plaintiff had an adequate remedy at law. The petition shows that the plaintiff had reserved the right to enter upon the premises from time to time for the purpose of inspecting them, making improvements, and preparing the ground for another crop; that the defendants, by threats of personal violence and intimidation, prevented him from coming on the premises for those purposes; that the defendants had agreed to give him a chattel mortgage on the crop to secure the rent and other liabilities growing out of the lease, and that they had not only refused to do so, but were threatening to remove a large portion of the crops and allow the remainder to stand unharvested, and that the defendants are insolvent. The evidence is amply sufficient to warrant a finding of each of the foregoing facts, and those facts are sufficient to show that the plaintiff was threatened with injuries which could not be adequately compensated in damages and which would be difficult to measure by any pecuniary standard, and that the damages, even if ascertainable, could not be collected because of the insolvency of the defendants. Such injuries are irreparable within the meaning of the law authorizing the issuance of an injunction. *Eidemiller Ice Co. v. Guthrie,* 42 Neb. 238.

It is further insisted that when the defendant refused to execute the chattel mortgage the lease by its terms expired, and the plaintiff could have proceeded at law for the recovery of the possession. But, in view of the injuries threatened, ordinary proceedings at law, in our opinion, would not have been sufficiently prompt to afford an

adequate remedy. Before his rights could have been established at law, the crop might have been destroyed, removed from the premises, waste committed, the time for preparing the soil for another crop past, or the plaintiff irreparably damaged in other ways, which a court of law would be powerless to prevent.

Another proposition advanced in support of the contention that the plaintiff was not entitled to relief by injunction is thus stated in defendants' brief: "The lease upon which this action is based and predicated is the joint obligation of the appellants, possessing none of the elements of a joint and several contract. Severalty cannot, by any process of either construction or interpretation, be read into it, and, hence, a valid defense by one obligor inures to the benefit of the other, particularly where such defense was known to the party seeking its enforcement at the time of its execution." The learned gentleman advancing this proposition does not overlook the exception to the rule there stated, which is that, where one of two joint obligors is an infant, a recovery may be had against the other, and a discharge as to the infant. *Cutts v. Gordon,* 13 Me. 474, 29 Am. Dec. 520, and cases cited. He insists that the exception does not apply in this case, because the plaintiff knew of the infancy of one of the defendants when the lease was made. In support of this contention he cites several cases from this court, not one of which, however, goes beyond the proposition that the contract of an infant is voidable. None of them tend, even remotely, to support his contention that the exception above referred to does not apply in this case, nor have we been able to find any that so hold. On principle we can see no good reason why the exception does not apply in this case.

The third proposition, as we understand it, is that the injunction against Lewis G. Manners is erroneous because of his infancy. Counsel says: "The contract of an infant, being voidable at his election, cannot be made the superstructure (foundation) of an injunction." The law per-

mits infancy to be used as a shield, but not as a sword. The infant defendant, with his codefendant, is in possession by virtue of the lease. His infancy may protect him from the terms of the contract, but it certainly is not a license to use the advantages he obtained by virtue of his contract to commit torts and inflict injuries upon the plaintiff for which the law affords no adequate remedy. The decree does not undertake to bind him by the terms of the contract; it merely enjoins him from the doing of certain acts which would be wrongful if the contract were binding and in force, and *a fortiori* wrongful, if he be regarded as a mere trespasser instead of a tenant under a valid lease. The decree, in our opinion, was drawn with a careful regard for the rights of all the parties. It requires the adult defendant to do less than agreed to do, and enjoins neither from doing anything he has a lawful right to do; it enjoins no affirmative duty whatever upon the infant defendant.

It is recommended that the decree be affirmed.

JACKSON, C., concurs.

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

AFFIRMED.

NEBRASKA MERCANTILE MUTUAL INSURANCE COMPANY V. WILBER W. MYERS.

FILED APRIL 18, 1906. No. 14,207.

Instructions: PREPONDERANCE OF EVIDENCE. A preponderance of the evidence is all that is required to establish a disputed fact in a civil action, and an instruction which informs the jury that, if upon any reasonable hypothesis a fact can be accounted for upon any other theory than a dishonest one, they should so find, is a violation of that rule, and in this case reversible error.

ERROR to the district court for Boone county: JAMES R. HANNA, JUDGE. *Reversed with directions.*

E. M. Coffin, E. J. Clements, M. W. McGan and *A. E. Garten,* for plaintiff in error.

H. C. Vail and *J. S. Armstrong, contra.*

JACKSON, C.

This is a proceeding to reverse the judgment of the trial court rendered in an action on a fire insurance policy. Two defenses were tendered by the answer: First, that when the policy was applied for the insured represented that the property was unincumbered, while in fact it was incumbered by a chattel mortgage securing an indebtedness of $2,200, and that by the terms of the contract such misrepresentation rendered the policy void; and, second, that the fire was caused by the wilful, intentional and wrongful act of the insured. By the reply it was admitted that the representation as to the incumbrance on the property was made, but denied that the representation was false; and, pleading to the charge that the fire was caused by his wilful, intentional and wrongful act, the allegation is: "Plaintiff denies that the fire which destroyed all the property described in the plaintiff's petition, which was destroyed, was caused by the wilful, intentional or wrongful act of the plaintiff." The trial resulted in a verdict and judgment for the plaintiff.

The property destroyed was a livery barn (on leased ground), two stallions, other horses, and such property as is usually kept in a livery barn. It appears that the plaintiff purchased the barn of one Culver in the latter part of March, 1902; that on the 2d day of that month Culver gave a chattel mortgage to the First National Bank of Albion, securing an indebtedness to that bank upon the property sold to the plaintiff, and other property retained by him. The mortgage was not of record at

the time of the sale. Soon afterwards, however, the bank placed the mortgage on file. After the existence of the mortgage had been established at the trial, the cashier of the bank was called as a witness on behalf of the plaintiff, and testified that immediately after the mortgage was filed the plaintiff came in and objected to their holding the mortgage on the barn, as he had purchased it and paid for it, and they told him that they didn't wish to cancel the mortgage because it covered other property they wished to hold; that they had no lien on the barn and didn't care to hold a lien on it; that after some other talk the plaintiff said he was satisfied, and he would come in later with Culver, and he stated it as his recollection that the plaintiff required a bond from Culver to hold him harmless. Under this state of facts, we think the jury were justified in finding that the insurance company was not prejudiced by the representations of the insured at the time he applied for the policy. The plaintiff had a right to rely upon the statement of the officers of the bank that they claimed no lien on the barn, in view of the fact that the mortgage was not of record when he procured the title.

It is urged, however, that the denial of the charge that the fire was caused by the wilful, intentional and wrongful act of the insured amounted to an admission that the insured caused the fire, and that the denial was only as to the purpose and intent; that evidence was introduced tending to show that the circumstances under which the fire occurred pointed to the plaintiff as having set the fire purposely. The plaintiff testified in his own behalf that he did not set the fire, and after the verdict of the jury had been returned the defendant presented a motion for a judgment notwithstanding the verdict. While that motion was pending, the plaintiff asked leave of the court to amend his reply by alleging that the fire was not caused by any act of the plaintiff. This application was denied; the motion for a judgment notwithstanding the verdict overruled and judgment entered on the verdict. That the

pleading is susceptible of the construction placed upon it by the defendant is doubtless true, but the trial court might reasonably, within the exercise of a sound discretion, have permitted the amendment to be made. We have concluded that the judgment must be reversed for other reasons, and think that before the case again proceeds to trial the amendment suggested ought to be allowed.

The court instructed the jury: "You are instructed that the law presumes every one to be honest and upright in all their transactions until the contrary be proved, and so in every case you should endeavor to reconcile the facts with such theory, if it can be reasonably done; and in considering evidence, if upon any reasonable hypothesis a fact can be accounted for upon any other theory than a dishonest one, you should so find." To the giving of this instruction the defendant excepted, and now insists that it was prejudicial error. We think that the objection to the instruction was well taken. All that the law requires in a civil action is that a disputed fact be established by a preponderance of the evidence. The language employed would be appropriate to an instruction in a criminal case, where the jury is required, before conviction, to be satisfied to the exclusion of every reasonable doubt; but the doctrine of reasonable doubt does not enter into the trial of a civil action. This instruction was doubtless intended to apply to the charge that the fire was caused by the wilful, intentional and wrongful act of the insured, and the jury might well infer that they were justified in finding that the fire was not so caused, if the fire could be explained upon any other reasonable hypothesis. Such is not the law in civil actions.

We recommend that the judgment of the district court be reversed and that the cause be remanded for a new trial, with instructions to permit the amendment to the reply requested by the plaintiff.

ALBERT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial, with instructions to permit the amendment to the reply requested by the plaintiff.

REVERSED.

NUCKOLLS COUNTY V. GUTHRIE & COMPANY.

FILED APRIL 18, 1906. No. 14,241.

Mandamus: CANALS: BRIDGES. Where water is diverted from its natural channel by means of a canal constructed and operated to supply power for a mill, it is the duty of the mill owner to erect and maintain suitable bridges for the convenience of the public at any point where the canal crosses a public road, and mandamus will lie to compel the performance of that duty.

ERROR to the district court for Nuckolls county: LESLIE G. HURD, JUDGE. *Reversed with directions.*

J. H. Broady and *E. D. Brown,* for plaintiff in error.

R. D. Sutherland and *S. W. Christy, contra.*

JACKSON, C.

The county of Nuckolls instituted an action in the district court for that county, praying for a writ of mandamus to compel the defendant to erect and maintain bridges across a canal, used by the defendant for the purpose of supplying water-power used in the operation of a mill at Superior, at three points where the canal is crossed by public highways. The defenses interposed are of two classes, technical and those affecting the merits.

The Republican river approaches the town of Superior from the west, and at a point apparently somewhat west of the town turns to the south and forms what might be termed an ox-bow. Lost creek, a dry run, approaches

Superior from the northwest. Its course, as it approaches the river west of Superior, is southward until it reaches the bottom-lands adjacent to the river when, in an irregular course, it extends eastward and enters the Republican river on the east side of the ox-bow. The testimony discloses that originally there was no water in Lost creek, except in case of freshet or excessive rains, when it sometimes overflowed its banks and extended out over the bottom-lands. In 1874 the firm of Schuyler & Barnes erected a flouring-mill at Superior, and for the purpose of supplying the power for the operation of the mill, dug a ditch from the west side of the ox-bow on the Republican river eastward into Lost creek, and diverted water from the river into Lost creek, and thence through the original location of Lost creek to their power. During a freshet the canal dug by them was filled with quicksand. They took down their mill and sold the site which was acquired by Guthrie Brothers, a partnership, in 1877, who that year erected a new mill, deepened and widened the canal from the Republican river to Lost creek, and have since operated their mill by means of the power diverted in that way from the river. Three public roads cross this canal. The county of Nuckolls constructed bridges on those highways, one on a section line road between sections 35 and 36, in township 1, range 7, in 1874, while Schuyler & Barnes were building the canal from the Republican river into Lost creek; one on a half section line road running north and south through section 35, in 1879; and one on a half section line road running north and south through section 36, in 1881. They were all built originally on the banks of Lost creek, but the channel has widened, necessitating the building of approaches, or bridges of additional length. The bridge on the half section line running through section 35 was at one time a quarter of a mile south of where it is now located. In 1881, however, Guthrie Brothers dug a new channel across a bend in Lost creek, and diverted the water from the original channel to the new one, so that the bridge as

now located is not on the original banks of Lost creek, but is at a point where, so far as the record discloses, no bridge was necessary until the new channel was cut in 1881.

It is alleged in the answer of the defendant that, before cutting the new channel, they entered into an agreement with the board of county commissioners of Nuckolls county, by the terms of which, when the new channel was made, Guthrie Brothers were to move the bridge from its old foundation and erect it over the new channel, and that the bridge was thereafter to be maintained at the expense of the county. Upon that allegation of the answer the testimony is brief, and we quote it in full. Mr. Robert Guthrie, originally of the firm of Guthrie Brothers, now of the defendant corporation, testified on behalf of the defendant concerning the change of the channel in 1881: "Q. Before making the excavation, what agreement, if any, did you have with the county commissioners as to making it, and keeping up the bridge thereon or moving the bridge thereon? A. I believe that was in 1880. Q. Did you have an agreement that you refer to with the commissioners in session at the county seat, or not? A. My brother was first told by one of the county commissioners to go ahead and move the— Q. Don't tell what he told your brother. A. It was the county commissioners here at Nelson. Q. And were the commissioners in session when you made this arrangement with them? A. Yes, sir; I met them in Nelson. Q. And met them at the county seat, in session? A. Yes, sir. Q. Go ahead, Mr. Guthrie, and tell all about that agreement. A. We told them what we wanted to do, and they said it was all right, just go ahead and move it up there, that it was a better place than where it was located, the old road was swampy, and the water was coming right close to it, and people couldn't cross it without making a high grade. Q. Then, as I understand it, your agreement with the commissioners was that you should go on, or no objection would be made by any one to your making this excavation or race and

emptying and intersecting Lost creek? A. Yes, sir. Q. What was the agreement, Mr. Guthrie, about moving the bridge, if any, moving the bridge from its old position on Lost creek and locating it on the race that you were about to make? A. I presented the question to them that we was discussing about digging the race and moving the bridge, and they told me to go ahead and move it, that it would be an advantage to them as well as to us, enhance the road, renew the condition of the road. Q. And what, if any, agreement was made by the commissioners and yourself as to the maintenance of the new bridge at the new point? A. I don't remember any special agreement, only they told us it was all right, to go ahead and move the bridge. Q. And who has maintained that bridge at that point since that time? A. They always maintained it, never refused to maintain it." Two of defendant's counsel were called on behalf of the defendant and testified to having made an examination of the record of the proceedings of the board of county commissioners, and that no record could be found of any contract or agreement between the county and the defendant.

It appears that after doing business for some years as partners, Guthrie Brothers formed a corporation under the name of Guthrie & Co., and that the corporation defendant succeeded to the rights of Guthrie Brothers. There was a general finding for the defendant, and the county prosecutes error.

The statute provides that any railroad corporation, canal company, mill owner, or any person or persons who now own, or may hereafter own or operate any railroad, canal or ditch that crosses any public or private road, shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches and culverts that may be necessary within their right of way. Comp. St. 1905, ch. 78, sec. 110. Construing this statute in *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412, it was held that under the act it is the duty of a railroad company to make and keep in repair suitable cross-

ings with approaches, notwithstanding the highway was laid out after the railroad was built, and that the public authorities are required to build that portion of the highway within the right of way, which they would have been required to make had the railroad not been constructed. With this construction of the statute before us, it is urged that there is no liability on the part of the defendant to construct and maintain bridges, because it is said that bridges were necessary to enable the public to cross Lost creek in any event. There is considerable merit in this contention as to the bridge on the section line between sections 35 and 36, and the one on the half section line through section 36, although the evidence impresses upon us the fact that the expense to the county of constructing and maintaining those two bridges, with the waters of the Republican river diverted into Lost creek, is greater than it would otherwise have been, and to the extent that the cost of the bridges under the present condition of the channel exceeds what it would have been, had the waters not been so diverted, the county has sustained an injury.

With the bridge on the half section line running through section 35, the conditions are entirely different. Here is a new channel created by the defendant. There is no pretense that there was any necessity for a bridge at that point prior to the time the channel was constructed. The claim of a contract with the county, under which the county was obligated to erect and maintain a bridge at that point, is entirely without support in the evidence. It does not appear that the county board ever took action, that it assumed to obligate the county in any respect. It is true that the testimony of the witness Guthrie discloses that the board was in session when he interviewed the members. The most that can be said of his evidence in that respect is that members of the board assented to the proposed change in the channel. We entertain no doubt about the liability of the defendant to erect and maintain a suitable bridge at that crossing.

But it is urged that the action was improperly brought

in the name of the county; that an action for mandamus can only be brought on the relation of the state. This objection is not well taken. The writ of mandamus is not a prerogative writ in this country. When it is an appropriate remedy, it is issued as a matter of course at the instance of a private suitor. *First Nat. Bank v. Lancaster,* 54 Neb. 467. Furthermore, the statute under which the action is instituted requires the proceeding to be brought in the name of the county. Comp. St., ch. 78, sec. 112.

Again, it is objected that the alternative writ ran in the name of the state. That, however, is in accord with the statute. It is said that the notices served on the defendant before the commencement of the action were insufficient, because it does not appear that the defendant owns a canal or ditch. It does appear, however, that it obtained the consent of property owners along Lost creek, and that it does own the land in section 35 over which the highway runs. The objection is without force or merit.

And, finally, it is contended that the county is estopped from asserting its right, because for a period of 20 years it has kept up and maintained these bridges without any claim of liability on the part of the defendant. This contention is equally without merit. The obligation is a continuing one, and will last so long as the statute remains in force and the necessity for bridges exists. The evidence discloses that the bridges in question are in a dangerous condition and in need of immediate repair.

We recommend that the judgment of the district court be reversed and the cause remanded, with directions to enter judgment requiring the respondents to erect and maintain a suitable bridge over its canal on the half section line road running through section 35, township 1, range 7.

ALBERT, C., concurs.

By the Court: For the reasons stated in the foregoing

opinion, the judgment of the district court is reversed and the cause remanded, with directions to enter judgment requiring the respondents to erect and maintain a suitable bridge over its canal on the half section line road running through section 35, township 1, range 7.

JUDGMENT ACCORDINGLY.

EASTERN BUILDING & LOAN ASSOCIATION, APPELLANT, V. JOHN TONKINSON ET AL., APPELLEES.

FILED APRIL 18, 1906. No. 14,272.

1. **Foreign Corporations: CONTRACTS.** A contract with a foreign building and loan association authorized to transact business in this state at the time the contract is made does not become unenforceable by reason of the failure of the association to renew its authority to transact business in the state.
2. **Contracts: USURY.** In determining whether a contract with a foreign building and loan association is usurious, it is proper to consider only such payments contracted for as are in the nature of interest and premiums on the loan.

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

A. W. Lane, for appellant.

Fred L. Sumpter and *O. B. Polk, contra.*

JACKSON, C.

The plaintiff is a building and loan association organized under the laws of New York and a resident of that state. On September 8, 1891, it complied with the provisions of the laws of this state relative to foreign building and loan associations, and procured from the state banking board a certificate authorizing it to transact business within the state. This authority was renewed on February 5, 1892,

and continued until January 31, 1893. In October, 1892, Adam Snyder, a resident of Lancaster county, became a shareholder in the plaintiff association and procured a loan from the plaintiff, secured by a mortgage on real estate owned by him and an assignment of his shares of stock. Upon the termination of the plaintiff's license in January, 1893, the plaintiff failed to meet the requirements of the statute and thereafter procured no authority from the banking board, such as is contemplated by law. Snyder made the payments provided for by the terms of his contract with the plaintiff for a time, and then defaulted. In September, 1896, a representative of the plaintiff called on Snyder, in Nebraska, for the purpose of securing, if possible, an adjustment of his loan, but it appears that Snyder was unable to make settlement and that foreclosure proceedings were likely to follow. This fact having been brought to the attention of John Tonkinson, who is a relative of Snyder and to whom Snyder was indebted, an arrangement was entered into whereby Snyder conveyed the real estate covered by plaintiff's mortgage to Tonkinson, and for the purpose of adjusting the indebtedness secured by the mortgage Tonkinson applied to the plaintiff to become a shareholder in that association and for an adjustment of the old mortgage indebtedness by giving a new mortgage on the real estate for the unpaid balance. This application was forwarded to the plaintiff's office in New York state and was there approved. The matter of the application to readjust the Snyder loan was presented to the Nebraska state banking board which adopted a resolution expressly authorizing the readjustment sought. Plaintiff issued its certificates of stock to the defendant Tonkinson, which, when matured, would be of the par value of $1,100. They prepared and forwarded to Nebraska for execution by the defendant Tonkinson and his wife a mortgage on the real estate, together with an assignment of the stock contracted for by Tonkinson. These papers were duly executed and forwarded to the plaintiff. Authority was given by Tonkinson to apply the proceeds of the new

mortgage, $1,100, in liquidation of the indebtedness of Snyder, it having been agreed that the plaintiff would accept that sum and release the Snyder mortgage. The plaintiff canceled the Snyder papers, and they were returned to him.

The stock contract between the plaintiff and defendant Tonkinson provided for monthly payments of $6.60 on the part of Tonkinson, until the monthly payments so made, together with the dividends declared by the plaintiff thereon, should equal the par value of the stock. The mortgage contained this provision: "Now, if the above bounden John Tonkinson, or his heirs, executors or administrators, shall well and truly pay or cause to be paid in gold coin of the United States of America of the present standard of weight and fineness unto the above named Eastern Building & Loan Association of Syracuse, N. Y., its certain attorney, successors or assigns, at its office in the city of Syracuse, N. Y., the sum of $1,100 so advanced or loaned as aforesaid, in the manner following, viz: The sum of $6.60 the monthly instalment or dues on the aforesaid shares, payable as aforesaid on or before the date of said shares, and on or before the first business day of each and every month thereafter, and, in addition thereto, interest at the rate of 6 per cent. per annum and a regular monthly premium of $2.75, payable monthly from October 1, 1896, making in all the sum of $14.85 for instalments, interest and premium, which shall be paid monthly as aforesaid to said association at its office in the city of Syracuse, N. Y., until the maturity of said shares, being for such a term as will secure to said obligor the payment of the full sum of $100 on each of said shares of stock from the monthly instalments paid thereon and dividends credited thereto in accordance with the provisions of the articles of incorporation, by-laws, rules and regulations of said association, and shall also pay or cause to be paid all fines which may be imposed by said association for default in payment of said instalments, dues, interest or premium, or for default in paying any insurance premium

or taxes, hereinafter referred to, and shall also well and truly keep and perform all of the covenants and agreements herein contained and the requirements of said certificate of stock, and the articles of incorporation, by-laws, rules and regulations of said association, and any lawful amendments thereof, which said certificate of stock, articles, by-laws, rules and regulations, together with the application for said loan, are hereby made a part of this obligation, then this obligation to be void, otherwise to remain in full force and virtue." Tonkinson made payments, including the payments on stock, interest and premium provided by the conditions of the mortgage, amounting in all, as appears from the record, to the sum of $712.80, when he defaulted, and the plaintiff instituted this action in the district court to foreclose the mortgage.

The answer tendered two defenses: First, that the plaintiff was without authority under the law of this state to enter into a contract with Snyder; and, second, that the contract was usurious. In the court below the determination was that the plaintiff had authority to enter into the contract and that it was valid as against that objection; but that the contract was usurious, and the defendant was credited with the total payments made by him on the principal of the loan and decree entered for $387.20, the balance found due. Both parties appealed.

The plaintiff complains of the decree wherein it is determined that the contract is usurious, and the defendant appeals from the decree in so far as it is found that the plaintiff was authorized to enter into the contract. It appears without question that the plaintiff met fully all the requirements of the statute at the time it obtained its certificate from the state banking board in 1891, and that the certificate was renewed by the banking board; that the renewal carried with it on the face of the certificate authority to continue in business until January 31, 1893. It is urged, however, on behalf of the defendant, that at the time of the renewal the plaintiff failed to file with the banking board the statement required by sections 148*a*

and 148*b*, ch. 16, Comp. St. 1891, in force at that time. In support of that contention the secretary of the banking board at the time of the trial was called as a witness, and from his testimony it appears that he had then been secretary of the board for about three years and a half (the trial was in October, 1904); that he had made search for the application upon which the order of February, 1892, was based, and had failed to find it. It appears, however, from his further examination that the only record of such applications kept by the board in 1891 and 1892 was by the filing marks and indorsements on the application itself, and that if the application was lost or mislaid there would be no record in his office of any such application; that the applications were not indexed, and that some of the papers were not even marked "filed," and that there was nothing in his office to show whether such an application had been filed or not. The presumption is that the officers of the state board performed their duty, and we do not feel justified in disturbing the finding of the trial court that the evidence fails to overcome that presumption, and we conclude that at the time the Snyder loan was made the plaintiff was authorized to transact business in the state, and that his contract was enforceable. The contract having been valid at its inception and enforceable under the laws of the state, the fact that the plaintiff thereafter withdrew from the state so far as the transaction of new business was concerned would not prevent the enforcement of the contract. *Rhodes v. Missouri Savings & Loan Co.*, 63 Ill. App. 77. The transactions between the plaintiff and defendant, Tonkinson, amounted to a readjustment of the mortgage indebtedness on the real estate when Tonkinson acquired the title, and do not, in our judgment, come within the ban of the statute.

The issue tendered by the plea of usury is a troublesome one. We are convinced, however, that the plea of usury ought not to be sustained. It is urged by the plaintiff that the contract is a New York contract and that under the law of that state was not usurious. We have con-

cluded, however, to base our opinion upon another ground suggested by authority cited in behalf of the association. The contract in suit is to some extent twofold in its nature. Tonkinson first became a subscriber for certain shares of stock, upon which he agreed to pay monthly the sum of $6.60 until the payments made by him, together with the dividends declared by the company and credited to the stock, should amount to the sum of $1,100, when, in the absence of the loan feature, he would have been entitled to withdraw that sum in cash. He, however, contracted for a loan of $1,100 and secured the payment of that amount by mortgage upon real estate. He might lawfully contract to pay 10 per cent. interest on the loan, or $110 a year. What he did contract to pay was interest at the rate of 6 per cent. per annum, payable in monthly instalments, and a monthly premium of $2.75, amounting in all to $105 a year. The by-laws of the association required that, where money was advanced on loans made to its shareholders, the stock of the association held by the borrower should be assigned to the association as additional security, one share of stock for each $100 borrowed, and it will be observed from the conditions of the mortgage that the contract between the parties was that, when the stock so assigned should have matured, if the payments of interest and premium were fully kept up, the amount due on the stock should be applied to cancel the mortgage indebtedness. The question then arises whether we are justified, under the circumstances, in holding that the payments on the stock contract should be considered in determining whether the contract for the loan was usurious, as it must be conceded that the interest payments and premium provided for do not exceed the amount which the parties might lawfully contract for as interest. This identical question was before the supreme court of the United States in *Bedford v. Eastern Building & Loan Ass'n,* reported in 181 U. S. 227; 21 Sup. Ct. Rep. 597. Mr. Justice McKenna, who delivered the opinion of the court, said:

"It is claimed, however, that if the transactions between

Bedford and the association were otherwise legal they were affected with usury, and to the extent that they were usurious they were unenforceable. The contention is that in making the loan of $4,600 Bedford was required to pay a fixed premium of $460, and received only $4,140, and that this constituted usury in Tennessee. This is made out, because, it is said, Bedford was required to withdraw his stock and receipt in full, and could therefore get no benefit from future profits of the association, and, it is asserted, that thereby the loan became 'fixed and certain, and no element of contingency' remained, and the transactions are withdrawn from the principle expressed in *Spain v. Hamilton,* 1 Wall. 604, that 'where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious.' But the fact is not as asserted. The stock was pledged as security for the advance; and the pledge was no more a withdrawal of the stock, terminating Bedford's ownership of it, than his mortgage was an absolute conveyance of his land. It is provided in section 3, article 19, that in addition to real estate security for a loan a shareholder shall 'transfer in pledge to the association one share of the stock held by said shareholder, as *collateral security,* on all loans made by the association' to him."

The conclusion we have reached is in harmony with our holding in *Anselme v. American Savings & Loan Ass'n,* 66 Neb. 520. There the borrower was required to take out 30 shares of stock, upon which the company demanded monthly payments amounting to $18. He borrowed $1,500 upon which he contracted to pay interest at the rate of 6 per cent. per annum, payable in monthly instalments. We found, however, that 15 shares of the stock subscribed for by the shareholder in that case were required to be taken out by him and payments made thereon as a premium on the loan, and that all payments made on those shares would be retained by the company as payment of the premium, and that therefore the borrower paid, in addition to $7.50 a month interest, $9 a month premium, or a total of $16.50

a month interest and premium on the loan, something over 13 per cent. per annum; so that in determining the question of usury in that case we did not consider payments on that portion of the stock which at its maturity would be applied to liquidate the face of the loan.

We conclude that the trial court erroneously determined that the contract was tainted with usury, and we recommend that the decree be reversed and the cause remanded, with instructions to the district court to enter a decree in conformity with this opinion.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded, with instructions to enter a decree in conformity with this opinion.

JUDGMENT ACCORDINGLY.

LINCOLN BUTTER COMPANY V. EDWARDS-BRADFORD LUMBER COMPANY.

FILED MAY 3, 1906. No. 14,160.

1. Corporations: ACTIONS. After the dissolution of a corporation by the expiration of its franchise, or otherwise, an action may be maintained in the corporate name upon a cause of action which accrued to the corporation.
2. ———: ATTACHMENT: ESTOPPEL. When the required number of individuals attempt in good faith to organize a corporation, and for that purpose sign articles of incorporation which contain substantially the provisions required by statute, and file the same with the county clerk of the proper county and proceed to do business as a corporation in the name adopted by the articles, one who transacts business with such company in its corporate name will not be allowed to deny its existence as a corporation *de facto;* and if, in an action against the company in its corporate name, he attaches its property upon a claim arising from business so transacted, he will not be allowed to deny that the business of the company was conducted by it in its corporate capacity.

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

John S. Bishop and *Charles O. Whedon,* for plaintiff in error.

Tibbets & Anderson and *Talbot & Allen, contra.*

SEDGWICK, C. J.

The determination of this case depends upon the capacity of the plaintiff to maintain the suit. The plaintiff in its petition in the court below alleged that it is a corporation, and it began this action as such. The evidence shows that three individuals in Lancaster county prepared and signed articles of incorporation. These articles of incorporation they filed for record in the office of the county clerk of Lancaster county, and proceeded at once to transact business in the corporate name adopted by the articles. The articles provided that "the nature of the business to be transacted by said corporation shall be the buying, reworking, making butter from cream and selling butter, and handling eggs, game or produce as may be deemed necessary, also the erection and maintenance of such buildings and structures as may be deemed necessary and to purchase real estate as a sight (site) therefor." By-laws for the government of the corporation were also prepared and signed by two of the individuals who executed the articles of incorporation. The capital stock authorized by the articles was $1,000, in shares of $50 each "to be subscribed and paid as required by the board of directors." There is no evidence when or by whom this stock or any part of it was subscribed and paid for. There is no evidence of any meeting of the stockholders or any election of officers. Mr. Robertson, who was one of the parties who executed the articles, is shown by the record to have acted as manager for the company. He purchased a creamery outfit and removed it to Brock, where he commenced transacting business in the name adopted by the articles, the "Lincoln

Butter Company." He employed "a butter worker," and appears to have transacted a considerable business until a few months later when the attachment proceedings hereinafter referred to were begun. Mr. Neuman, from whom the creamery outfit was purchased, testified that Mr. Robertson represented himself to the witness as the Lincoln Butter Company, and that Mr. Robertson afterwards took possession of the machinery for the Lincoln Butter Company. A note and chattel mortgage were given for the purchase of the machinery. These papers were executed by Mr. Robertson and the Lincoln Butter Company was not named therein. To explain this fact, Mr. Robertson testifies that the parties from whom he purchased required the papers to be so executed because they thought that the securities would be better if executed by an individual than if given by a corporation.

The articles of incorporation were not filed with the secretary of state, nor was the statutory notice of incorporation published. When the foregoing facts appeared in evidence, the defendant moved to dismiss the case "for the reason that it is shown by the evidence and admissions already made that the corporation that purports to sue in this case as plaintiff was never legally organized, and never became a *de jure* or *de facto* corporation, and for the further reason that the evidence shows that the corporate existence, if it had any corporate existence, has expired." The plaintiff then made extensive and various offers of proof. Among other things offered in evidence was a certified transcript of the record of the proceedings in justice court in which the defendant had procured an attachment against the plaintiff herein, and had caused the property of the plaintiff to be attached. It was to recover damages arising from this attachment that this action was brought. The evidence offered showed that this defendant had begun an action against the plaintiff in justice court, in which it filed an affidavit for attachment against the "Lincoln Butter Co. and W. M. Robertson, Jr., M'gr." The ground for attachment alleged in the affidavit was "that the de-

fendant is about to convert his property or a part thereof for the purpose of defrauding his creditors." This evidence was excluded by the court and all of the other evidence offered by the plaintiff was also excluded. The reason given by the court for this ruling was entered upon the record in the following language: "For the reasons given in the objection to the testimony, and it appearing to the court that this suit was not begun until January 22, 1903, after the corporation was dissolved by operation of law, the objection is sustained." The objection of the defendant referred to had been renewed and restated in these words: "The defendant objects to the offer made for the reason the petition fails to state a cause of action in favor of the plaintiff and against the defendant; for the further reason that upon the evidence already adduced and admissions of counsel it is shown that the plaintiff never had at any time a legal corporate existence and had no capacity to sue. Furthermore, upon the evidence already adduced, it is shown that the charter, if any ever existed, of the plaintiff has expired; that there is a defect of parties plaintiff, and that the plaintiff has no standing in court to bring the action set forth in plaintiff's petition." The articles of incorporation provided that the corporate franchise should continue two years, which time had expired when the action was begun, and this is the principal reason given by the court for sustaining the objection. Of course, the fact that the time specified for the existence of the corporation had expired would furnish no grounds for the ruling of the court. Section 67, ch. 16, Comp. St. 1905, provides: "Any corporation created by this chapter may, at any time after its dissolution, whether such dissolution occur by the expiration of its charter or otherwise, prosecute any suit at law or in equity, in and by the corporate name of such dissolved corporation, for the use of the party entitled to receive the proceeds of any such suit, upon any and all causes of action accrued, or which, but for such dissolution, would have accrued in favor of such corporation, in the same manner and with the like effect as if such corpora-

tion were not dissolved." The fact, however, that the trial court gave an insufficient reason for its ruling will not render that ruling erroneous, and the question is whether the ruling can be supported by any reason. If the evidence offered, together with that already given, would show the competency of the plaintiff to maintain this action against the defendant, the ruling of the court was erroneous.

Section 144, ch. 16, Comp. St. 1905, provides: "No body of men acting as a corporation under the provisions of this subdivision shall be permitted to set up the want of legal organization as a defense to any action brought against them as a corporation; nor shall any person sued on a contract made with such corporation, or for an injury to the property of such corporation, be permitted to set up the want of legal organization in defense of such action." It is urged that corporate existence is not established by proof of acts of the members that are as consistent with the existence of an unincorporated association as of a corporation. There is no doubt of this proposition. It is clearly stated in *Fredenburg v. Lyon Lake M. E. Church,* 37 Mich. 476. All that was shown in that case was that the associates held the ordinary meetings of a religious society, and that they elected officers; among which was the plaintiff, as treasurer. There was no evidence that any articles of incorporation had ever been signed by the associates and filed for record in the public office prescribed by law. The court said:

"Indeed, the evidence in the court below, taken together, tended very strongly to show that no corporation had ever been formed, and that the associates had not seen fit to avail themselves of the authority of the statute for that purpose."

In the case at bar it is clearly shown that the associates attempted to avail themselves of the authority of the statute. They appear to have acted in good faith, though mistakenly, in their attempts to form a *de jure* corporation. After they had so imperfectly organized, they began doing

business in the name of the supposed corporation, and, while it may be true that this business might have been done in that way without incorporation, we think, in view of the provisions of the statute above quoted, one who had prosecuted an action against them in that corporate name, and in that action had attached their property, could not be heard, in an action for damages arising out of such attachment, to allege that the business had not been conducted as corporate business, and that the transactions which were suitable and proper to a corporate existence were not had and done by the plaintiff in its corporate capacity. After the court had excluded the evidence referred to, the jury were instructed to render a verdict in favor of the defendant. This verdict, for the reasons above given, cannot be sustained.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

IN RE DISBARMENT PROCEEDINGS OF WILLIAM L. NEWBY.

FILED MAY 3, 1906. No. 14,320.

1. **Attorneys: DISBARMENT.** If proceedings for disbarment are begun against an attorney at law based solely upon a charge of crime against the laws of this state, which is not admitted by the accused, this court will not, ordinarily, investigate the facts constituting the alleged crime while the matter is pending upon indictment in the district court.
2. ———: ———. If the charge upon which disbarment proceedings are based involves professional misconduct in the relations of an attorney at law with the court in which he practices, that court may, upon satisfactory proof, disbar the attorney from practicing before it.
3. ———: ———. This court alone can pass upon the qualifications of applicants for admission to the bar, and has sole power to annul such admission.

ERROR to the district court for Saline county: LESLIE G. HURD, JUDGE. *Judgment, as modified, affirmed.*

W. L. Newby, W. G. Hastings and *A. G. Wolfenbarger,* for William L. Newby.

Norris Brown, Attorney General, W. T. Thompson and *Joshua Palmer,* for the state.

SEDGWICK, C. J.

Proceedings were begun in the district court for Saline county to disbar William L. Newby, an attorney at law practicing in that court. The complaint filed charged that an action was begun in that court to foreclose a tax lien upon certain real estate situated in that county, and in that action Charles E. Jennings, who then appeared by the records of the county to have the legal title to the real estate in question, was made defendant, the plaintiff at the time supposing that the said Jennings was living; that in fact the said Jennings was before that time deceased; that the said Jennings was a resident of Oklahoma territory some time before his decease, and died there, and an administrator of his estate was there appointed, and that William L. Newby filed a petition in intervention for one Melinda H. Smiley, alleging that the said Smiley was the owner in fee of the real estate in question; that after the decease of said Jennings the said Newby appeared before a notary public of Logan county in the territory of Oklahoma and pretended that he, the said Newby, was Charles E. Jennings, and there executed and acknowledged a deed in the name of Charles E. Jennings purporting to convey the real estate in question to the said Smiley, and "forged the name of said Charles E. Jennings to said deed," and that the said Newby, knowing that the said Jennings was deceased, appeared in the said action as the attorney of said Jennings, and also as the attorney of said Smiley; that he filed various papers in said cause to which he signed the name of said Jennings, and that the said proceedings on the part of said Newby were done by him for the purpose of deceiving the court as well as the parties to

the litigation, and to make it appear that the said Smiley was the owner of the real estate in question, and that he was the authorized attorney for the said Jennings, well knowing at the time that the deed aforesaid was a forgery, and that the said Jennings was dead at the time he so appeared. The complaint recites that defendant filed an attorney's lien in said cause and signed the same as attorney for said Jennings. To this complaint Newby filed an answer in which he admitted the allegations in regard to the commencement of the tax foreclosure proceedings, and admitted that he appeared for Melinda H. Smiley and filed a petition in intervention, and acted for her therein, and filed an attorney's lien in said cause "on the 19th day of February, 1904, as the same appears of record and in the files of this court," and denied the other allegations of the complaint. The court appointed a committee of three members of the bar "to ascertain and report the facts." This committee afterwards reported to the court the following findings:

(1) We find that there is an action pending in the district court for Saline county, Nebraska, wherein Ella A. Taylor is plaintiff and Charles E. Jennings et al. are defendants, to foreclose a tax lien on lots Nos. 144 and 145 in R. S. Bentley's addition to the town of Friend, Nebraska. (2) That this respondent appeared in said action as attorney for Charles E. Jennings, defendant, and Melinda H. Smiley as intervener. That his appearance for Charles E. Jennings was without authority. (3) That Charles E. Jennings died at Lawton, Oklahoma territory, October 13, 1902, seized in fee simple of lots Nos. 144 and 145 in R. S. Bentley's addition to the town of Friend, Nebraska. (4) That at the time the respondent filed the petition of intervention in said action for Melinda H. Smiley he well knew that the deed pretending to convey to her the lots in question was not a true deed. That on the 15th day of June, 1903, the respondent appeared before one Elmer J. Garner, a duly qualified notary public in and for Logan county, Oklahoma territory, at the village of Coyle, in said county

and territory, and represented himself to be Charles E. Jennings, and then and there signed and acknowledged a deed as Charles E. Jennings before said Garner as such notary public, pretending to convey lots Nos. 144 and 145 in R. S. Bentley's addition to the town of Friend, Saline county, Nebraska, to Melinda H. Smiley; and afterwards, to wit, on the 18th day of February, 1904, respondent presented said deed to Frank J. Sadilek, the register of deeds in and for Saline county, Nebraska, who afterwards recorded the same in book 47 of the deed records of Saline county, Nebraska, and on page 195 thereof; and that on the 14th day of March, 1904, said deed was in the possession of the respondent. We find that the said Melinda H. Smiley is the mother of the respondent, and is now living. We find that the respondent has been guilty of deceit to the court, and in collusion to deceive with Melinda H. Smiley.

It was, of course, unnecessary to make findings of matters admitted in the answer, or of matter shown by the files of the court in which the proceedings were pending, which were referred to and identified by the answer. Some exceptions were taken to this report of the committee, and after all objections thereto had been overruled the court entered the following order: "And on this same day this matter came on for hearing on the report of the commitee heretofore filed in this case, and the court being fully advised in the premises, the court hereby approves and confirms the findings of the referees herein in all things. It is therefore considered, ordered and adjudged by the court that the said William L. Newby be debarred from all privileges as an attorney at law, and from practicing in the courts of the seventh judicial district and from the courts of the state of Nebraska, and the committee are directed to certify this order to the supreme court of the state of Nebraska." The case is in this court upon proceedings in error on the part of Newby to reverse this order of the district court.

1. The first question presented by the plaintiff in error,

and the one most insisted upon and discussed, is whether disbarment proceedings based upon a charge of forgery can be sustained and disbarment ordered before conviction upon a criminal prosecution for forgery. In *Morton v. Watson,* 60 Neb. 672, which was a proceeding for disbarment, the court said:

"We do not hold that it is indispensable that a hearing of this nature should be suspended because a criminal prosecution is pending charging the person against whom a disbarment proceeding is being taken with the same facts until the criminal cause is terminated. A finding in a disbarment proceeding either adverse to or in favor of the person accused perhaps would in no way affect such criminal action; nor would a verdict of either guilty or not guilty in a criminal action be binding on a court in a disbarment proceeding wherein the same act is charged."

This language, however, is not to be regarded as constituting a precedent binding upon the court. We recognize the authority of the case itself, and the binding force of adjudication upon the question there involved. In that case referees were appointed by the court, who reported that a prosecution was pending in which the defendant was "under indictment or information of a criminal nature for a criminal charge" in connection with one of the specifications of the complaint upon which the disbarment proceedings were based, and the referees further reported that, for that reason, they had declined to hear evidence tending to prove the criminal charge upon which the defendant was under indictment; and the court determined the question as to whether the referees should have heard such evidence in the following words: "But we have no doubt that it was within the sound discretion of the court, and its committee, to refuse to take up the specification covered by the pending indictment until the criminal prosecution had ended." This language disposed of the question as far it was necessary to do so in the determination of that case, and we think that under the circumstances in that case this ruling was correct. We are not,

however, prepared to say that, if an attorney at law has been convicted of a crime involving moral turpitude, this court would under any circumstances continue him upon the roll of its honorable attorneys while under conviction and sentence for such crime. We think that this court would take the verdict of the jury and the judgment of the criminal court thereon as sufficient evidence of guilt and would not reinvestigate the facts.

Again, when a member of the bar of this court is charged with a crime involving moral turpitude as ground for disbarment, and the facts in relation to that crime are in process of investigation before a court constituted by the constitution for the investigation of such matters, this court would await the determination of the criminal proceedings before passing upon the question of disbarment based solely upon the alleged commission of such crime. In this case, we think the honorable referees who were appointed by the district court to investigate these charges against this defendant and who have manifested so much zeal and care in ascertaining the truth of the matter, were mistaken in supposing that it was their duty to compel the defendant himself to testify in regard to the facts tending to show his guilt of a crime which ought to be investigated by a constitutional jury. There is an exception to the rule of law which we are now expressing, as shown by the opinion of the majority of the supreme court of the United States in *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552. The opinion of the majority of the court in that case was prepared by Mr. Justice Bradley and contains an exhaustive review of the decisions of this country, and of England, and of the common law principles involved, and although his reasoning is strenuously criticised by Mr. Justice Field, in a dissenting opinion, we are satisfied to adopt the views of the majority of the court as expressed in the third paragraph of the syllabus in the following words:

"That although, in ordinary cases, where an attorney commits an indictable offense, not in his character of attorney, and does not admit the charge, the courts will not

strike his name from the roll until he has been regularly indicted and convicted, yet that the rule is not an inflexible one; that there may be cases in which it is proper for the court to proceed without such previous conviction; and that the present case, in view of its special circumstances, the evasive denial of the charge, the clearness of the proof, and the failure to offer any counter proof, was one in which the court might lawfully exercise its summary powers."

At the time the referees took the evidence in this case no criminal prosecution had been begun against the defendant, but this fact would hardly justify the compulsory examination of the defendant under oath upon the facts, which, if proved before a jury, would convict him of forgery. So far as these proceedings rest upon a charge and evidence constituting the crime of forgery, therefore, we are satisfied that they ought not to be allowed to stand.

2. Attorneys practicing in the district courts of this state are officers of the courts in which they practice. Their position is an honorable one; they are the trusted advisers of the court. There can be no doubt that the court has ample power to protect itself against dishonorable and corrupt practitioners. "It is the duty of an attorney and counselor: (1) To maintain the respect due to the courts of justice and to judicial officers. (2) To counsel or maintain no other actions, proceedings, defenses, than those which appear to him legal and just, except the defense of a person charged with a public offense. (3) To employ for the purpose of maintaining the cause confided to him, such means only as are consistent with truth. (4) To maintain inviolate the confidence, and, at any peril to himself, to preserve the secrets of his clients. (5) To abstain from all offensive practices, and to advise no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged. (6) Not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest. An attorney and counselor who is guilty of deceit

or collusion, and consents thereto, with intent to deceive a court, or judge, or a party to an action or proceeding, is liable to be disbarred, and shall forfeit to the injured party treble damages, to be recovered in a civil action." Comp. St., ch. 7, secs. 5 and 6. It appears to us that there can be no doubt that the conduct of this defendant, as set forth in the charges filed against him, and established by his answer and the findings of fact by the referees, independently of the facts constituting the alleged crime of forgery, fully justifies the district court in refusing to allow him to appear as an attorney in that court.

There was an action pending in that court involving the foreclosure of a tax lien upon real estate. The defendant in that action had not been a resident of the county, but was formerly a resident of the territory of Oklahoma, and had died there a long time before the action was begun. The attorneys for the plaintiff were ignorant of the fact of the defendant's death, and so proceeded as though the defendant was living, and was a resident of Oklahoma. This defendant, knowing that the defendant in that action was deceased, and knowing that he had no authority whatever to appear for him while he was living, and of course could have no authority to so appear after his death, entered appearance in the name of the deceased defendant, and filed several papers in the case in which he, this defendant, signed the name of the deceased defendant in the action referred to. Afterwards, claiming compensation for these services as an attorney, he filed an attorney's lien against the deceased man, and undertook to establish that lien. He joined with one Smiley in an attempt to deceive the court and to lead the court to suppose that the action could proceed to an adjudication of the rights of the dead man, who had been named as defendant. He wilfully attempted to lead the court to believe that he had performed legal services in that particular action for one whom he never had authority to represent; one whom he knew was deceased at the time the action was begun, and so could not have incurred any liability to him

as attorney; and attempted thereby to establish a false claim for services rendered as an officer of the court. Upon these facts the court made an order terminating the relations of the defendant with the court as an officer thereof, and we cannot say that the court was not justified in so doing.

3. The judgment of the court should have been limited to disbarring the defendant from practicing as an attorney in that court until further order. Our statute contains no provision for disbarment proceedings. This matter is left to the common law power and duty of the various courts. It is a principle of general, if not uniform, application that the court which is entrusted with the power and the duty of determining the qualifications for admission to the bar has, by implication, the power and duty also to determine when those qualifications are wanting, and when the privilege of that high calling has been forfeited. This court has the sole power of admission to the bar, and therefore has sole power to annul such admission when sufficient cause appears. Charges of misconduct and deceit in the district court are properly entertained and dealt with in that court. Charges of criminal or immoral conduct calling for disbarment should be addressed to this court. No doubt the formal certificate to this court of these proceedings and the conviction of the defendant upon these charges are sufficient to require this court to take action. Further proceedings in this court upon the main charge against the defendant are continued until the final determination of the criminal proceedings now pending in the district court of Saline county. When those proceedings are finally disposed of, it will be the duty of the attorney general to so inform this court, and further proceedings will then be taken thereon.

The judgment of the district court complained of is modified so as to disbar the defendant from practicing in the district court of the seventh judicial district until the further order of that court, and as so modified is

AFFIRMED.

WILLIAM LIVINGHOUSE V. STATE OF NEBRASKA.

FILED MAY 3, 1906. No. 14,567.

1. **Rape: EVIDENCE.** The uncorroborated evidence of the prosecutrix is insufficient to sustain a conviction of the crime of statutory rape.

2. ———: ———. Where in such a case the testimony of the prosecutrix lacks the element of probability, and the corroborating evidence is of a doubtful character, a judgment of conviction will be set aside for want of sufficient evidence to sustain it.

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

F. A. Berry and *Allen & Reed,* for plaintiff in error.

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

BARNES, J.

William Livinghouse was convicted in the district court for Wayne county of the crime of statutory rape upon the person of one Maude McRoberts, a female child under 15 years of age, and was sentenced to the state penitentiary for a term of three years. He brings the case to this court by petition in error, and will hereafter be called the accused.

His first contention is that the verdict and judgment are not supported by sufficient evidence. We shall not attempt to quote the evidence produced on the trial, but shall content ourselves with a summary statement of it. The prosecutrix testified, in substance, that she lived with her mother and step-father in Wayne county, Nebraska; that she was 15 years old on July 16, 1905; that the first time she saw the accused was in the latter part of August, 1904, when he came to her father's place to work; that she left home the following Friday and was gone two months, returning the last Saturday in October; that she was at

home thereafter during all the time the accused worked for her father, and that he made his home there until about the time he was arrested; that she slept up-stairs, in the south room, and in the same bed with her sister Edna, there being two rooms up-stairs, and the accused slept in the north room, her parents sleeping down-stairs. She also stated that her two brothers, each 11 years old, occupied another bed in the same room with her and her sister; that the accused came into her room about midnight on or about the middle of November, 1904, got into bed with her and her sister, told her that he would not hurt her, charged her not to tell anyone, and had sexual intercourse with her; that she neither consented nor resisted; that she told no one about the matter until about the 8th day of May following, when it was discovered by others that she was pregnant; that the accused was a man over 18 and about 45 years of age; that the door between the rooms where she and the accused slept was left open at his request, because it was so warm up-stairs.

Edna McRoberts, the sister of the prosecutrix, testified that she was 13 years old, and was living at home all of the time the accused worked for her father; that he came there about the first of August, 1904; that she slept in the room with her sister every night during the month of November of that year; that she saw the accused in the room where she and her sister slept during that month, in the night-time, at least four or five times; that when he came into the room he would stand by the bed on the side where her sister slept; that he would stand there from five to ten minutes, and then go out; that he never spoke to them, and, to use her own words, "I never saw him do anything." It appears that she never told her parents, nor talked to her sister about the matter. She further testified that she was awake about midnight every night during the month of November, 1904, and she was sure of that fact because she always heard the clock strike 12.

Charles E. West, the step-father of the prosecutrix, stated that the accused was employed by him during the months

of October and November, 1904, and up to about May 8, 1905; that the defendant said to him, when he paid him his wages, which was at or about the time of his arrest: "You take the money home to the girl, she needs it worse than I do."

Mrs. Laura West, mother of the prosecutrix, testified, in substance, that Maude was 15 years old on the 16th day of July, 1905; that the accused began to work for her husband on August 24, 1904, and left their place May 8, 1905; that he was about 45 years old; that she had a conversation with him in Epler's store, in the town of Wayne, on May 8, 1905, and just before he was arrested, the substance of which she gave as follows: "He was walking along the sidewalk with Mr. West, and I was in Mr. Epler's store. He came in there, and wanted to know if I would talk to him. I told him, yes, I would talk to him. He called me in the back store, and says: 'Let's go back there so nobody will hear us.' He says to me: 'Mrs. West, can't we settle this some way?' He says: 'I'm willing to settle in any way you folks say.' He says: 'I'll settle it any way on God Almighty's earth that you folks say.' I says: 'I don't know what we will do with you.' He then said if we would settle it he would see that the child, or girl never would want for anything while he lived, and I told him that—I told him that I didn't know. I started away, walked away. He says to me: 'Just wait a minute; I want to talk one word more.' He was crying. He says: 'If you folks send me up to the pen, my character would be ruined for life.' I says: 'What about the girl's character?' He says: 'I will see that the girl's character will never be hurt.' I started to walk away again and he called me back the third time to talk to me; said he just wanted to say another word; said if we would settle he would settle any way we said. I turned and walked off and left him standing there crying." She further testified that a child was born to the prosecutrix on July 10, 1905. The prosecutrix also testified that she had a conversation with the accused on the 8th day of May, 1905, while she was in the cellar at their house skimming

milk; that he asked her if she was going to have him arrested, and she told him that she did not know; that he then asked her if she would marry him. On cross-examination she testified that she was crying when the accused was talking to her in the cellar; that he inquired if he was the father of the child and she told him he was, that she knew he was the father of her unborn child because she had had no intercourse with any other person.

The accused testified in his own behalf, and denied positively that he ever had sexual intercourse with the prosecutrix; denied that he was ever in her room at any time when she was there; denied that he ever told her stepfather to take the money home to the girl, that she needed it worse than he did. He admitted that he had a conversation with Mrs. McRoberts in Epler's store in Wayne, but denied that he ever made the statements testified to by her. He gave the conversation as follows: "Well, I just walked in there, and asked what she accused me of that trouble for. She said: 'I had ruined the girl for life.' I told her I had not. That I was not to blame for anything of the kind. I did not tell her that I would marry or support the girl." The foregoing is the substance of all of the evidence introduced on the trial.

The rule is well established that to sustain a conviction of the crime of rape the evidence of the prosecutrix must be corroborated; but this does not mean that there must be other evidence as to the main fact of sexual intercourse. It is sufficient if corroborating facts and circumstances be shown which tend to substantiate the truth of her statement. The charge called statutory rape is one easy to make, difficult to prove, and more difficult to be defended against. It is one which naturally creates a prejudice against a person alleged to have committed it, and it is the duty of the courts to carefully scrutinize the evidence in such cases; and where, as in this case, the story of the prosecutrix lacks the element of probability, and few, if any, corroborating circumstances are shown, to refuse to sustain a conviction. It appears from the record that the

prosecutrix was away from home, and in the village of Randolph, for about two months next before the 28th day of October, 1904. It also appears that her child was born on the 10th day of July, 1905. There is no evidence in the record showing or tending to show that its birth was premature, and when we consider the usual period of gestation (about 280 days), with the fact that the child was born about 50 days short of that time, it would seem that the pregnancy of the prosecutrix and the birth of her child, should be given but little weight as a circumstance corroborating her testimony of the principal fact. It is contended by the state, however, that the alleged statements of the accused, testified to by the step-father and the mother of the prosecutrix, amount to a sufficient corroboration of her testimony to sustain the judgment of the trial court. The corroboration in this case, to say the most of it, is extremely slight. If the evidence of Edna McRoberts is to be believed, then the act of sexual intercourse between the prosecutrix and the accused, as testified to by her, could not have taken place. It appears that the accused at all times denied that he ever had sexual intercourse with the prosecutrix, and never directly admitted his guilt in any of the conversations with the mother and step-father of the prosecutrix; that on the trial he gave his own version of the conversations had with those witnesses, which differed materially from the statements made by them. So it would seem from a careful consideration of the evidence that it was insufficient to establish the guilt of the accused beyond a reasonable doubt. Indeed, it appears that the jury were in doubt of his guilt, for by their verdict they recommended him to the mercy of the court, and so, without hesitation, we have reached the conclusion that the evidence does not sustain the verdict. Having thus disposed of the case, it is neither necessary nor proper for us to consider any of the other errors assigned by the accused.

For the foregoing reason, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

WILLIAM L. HICKS V. UNION PACIFIC RAILROAD COMPANY.

FILED MAY 3, 1906. No. 14,209.

1. **Carriers: PASSENGERS.** One who has not presented himself at the passenger station of a railway company or other place provided for the reception of passengers, and who has done nothing to indicate to the company's agents or employees that he intends becoming a passenger, and has in no way committed himself to the care or control of the company or placed himself in its custody, has not established the reciprocal relation of carrier and passenger, and cannot be regarded as a passenger being transported and under protection of the statute of the state.
2. **Directing Verdict.** Upon an examination of the evidence, *held*, that the court erred in withdrawing the questions of negligence and of contributory negligence from the jury and peremptorily directing a verdict.

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

H. M. Sullivan and *Warrington & Stewart*, for plaintiff in error.

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

AMES, C.

This is a proceeding in error to review a judgment for the defendant in an action to recover damages for a personal injury.

Hicks, who lived some distance from Gothenburg, in this state, went to that village one morning, in company with three other persons, with the intent to travel thence upon one of the defendant's railway trains to the village of Lexington, situate some distance to the eastward. Having arrived at the former town, the four persons stopped for breakfast at a restaurant lying to the northward of the railway line and passenger station of the defendant company. Before the meal was through with, it was an-

nounced by some bystander that the train upon which the party desired to take passage had arrived and was about to leave. This train was standing on a side-track southward from the passenger station, the building being between it and the plaintiff, and between the train and the building was the main line or track of the company. When the announcement was made, the party left the restaurant hurriedly and ran toward the station. Practically simultaneously, a through train not scheduled to stop at the village approached at a rapid, but it does not appear at an unusual, rate of speed from the west and swept over the track between the station and the train upon the siding. The country in that neighborhood is a flat or level prairie, and from any point at or within 300 feet north of the station the train on its approach could have been seen for a distance of several miles, but the plaintiff did not take the precaution to look in that direction, because, it seems, he did not apprehend the likelihood of the approach of a train from that direction at that time. The train on the side-track had arrived some five minutes before, and was emitting considerable noise, due to the "blowing off" or cleaning of the flues of the engine with blasts of steam, and his attention was not arrested by the sounding of the whistle and ringing of the bell of the incoming train, or by any other means, until he had run past the east end of the station and had crossed the main track, when his attention was attracted either by the hallooing of bystanders or by the noise of the incoming train, he is uncertain which, or perhaps by both, and he looked around and discovered the latter at a distance of about 400 feet. The incoming train was several minutes behind time, and in the usual course should have passed the station before the arrival of the standing train, but it does not appear that the plaintiff relied upon or was misled by that fact or that he knew of it. But the evidence shows that, at the time the plaintiff ran past the station and went upon the track, the conductor and a brakeman were standing on the north side of the main track waving their

hands and hallooing so as to warn people of the approach of the train and the danger attendant thereon. Immediately upon his discovery of the situation, the plaintiff became aware of immediate peril and became confused and morally irresponsible. Whether he attempted to retrace his steps across the main track, or to retreat further toward the standing train, or whether he practically stood still, he does not remember and perhaps never distinctly knew. At all events he was beside the track when the moving train swept past and was struck by some of its projecting parts, receiving injuries to recover damages for which this action was brought. His companions boarded the standing train unhurt.

The principal argument by counsel is of the question whether the plaintiff was a passenger being transported within the meaning of the statute, so as to impose upon the company the liability of an insurer of his safety. At the close of the plaintiff's evidence the court instructed the jury to return a verdict for the defendant, seemingly upon the ground of contributory negligence, but perhaps for the reason that in his opinion there was insufficient evidence of negligence by the defendant. We are unable to adopt the idea that the plaintiff was a passenger. He had not presented himself in the defendant's station, or upon its platform or other place provided for the reception of passengers. He had said or done nothing that indicated in any certain or unequivocal way to the company's agents or employees or even to the bystanders, except his three companions, that he intended becoming a passenger, nor in any way committed himself to the care or control of the defendant or placed himself in its custody, so that the reciprocal relation of carrier and passenger cannot with propriety be said to have been established. That some such act must be done, and some such relation entered into, in order to render one a passenger being transported, within the meaning of our statute and under its protection, is the central idea expressed by this court, after a review of the authorities, in *Fremont, E. & M. V. R. Co. v. Hagblad,* 72

Neb. 773, and ought now to be regarded as the settled law of this state.

Neither do we think, in view of the evidence disclosed by this record, that, as a matter of law, the defendant company was guilty of actionable negligence. The train that stood upon the siding was one that in railroad parlance is called a "local": that is, one that stopped at all the stations and did not run with great rapidity when in motion. The other is what is called a "fast mail," which stopped at only the more important stations at long intervals of time and space, and which maintained, and presumably was under contract with the United States government to maintain, a great rate of speed. That such trains unavoidably "lose time," or are behind their schedule occasionally, is a matter of common knowledge, as is also the fact that it is necessary for them, in order to fulfill their mission, to overtake and pass slower moving trains, and to meet and pass other trains standing upon sidings, and that such sidings are, and practically can be, maintained, at least in sparsely settled districts, only at local or way stations. That such a situation is one of considerable peril is without doubt, but that the danger may be less than in like circumstances in more densely inhabited places is also obvious. That the company by its servants took some pains to warn the public of the dangers of the occasion is not disputed. Whether such means were such as ordinarily careful and prudent men would have regarded as commensurate with the peril or required by the circumstances is, we think, a question to be answered by the jury.

And so with respect to the conduct of the plaintiff. He was a man of mature years and a resident of the vicinage. He must be assumed, we think, to have had such general knowledge of the manner of operating the defendant's trains, and trains upon other railroads in like places, as was derivable from casual observation and readily obtainable by the public at large. But whatever may be the case in cities and densely settled communities the act of "run-

ning for a train" and of boarding one standing still upon a siding at a way station, without entering the building, is one which, in comparatively sparsely inhabited localities, is practiced daily by ordinarily careful and prudent men, and one which, in itself, is not regarded by such men as negligent or especially dangerous. But such an act may under special circumstances and perhaps under such as occurred in this instance, be done so heedlessly and recklessly as justly to expose the person committing it to the charge of negligence. Whether in this or any similar instance it does so is a question addressed to the judgment of ordinarily careful and prudent men after a consideration of all the circumstances, and one which therefore should, in our opinion, be answered by the jury. Every case depends largely upon its own peculiar features and surroundings, and although "the books are full" of decisions, and a great many are cited by counsel on both sides, it is seldom that two are exactly alike even in essential particulars, or that one can be found that can be regarded as a controlling precedent or authority for a subsequent case. This fact is, of course, due to the difficulty or impossibility of formulating rules of law which are capable of accurate application to diverse transactions, and hence the comparative rarity of cases in which a peremptory instruction to return a verdict for either party is permissible.

For these reasons, it is recommended that the judgment be reversed and a new trial granted.

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.

REVERSED.

HIRAM RICE V. STEPHEN V. PARROTT.*

FILED MAY 3, 1906. No. 14,239.

1. Contract: STATUTE OF FRAUDS. An oral contract, upon sufficient consideration, to divide the profits of a purchase and sale of land is not affected by the statute of frauds and is valid and enforceable.
2. ———: REPUDIATION: ACTION. An express repudiation and denial of such a contract by the party having the title will give rise to a cause of action at law for damages.
3. Appeal: MOTION FOR NEW TRIAL. An appeal to this court without the execution of a supersedeas bond is not a waiver of a pending motion for a new trial in the district court, and it does not deprive the latter court of jurisdiction to grant the motion.

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

Charles Riley and *H. C. Vail,* for plaintiff in error.

J. A. Price, Reeder & Hobart, I. L. Albert and *J. J. Sullivan, contra.*

AMES, C.

The facts established, as we think, by a clear preponderance of the evidence in this case are that in March, 1899, Rice and Parrott entered into an oral agreement to the effect that the former should purchase with his own funds, and take to himself a conveyance of a certain tract of land, and that in consideration of certain acts and services performed and to be performed by Parrott in the procuring of the purchase and in looking after and caring for the land, the net profits of the transaction, when the land should be sold, should be equally divided between the parties. It is not clear that any specific date upon which the sale should be made was agreed upon although there is some conflict in the evidence in that regard, but the point

* Rehearing allowed. See opinion, p. 505, *post.*

is in this case immaterial because the law, in the absence of stipulation, implied a reasonable time. The purchase and conveyance were made for a consideration of $4,000 paid by Rice. Parrott, having, after the lapse of some time, made an ineffectual demand upon Rice for a sale of the land, procured a purchaser for it himself at an agreed price of $7,400 cash, and prepared a deed to the intended purchaser, which Rice refused to execute, and he also repudiated and denied any interest in the transaction on the behalf of Parrott, who is not shown to have been in any respect in default in the keeping of his part of the agreement. In October, 1901, two and a half years after the purchase of the land, Parrott begun this action apparently for a specific performance and for an accounting. The original petition is not in the record. A trial to the court resulted, on May 1, 1903, in a judgment of dismissal without prejudice to a new action at law. Within three days Parrott filed a motion for a new trial which the court took under advisement and decided at a subsequent term, on November 17, 1903, by granting the application. In the meantime, and just before the expiration of the six months' period of limitation, Parrott filed and docketed an appeal in this court, but without the execution of a supersedeas, and immediately after the granting of his motion for a new trial he voluntarily dismissed his appeal. He, thereupon, by leave of court, filed an amended petition, also praying an accounting and specific performance. Issues were made up, and as the result of a trial to the court, without a jury, the plaintiff recovered a money judgment for $2,100 and costs of suit, which the defendant seeks to reverse by this proceeding in error.

It has been argued at considerable length, both orally and by brief, that by docketing his appeal in this court the plaintiff below waived his then pending motion for a new trial, and that his subsequent dismissal of the appeal operated as an affirmance of the judgment of the district court dismissing the action, and deprived the latter mentioned court of jurisdiction. This contention is predicated

upon two grounds: First, upon the doctrine of the election of remedies, and it is said that the plaintiff, having elected to review the former judgment by appeal and actually begun proceedings to that end, could not afterwards abandon them and proceed at law by urging the motion for a new trial. But this is putting the cart before the horse. If the doctrine of the election of remedies were applicable, the plaintiff by filing his motion for a new trial elected to proceed at law, and waived his remedy in equity by appeal, which latter not only had he a right to abandon, but this court, upon the matter being brought to its attention, would have deprived him of by dismissal. But such has never been regarded as the law in this state, and, ever since the organization of its courts, parties have universally enjoyed the liberty of completing their records by obtaining rulings upon motions for new trial in equity causes, and afterwards appealing, and subsequently, if they chose, of abandoning the appeal and proceeding by petition in error.

The second ground is that the appeal vacated the judgment of the district court and deprived it of jurisdiction over the cause by transferring the entire controversy to this court. Although in some respects and for some purposes an appeal has such an effect, it cannot be said to have it unqualifiedly in all cases and in all regards, for, otherwise, the mere docketing of an appeal would operate as a supersedeas and dispense with the necessity for the undertaking prescribed by the statute upon the subject. That statute must itself be regarded as an express legislative enactment that the judgment shall, in the absence of the undertaking, retain its vitality and be capable of execution during the pendency of the appeal, and this court has held that even after supersedeas has been effected it may, for sufficient cause, be set aside and the judgment of the lower court restored to its original *status* and enforceability. *Tulleys v. Keller,* 42 Neb. 788. As we have pointed out no supersedeas was given in this case, and the judgment for costs remained enforceable against the

plaintiff until it was vacated by the order granting the motion for a new trial, and a like condition could have existed, of course, if the judgment had been in favor of the plaintiff and the situation of the parties had been reversed. It follows, we think, as a necessary consequence, that the district court retained its jurisdiction over the judgment, and of process and procedure founded upon it, and if its power to vacate it, in all respects as it would have done if no appeal had been taken, except that it could not interfere or impair the procedure in this court so long as the judgment remained in existence.

We are therefore concerned only with the sufficiency of the pleadings and evidence to sustain the judgment of the district court about which we have no doubt. It is urged, with some earnestness, that in the absence of a writing no estate or interest in the land was created and that an action for a specific performance of the agreement to make sale of it will not lie. But this question need not now be decided. It has been held by this court that an oral contract, upon sufficient consideration, to divide the profits of a purchase and sale of land is not affected by the statute of frauds, and is valid and enforceable. *Harris v. Roberts,* 12 Neb. 631; *Cameron v. Nelson,* 57 Neb. 381; and such seems to be the current authority elsewhere. *Holmes v. McCray,* 51 Ind., 358; *Richards v. Grinnell,* 63 Ia. 44; *Coward v. Clanton,* 79 Cal. 23, 21 Pac. 359; *Meagher v. Reed,* 14 Colo. 335, 24 Pac. 681. *Harris v. Roberts, supra,* was, in essential features, not unlike this, the action being at law for damages for breach of an oral contract to convey. Whether in that case or in this a specific performance of the agreement could have been decreed has not been decided and need not be. In neither case could the party who held the title, after having repudiated his agreement and refused to convey, retain both the land and the consideration for which, in part, he obtained it. If he retains the former no statute excuses him from his obligation to return the latter, with such sum in addition thereto or

substitution therefor, by way of profits, as he promised to make. This conclusion is in harmony with *Norton v. Brink*, 75 Neb. 566. It was there decided that after such a contract has been executed by a sale of the land the statute of frauds is not a bar to an action to compel its performance by a division of the proceeds. It follows, of necessity, that the statute is not a bar to an action at law for damages for a breach of the contract by refusal to make a sale. That Rice was guilty of a breach of his contract cannot be successfully disputed. The action, though in form for specific performance, proceeded as one at law and resulted in a judgment for money only. There was no objection to the jurisdiction of the court in equity, and no demand for a jury to try the issue of damages, and it is not claimed that the amount of the recovery is excessive.

We are of opinion that no reversible error has been committed, and 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.

The following opinion on rehearing was filed April 4, 1907. *Judgment of affirmance adhered to:*

Contract: STATUTE OF FRAUDS. An oral agreement whereby one of the parties thereto is to look up and negotiate the purchase of such land as can be bought and sold at a profit, to take charge of, rent, improve and procure purchasers therefor, the titles to be taken in the name of the other party, who agrees to furnish the amount of money necessary to carry on the business, the net profits of the venture to be equally divided, is not within the statute of frauds.

BARNES, J.

The plaintiff below had judgment, and defendant prosecuted error. By our former decision the judgment of

the district court was affirmed. A motion for a rehearing was sustained, and all of the questions presented by the record have been reargued to the court. For a full statement of the facts underlying this controversy reference may be had to our former opinion, *ante,* p. 501. The first trial in the district court resulted in a judgment dismissing the plaintiff's action without prejudice. A motion for a new trial was filed in due season, but no ruling was had thereon until more than six months after the judgment was rendered; and plaintiff, as a matter of precaution, lodged a transcript in this court and had his appeal docketed. The motion for a new trial was finally sustained, and thereupon plaintiff was allowed to dismiss his appeal.

It is again strenuously contended by counsel for the defendant below that plaintiff waived his pending motion for a new trial by filing a transcript and docketing an appeal in this court; that his subsequent dismissal of the appeal operated as an affirmance of the judgment of the court dismissing his action and deprived that court of jurisdiction. On this question, by our former opinion, we ruled against the defendant. On a reexamination of the matter we are satisfied with that ruling. We find that in the recent case of *Henry v. Allen,* 147 N. Y. 346, it was held that the taking of an appeal and its pendency does not prevent the trial court from sustaining a motion for a new trial, and it was said in that case by the court of appeals:

"We have heretofore pointed out that upon an appeal to this court the record itself is not transmitted to us, but a transcript thereof, and the case for all general purposes still remains in the court of original jurisdiction. *People v. Board of Education,* 141 N. Y. 86. In the above case we said: 'In all matters pertaining to the appeal itself and to the proper hearing thereon this court has jurisdiction, and also in regard to all applications which by statute may be made to this court after the taking of the appeal, but as to all other applications the case is

regarded as still pending in the court of original jurisdiction, and such applications should be made to that court.' * * * If the supreme court, in the exercise of its discretion, grants the motion for a new trial, the legal effect will be the vacating of the judgment from which the appeal has been taken to this court, and a motion to dismiss the appeal would then be proper."

So, both on principle and precedent, our former judgment on this point was right and we adhere to it.

The second contention, and the one most relied on for a reversal of the judgment of the trial court, is that section 3, ch. 32, Comp. St. 1905, commonly called the statute of frauds, is a bar to plaintiff's right of recovery herein. The facts stated in plaintiff's petition and found by the trial court are, briefly stated, as follows: On or about the 30th day of March, 1899, the plaintiff and defendant entered into an oral agreement by which the defendant was to furnish all the money necessary to conduct the business of speculating in real estate, was to take and hold in his own name the title to such land as should be purchased until the same could be sold at a fair and reasonable profit above the original investment, and he was then to convey the same to the purchasers. It was agreed that the plaintiff, being a dealer in real estate, should look for and procure such lands as in his judgment could be bought and sold again at a profit, should cause the title thereto to be conveyed to the defendant, should seek for and procure purchasers for such lands, and should sell the same when a profit could be realized upon the original investment. He was also to have the general oversight, care and management of such real estate as might be bought and sold. He was to attend to renting the same, and to threshing, dividing and marketing the crops grown thereon; and when he procured a purchaser at a fair and reasonable profit the defendant was to convey the lands to such purchaser, and the proceeds of the sales were to be divided as follows: The defendant to be paid the amount of his original investment; the remainder, together with

the income from the land, was to be equally divided between the plaintiff and defendant, after deducting taxes and expenses. It appears that in pursuance of the agreement the plaintiff purchased two tracts of land; one known as the Stangland farm, and the other as the Copson land, and had them conveyed by good and sufficient title to the defendant; that he thereupon took charge of the property, rented it, improved the Copson farm by hauling about 100 loads of manure thereon; that he looked after the division of the crops, and finally, a short time before this action was commenced, procured purchasers therefor at fair and reasonable prices, at a good profit over the original investment, and demanded that the defendant should convey said real estate to such purchasers. The defendant refused to comply with this request, and refused to pay the plaintiff his share of the profits which could have been realized upon such proposed sales.

It appears that contracts of this kind have been quite uniformly upheld by the courts of this country. In *Carr v. Leavitt,* 54 Mich. 540, the facts were similar to those in the case at bar. There the defendant, desiring to purchase certain lots in the city of Detroit, procured the services of the plaintiff in bringing about such purchase, and it was agreed that the plaintiff should employ his time and services in and about the purchase of said property at a price fixed between the plaintiff and defendant, and in and about the management of said property; that the defendant would furnish the means necessary to make the purchase, and upon the sale and disposition of the property so purchased the defendant would pay the plaintiff one-half the profits realized upon the sale over and above the price paid therefor. The plaintiff performed the services, and purchased the property for $37,000, which was the price agreed upon. The property was conveyed to the defendant, and later on was sold for $52,000, and the defendant, on demand, refused to account to or pay the plaintiff one-half of the profits realized on the sale. It was admitted that the alleged contract was not in writing, and

the defendant took the objection that the contract was void under the statute of frauds. The trial judge held the objection well taken, and directed a verdict for the defendant. The case was appealed to the supreme court and upon the foregoing facts Cooley, Chief Justice, speaking for the court, said:

"If the contract the plaintiff relied upon was within the statute, it must have been because it contemplated a purchase and then a sale of certain lands. But the plaintiff was to be neither purchaser nor seller, and the contract did not contemplate that in any contingency an interest in the land was to be conveyed to or vested in him. It contemplated only that in a certain event the plaintiff should receive a share of the moneys that a sale of the land should bring. His interest was therefore in these moneys, and not in the land itself. And the moneys were to be payable to him in consideration of services performed. The profits on the two trades, to be brought about by the plaintiff, were to be taken as the measure of compensation, instead of any other that might have been agreed upon. This surely was not a contract 'for the sale of any lands or any interest in lands,' within the meaning of the statute of frauds. How. St., sec. 6181. That statute contemplates a transaction between parties contracting with each other as principals; and this was not such a transaction. In this case plaintiff as agent undertook to perform for the defendant certain services, and the defendant undertook to make a compensation therefor, the amount of which should be contingent on the value of the services. It was assumed in *Bunnel v. Taintor's Adm'r,* 4 Conn. 568, that such a contract was not within the statute, and there are many express adjudications to the same effect."

We approve of the rule announced in that case, and the reasoning of the learned chief justice supporting it. As before stated, nearly all of the courts of this country have upheld contracts like the one here in question. Some of them on the ground that the contract is one of partnership for the purpose of speculating in real estate; others holding

that the contract is one for profit-sharing only; and still others, on the ground of compensation for services, as set forth in the opinion just quoted from. *Richards v. Grinnell,* 63 Ia. 44; *Brosnan v. McKee,* 63 Mich. 454; *Snyder v. Wolford,* 33 Minn. 175.

It is further contended that an affirmance of the judgment of the trial court commits us to a rule inconsistent with our last opinion in *Norton v. Brink,* 75 Neb. 575. It seems clear, however, that such is not the case, for the two cases are easily distinguishable. In *Norton v. Brink,* to avoid the statute of frauds, it was alleged that by the contract the land in question was to be purchased in partnership, and held for joint profit by the plaintiff and defendant. Nothing was said as to when it should be sold, if at all. It appears that Brink purchased the land himself, paid the full consideration therefor, took the title in his own name, and died without having sold it. His son, who inherited his estate, sold the land at a profit, and suit was brought against him to declare a resulting trust and for an accounting as to the proceeds of the sale. It was there held that the facts did not create the relation of partnership, and as the plaintiff had contributed nothing to the enterprise, and had paid no part of the purchase price, no resulting trust arose in her favor.

In the case at bar the plaintiff makes no claim to an interest in the land; neither does he allege the existence of a partnership. His claim is based on his right to recover one-half of the net profits of the transaction as his compensation for his services contributed to the joint enterprise. His evidence not only sustains this claim, but the defendant has in two letters written by himself to the plaintiff acknowledged the existence of such claim; and those letters were properly received in evidence against him. In one of them he says: "Yes, Parrott, I always keep my word. You are to have one-half the profits in the above farm when sold, and the same in the Copson farm. Of course, this is after the expenses are deducted, provided the income on

them does not meet expenses." In the other letter, among other things, he said: "We must get all we can out of the place until a good price is given for it." This is a case where the establishing of the debt does not involve the establishing of an interest in the land itself. And, when the action concerns only the purchase money for the execution of the conveyances, of course the promise does not seek to create a trust, and is enforceable. *Harris v. Roberts,* 12 Neb. 631; *Cameron v. Nelson,* 57 Neb. 381; *Linscott v. McIntire,* 15 Me. 201; *Hess v. Fox,* 10 Wend. (N. Y.) 436; *Snyder v. Wolford, supra; Smith v. Putnam,* 107 Wis. 155.

For the foregoing reasons, we are satisfied that our former conclusion on this point was right. As the foregoing are the only questions presented for our consideration on the rehearing, our former judgment is adhered to.

AFFIRMED.

AMERICAN BONDING COMPANY V. FRED HEYE ET AL.

FILED MAY 3, 1906. No. 14,249.

Supersedeas Bonds: LIABILITY OF SURETY. In the absence of fraud or mistake, or of some circumstances working an estoppel, a surety upon a supersedeas bond can be held only for consequences of the proceeding in which the instrument was given.

ERROR to the district court for Otoe county: PAUL JESSEN, JUDGE. *Reversed with directions.*

Hall & Stout and *E. Wakeley,* for plaintiff in error.

John C. Watson, contra.

AMES, C.

The defendants in error, Heye and others, successfully prosecuted in the district court for Otoe county an action against P. R. E. E. Linton and A. P. Linton to quiet title and possession in the former, of a tract of land lying in that county. For the purpose of obtaining a review of that judgment by this court, the Lintons, as principals, and the

American Bonding Company of Baltimore, as surety, executed and filed with the clerk of the district court a bond in the penal sum of $100, reciting the judgment, in substance, and concluding with the following as its condition. "That the judge of the court fixed the amount of the supersedeas bond at $100; that the above obligation is given in pursuance of said order, and upon all the conditions provided by law for such bonds required to be given upon appeal; the said American Bonding Company of Baltimore hereby obligated itself to pay any portion of the above obligation fixed by the court, which may be required of it, for any violation of the provisions of said bond or the provisions of the law required in such bond hereby incorporated by reference." Shortly after the giving of the foregoing bond the Lintons prosecuted a petition in error in this court, which resulted in an affirmance of the judgment of the Otoe county court, and thereupon they sued out a writ of error from the supreme court of the United States, and for the purpose of effecting a supersedeas they, as principals, and the bonding company, as surety, executed and filed with the clerk of this court a bond in the penal sum of $500, reciting, in effect, that it was given as a supersedeas of a judgment rendered by the circuit court of the United States for the district of Nebraska, pending the prosecution of a writ of error to reverse such judgment from the supreme court of the United States. Afterwards such proceedings were had in the last named court that the judgment of this court was affirmed. This action was begun in the county court of Otoe county by the obligees named in said bonds against the surety alone to recover the amount of costs taxed against the plaintiffs in error, the Lintons, in this court and in the supreme court of the United States. There was a judgment for the plaintiff in the county court, which was affirmed in a proceeding in error in the district court, and from the judgment of affirmance the present proceeding is prosecuted.

The petition recites the facts substantially as above related, and does not aver that at any time before the be-

ginning of this suit the bonding company knew or had notice, actual or constructive, that the instrument first described was used, or was intended or contemplated to be used, as a means of superseding the judgment in Otoe county pending a proceeding in error in this court, or that the instrument secondly described was used, or intended or contemplated to be used, as a means of superseding any judgment of this court under any circumstances. It can scarcely be necessary to cite authorities or to adduce reasons for holding that such a petition does not contain facts constituting a cause of action. The latter mentioned instrument appears to be entirely foreign to the litigation in which it was attempted to be used, and the most that can be said of the former one, even if so much can be said, which is doubtful, is that it was intended to be used in the prosecution of an appeal to this court, and it is quite evident that one might be willing to be surety in an appeal in which there would be a trial of the cause *de novo* and upon its merits, who would decline absolutely to be sponsor for a prosecution confined to allegations of errors committed by the lower court in the progress of the trial. It is plain that, in the absence of fraud or mistake or of some circumstances working an estoppel, a surety upon a supersedeas bond can be held only for consequences of the proceeding in which the instrument purports to have been given.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded, with instructions to that court to reverse the judgment of the county court and proceed according to law.

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 the cause remanded, with instructions to that court to reverse the judgment of the county court and proceed acording to law.

REVERSED.

JOHN B. HAGEMAN V. ESTATE OF ENOS S. POWELL.

FILED MAY 3, 1906. No. 14,280.

Witnesses: Competency. One who has a direct legal interest as one of several joint heirs or colegatees in an action against a representative of a deceased person is not rendered by the statute incompetent to testify as to transactions and conversations between the deceased and an adverse party in whose alleged right, claim or demand the witness has no interest.

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

R. W. Sabin, for plaintiff in error.

Sackett & Spafford, contra.

AMES, C.

Enos S. Powell died leaving several heirs at law, who are also joint residuary legatees under his will, and among whom was Mrs. Hageman, wife of the plaintiff, who is plaintiff in error herein. For several years immediately preceding his death he had been a member of the household of the plaintiff, who filed in the county court a claim for the reasonable value of his board and lodging. From an order of the county court thereon there was an appeal to the district court, where a petition, alleging the claim, was put in issue by answer and the cause prosecuted to trial. Upon the trial the plaintiff made offers of proof, by his wife as a witness, both of which were objected to and both of which the court excluded: First, that she overheard a conversation between the deceased and her husband with reference to the former making his home with the latter and paying therefor; and, second, that shortly before the death of her father she had a conversation with him in which he admitted having promised to pay her husband for the services, to recover for which the claim is prosecuted. There was a judgment for the defense, from which the plaintiff prosecutes error.

The only questions involved are as to the propriety of the rulings of the court upon the foregoing offers of testimony. Section 329 of the code enacts that "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." Mrs. Hageman has a direct legal interest in the result of the suit, because, if her husband succeeds, a satisfaction of his claim will diminish her distributive share of her father's estate. But is she a party, or interested, adverse to the legal representative of the deceased in such sense that her testimony is excluded by the statute? A somewhat similar question was before this court and answered in the negative in *Parker v. Wells*, 68 Neb. 647. The decision in that case professedly followed and was founded upon the opinion in *Wylie v. Charlton*, 43 Neb. 840, from which a lone excerpt was quoted. After an extended discussion the latter mentioned opinion concludes, upon that branch of the case, with the following as a summing up of the results of reasons and authorities upon the subject:

"Having in view the common law as to competency, and the mischief which this statute sought to prevent, it should be construed as if it read that no person having a direct legal interest in the result of an action shall be permitted to testify, when the party interested adversely to the witness' interest is the representative of a deceased person."

It is clear that the statute so read would not exclude the testimony offered on the trial of this case. But intermediate between the two cases cited is the opinion of this court by former Chief Justice NORVAL in *Kroh v. Heins*, 48 Neb. 691, which is claimed to be inconsistent with them. But the writer thereof cannot be supposed to have been forgetful of *Wylie v. Charlton, supra*, which he cites with approval, and without an attempt to distinguish or discriminate between it and the decision which

he himself was announcing. So that it does not appear that he regarded the two opinions as being in mutual conflict, nor were they necessarily so. In *Kroh v. Heins,* Mrs. Heins, who was one of several plaintiffs in the lower court and whose testimony it was held should have been excluded, was, or alleged herself to be, the sole trustee and owner of the legal title of the choses in action which were the subject of the suit and concerning the ownership of which she testified respecting transactions and conversations had between herself and the deceased, of whom she and the other plaintiffs were joint heirs, which testimony tended to support her own legal title as trustee and the beneficial ownership of the defendants who were her own children. The court held that, although she might waive her incompetency so far as it affected herself alone, she could not waive it on behalf of her coplaintiffs, and that, though she had legal interests on both sides of the controversy, the court would not weigh them for the purpose of attempting to ascertain the preponderancy, citing to this point *Wylie v. Charlton, supra.* We conclude from the foregoing considerations that the construction of the statute announced in *Wylie v. Charlton, supra,* ought now to be regarded as the settled law in this state, and since Mrs. Hageman has no interest in this controversy adverse to that of her coheirs and legatees of the estate of her deceased father, she is not incompetent to give the testimony offered on the trial.

For these reasons, we recommend that the judgment of the district court be reversed and a new trial granted.

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.

REVERSED.

DAVID OTTO ET AL. V. GEORGE CONROY ET AL.

FILED MAY 3, 1906. No. 14,300.

Highways: VACATING: DISCRETION OF COUNTY BOARD. The decision of the necessity or expediency of establishing, maintaining or vacating a public road is committed exclusively to county boards and other like legislative and governmental agencies, and is not subject to judicial review.

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

Hamer & Hamer, for plaintiffs in error.

H. M. Sinclair, contra.

AMES, C.

A certain public road in Buffalo county intersected a section line at two points, and between those two places traversed two adjoining quarter sections of land. A sufficient number of freeholders, having the qualifications required by the statute, presented to the county board a petition praying for a vacation of the road between these two points of intersection, and the connection of such points by the opening and working of a statutory road along the section line. A large number of residents of the county, none of them living or owning property between the places of intersection, or along the line either of the statutory road or of that portion of the old road proposed to be vacated, filed a remonstrance against the action prayed in the petition, the gist or substance of which is the following: "This road has been traveled by the public for 29 years and is one of the main-traveled roads leading into the village of Shelton, and is now a good road for hauling heavy loads over. Realizing that the change as contemplated by your honorable body will require a great expense if the new road is put in good condition to travel, and that such contemplated change will work a great hardship upon

the farmers who are now compelled to travel it, and that many of them will be compelled to go elsewhere to trade, thus working a great injury to the business interests of the village of Shelton, we desire to protest against the proposed changing of said road as contemplated by your honorable body and petition that said road be left as it now is." The county board rejected the remonstrance and granted the petition, as did also the district court to which the matter was carried by proceedings in error, and from the judgment of affirmance in the district court error is prosecuted here.

There was a considerable volume of evidence taken before the county board and preserved in a bill of exceptions, from a clear preponderance of which, as counsel for remonstrants contend, it is made to appear that the action of the county board was impolitic and unwise because the section line road is rough and hilly, requiring the expenditure of a large sum of public funds to render it passable, while the part of the road proposed to be vacated is comparatively level and smooth, so that travel thereon is more expeditious and heavier loads can be hauled over it than upon the former, even after it shall have received all practicable improvement. But we concur in the opinion of the learned judge of the district court, expressed in special findings and entered upon the record, that these are matters calling for the exercise of administrative rather than judicial discretion and are not the subject of review by the courts. The case before us illustrates the truth of this proposition so clearly as to amount to a demonstration and to obviate the necessity of extended argument or the citation of authority. No error of procedure is complained of or pointed out. If the district court had reversed the order sought to be reviewed it is not presumable that a different state of facts would have been made to appear upon a reexamination of the questions involved, so that the order of reversal would have had no practical force, unless it should have been accompanied by a mandate requiring the county

board to rescind its order and enter in lieu thereof one upholding the remonstrance and denying the petition, at least with respect to the vacation of the old road. No petition was needed for the opening of the statutory or section line road. There must be a finding that the public good requires such action, but, with respect to the order by the county board with reference to the utilization thereof there is no procedure subject to judicial review or in the course of which any error could have been committed; there being involved no claim by property owners for damages. *Barry v. Deloughrey,* 47 Neb. 354. It is, indeed, represented in the remonstrance and argued by counsel that certain objectors who are residents and property owners in the village of Shelton, and elsewhere in the county at varying distances from the vicinity of the proposed change in the route of travel, will suffer considerable indirect pecuniary damages on account of the diminution of their trade and the depreciation of the value of their lands which, it is alleged, will be occasioned by such change and consequent impairment of the highway. But no claims for any such damages were presented to the county board, or if any were so presented the action of the board thereon is not complained of in this proceeding. It will be seen, therefore, that an order of reversal, for the reason urged by plaintiffs in error, will be nothing more nor less than the assumption by the court of the ordinary functions of the county board with respect to the general administration of the road law. It is quite clear that neither the statute nor the constitution intended to confer any such power or duty upon the courts. On the contrary it is quite certain, both upon principle and authority, that the decision of the necessity or expediency of establishing, maintaining or vacating a public road is committed exclusively to county boards and other like legislative and governmental agencies, and is not subject to judicial review. *Butte County v. Boydston,* 11 Pac. (Cal.) 781; *Sherman v. Buick,* 32 Cal. 242; *Vedder v. Marion County,* 28 Or. 77, 36 Pac. 461; *Commissioners*

Court v. Bowie, 34 Ala. 461; *Tiedt v. Carstensen,* 61 Ia. 334; *Howard v. Board of Supervisors,* 54 Neb. 325.

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

EPPERSON, C., concurs.

OLDHAM, C., not sitting.

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

AFFIRMED.

NELSE ANDRESEN V. BALTHAS JETTER ET AL.

FILED MAY 3, 1906. No. 14,306.

1. **Trial.** It is not error for the court to omit to submit to the jury evidence in support of a cause of action not set forth in the pleadings or embraced within the issues.
2. **Evidence** examined, and *held* to justify a peremptory instruction to return a verdict for the defendants.

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

E. W. Simeral, for plaintiff in error.

A. S. Ritchie, contra.

AMES, C.

This is a joint action against Balthas Jetter, a saloonkeeper, and Theodore Jorgensen, his barkeeper, and two other persons who are sureties upon the liquor bond of the former to recover damages for an alleged assault by Jorgensen upon the plaintiff, none of the other defendants being present or cognizant of it. The evidence is very brief and without conflict. The plaintiff was in the saloon where he had been drinking to some degree of intoxication, it does

not appear how great, but evidently falling a great deal short of incapacitation either mental or physical. While there he fell into an altercation with the barkeeper in which he used language which he says provoked the assault complained of, but which he testifies he would have used if sober, in reply to certain alleged insulting remarks by Jorgensen, who does not appear to have been intoxicated. At the conclusion of the plaintiff's evidence the court directed a verdict for the defendants, and the plaintiff prosecutes error.

Upon this showing we do not see how it can be maintained that the damages alleged were, in the language of the statute, "sustained in consequence of the liquor traffic." For aught that appears to the contrary the same provocative words on both sides might have been used and have had the same effect at any time and any place when and where the parties should have met, and it is expressly shown that they were not due to intoxication. The judgment and verdict are, therefore, unquestionably correct as to all the defendants except Jorgensen and as to them should be affirmed.

The action is distinctly and unequivocally in contract, on the liquor bond. The charge is that the liquor dealer, by and through Jorgensen as his agent, sold and gave to the plaintiff intoxicating liquors, and that Jorgensen also drank such liquors, and "that, on account of the liquor so drank by Jorgensen and this plaintiff, he, the said Jorgensen, did make" the assault complained of. This is the sole cause of action set out, or attempted so to be, in the petition and, as we have seen, there was a total failure of proof in its support, but the plaintiff contends that, even such being the case, there was sufficient evidence of assault by Jorgensen to have supported a recovery against him in a common law action in tort, and that, although there was no ground of action against the other defendants, the evidence ought to have been submitted to the jury against him, or an instruction to return a verdict against him ought to have been given by the court. The brief of plaintiff in error con-

tains neither argument nor citation in support of this contention and we are satisfied that none can be found. The course suggested would be to permit a recovery upon a cause of action not set forth in the pleadings or embraced within the issues, and which would, therefore, not have been disclosed by a complete record so as to operate as a bar to a new prosecution for the same cause.

For these reasons, it is recommended 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.

WILLIAM F. HOCH v. HERMAN C. F. SCHLATTAN.

FILED MAY 3, 1906. No. 14,330.

Appeal: REVIEW. The mere printing of an assignment of error in a brief without comment, and without statement attempting to show why or for what reason or in what respect the trial court erred, is not sufficient to require this court to discuss the errors complained of.

ERROR to the district court for Douglas county: HOWARD KENNEDY, JR., JUDGE. *Affirmed.*

Meyers & Ten Eyck, for plaintiff in error.

L. D. Holmes, W. H. Holmes and *Nelson C. Pratt, contra.*

AMES, C.

This is an action in forcible detainer begun in justice's court against a tenant alleged to have forfeited his lease by nonpayment of rent. There was a judgment for the

plaintiff in the justice's court, and also upon appeal in the district court, and from the latter the defendant prosecutes error.

The cause was submitted here upon briefs without oral argument. There seems to have been some conflict of evidence with reference to the issue of default in payment of rent, which the jury decided in favor of the plaintiff, presumably upon proper instructions. The brief of plaintiff in error contains a list of ten assignments of error, of which the following are samples: "The court erred in refusing to give the first instruction asked by the defendant." "The court erred in giving paragraph two of the instructions, on his own motion." But why or for what reason or in what respect, in the opinion of counsel, the court erred in either or any instance the brief does not state, and in the absence of such a statement the error, if any, will not be considered although the assignment is printed in the brief. No error in the record has been brought to our attention, and we 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, the judgment of the district court is

AFFIRMED.

S. F. HARRIS V. CLARENCE S. PAINE ET AL.

FILED MAY 3, 1901. No. 14,303.

Petition examined, and *held* not obnoxious to a general demurrer.

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

J. A. Brown, for plaintiff in error.

Wilson & Brown, contra.

OLDHAM, C.

This case was originally instituted before a justice of the peace, and taken by appeal to the district court for Lancaster county, where plaintiffs filed an amended petition alleging that, for a valuable consideration, defendant had made, executed and delivered to Jacob North & Company a contract in words and figures as follows: "Jacob North & Co., Publishers, History of Nebraska, J. Sterling Morton, Editor in Chief.—Lincoln, Neb., Nov. 9, 1901.—Messrs. Jacob North & Co.: You are hereby requested and authorized to prepare and reserve for me one copy of the History of Nebraska which I agree to take as soon as completed, and for which I agree to pay to you or to your order the sum of twenty-five dollars ($25) on the following terms, viz: Fifteen dollars ($15) on demand; the balance, ten dollars ($10), on delivery of work complete, this work to be bound in full leather, and to consist of two volumes of about 800 pages each. (Signed) S. F. Harris." It was further alleged that the $15 mentioned in said contract had been due and owing since November 9, 1901, at which time the said contract was duly accepted by Jacob North & Company; that no part thereof had been paid; that the contract had been assigned to the plaintiffs by Jacob North & Company for a valuable consideration; that the plaintiffs had made demand on defendant for payment of the $15 prior to the bringing of the suit. Plaintiffs prayed judgment for $15 and interest. Defendant demurred to the amended petition, and the demurrer was overruled by the court. Defendant elected to stand on the demurrer, and judgment was rendered as prayed for in the petition. To reverse this judgment defendant brings error to this court.

The only question involved is as to whether plaintiffs' petition is obnoxious to a general demurrer. The written instrument on which the action is based is an order for a copy of the "History of Nebraska." This order, when

signed by the defendant and accepted by Jacob North & Company, became a valid and binding contract between the parties. The petition alleges that the order was accepted by Jacob North & Company. It is true that it is not alleged in the petition that the work was prepared and reserved for defendant's use, and it is urged in defendant's brief that without such allegation the statement in the petition that the order was duly accepted is a mere conclusion of law and not an allegation of fact. While the petition is in no sense an accurate model of pleading, yet, as against a general demurrer, the allegation that the order was accepted is sufficient. If defendant desired to be informed as to what action Jacob North & Company had taken to indicate an acceptance of the order, she should have assailed the petition by motion, and not by demurrer. And again, if the consideration of the contract has absolutely failed by reason of the refusal or neglect of Jacob North & Company to prepare the work and reserve it for defendant, such fact should have been pleaded by answer. The petition shows the signing of the order by defendant and its acceptance by Jacob North & Company, and the terms of the contract alleged upon provided for the payment of $15 on demand, when the order was accepted.

It is urged, further, that the very nature of the order shows on its face that it is not assignable, on the well-established proposition that executory contracts which stipulate solely for special personal service, skill or knowledge are not assignable. If the petition had shown that the work of editing the book was to be done by some other than the editor named in the contract, Honorable J. Sterling Morton, there would be much weight in this contention, but the mere mechanical work of printing and binding a book is not, at least on its face, of such personal character as to prevent the contract from being assigned. If there was any reason of a personal nature why defendant was induced to subscribe for this book on the assurance that it would be bound and printed by Jacob

North & Company, and no one else, such fact should have been made to appear by answer.

It is urged that the court erred in permitting plaintiffs to amend their petition filed before the justice of the peace by inserting the allegation that a demand was made for the $15 before suit was instituted. This objection cannot be raised by general demurrer to the amended petition, and, even if it were raised, it is without merit, as the amendment in nowise changed the cause of action alleged upon in the magistrate's court.

We therefore conclude that the petition on its face states a good cause of action, as against a general demurrer, and we recommend that the judgment of the district court be affirmed.

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

MARLIN C. YOUNG, APPELLEE, V. SARAH C. FIGG ET AL., APPELLANTS.

FILED MAY 3, 1906. No. 14,319.

Execution Sale: NOTICE. In a sale of real estate on execution under the provisions of section 497 of the code, notice of the sale must be published during thirty days before the date of the sale. *Miller v. Lefever*, 10 Neb. 77, followed and approved.

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

George A. Magney and *E. S. Nickerson,* for appellants.

A. E. Langdon, contra.

OLDHAM, C.

This is an appeal from a confirmation of a sale in a mortgage foreclosure proceeding. The objection urged

against the regularity of the sale was that notice of the sale was not published for thirty days before the day of the sale. It appears from the affidavit of the publisher that the first publication of the notice was made December 15, 1904, and the sale was had on January 14, 1905, or on the 30th day of the notice. Section 497 of the code provides: "Lands and tenements taken in execution shall not be sold until the officer causes public notice of the time and place of the sale to be given, for at least 30 days before the day of sale." This section also provides: "All sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable." This section of the statute has been frequently construed by this court, beginning with the case of *Miller v. Lefever*, 10 Neb. 77, and in this and in each subequent decision we have held that 30 days must intervene between the first publication of the notice and the day of the sale. In the case at bar only 29 days intervened; consequently the court erred in overruling defendant's motion to set aside the sale.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to sustain the motion to set aside the sale.

AMES and EPPERSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to sustain the motion to set aside the sale.

REVERSED.

JACOB A. YOUNKIN V. WILLIAM R. ROCHEFORD ET AL.*

FILED MAY 3, 1906. No. 14,322.

Master and Servant: TORTS OF COEMPLOYEES. The master is not liable for an injury inflicted upon one of his employees by the tortious act of another outside of the course of his employment, and this is true even though the coemployees are not fellow servants.

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

John M. McFarland and *Benjamin S. Baker,* for plaintiff in error.

Crofoot & Scott, contra.

OLDHAM, C.

This was an action by the plaintiff in the court below for the recovery of damages for personal injuries sustained while in defendants' employ. There was a trial of the issues to the court and jury, and at the close of all the testimony a verdict was directed for the defendants. From a judgment rendered on this verdict, plaintiff has appealed to this court.

The facts upon which plaintiff predicated his right of recovery are as follows: For several years preceding the injury complained of defendants had been engaged in making and burning brick in the city of Omaha. Plaintiff had been in the employ of defendants at various times for several years preceding his injury and had engaged in various classes of work in the yards, sometimes off-bearing the brick, and at other times placing the brick in the kilns, and attending the burning of the kilns. All of the work done on the yards was under the direction of the foreman, Mr. Zarp. One O'Mara was an engineer employed by defendants to run a stationary engine, used for the purpose

* Rehearing allowed. See opinion, p. 531, *post.*

of grinding the clay and moulding it into bricks on a table, from which the off-bearers removed them to the drying sheds. The top of this table was oiled by O'Mara, that the bricks might be easily removed and retain their form as moulded. O'Mara had a bucket in which he mixed the oil for this purpose, as well as for oiling the engine. The kilns in which the brick were burned were a considerable distance from the stationary engine, the one on which the injury was received being about 100 feet away.

At the time of the injury, plaintiff was on the side near the top of a kiln of brick which he was burning. The night foreman had taken the oil can used by O'Mara from the stationary engine to another portion of the yards to use the oil in firing a kiln. When O'Mara came to his work he inquired for his oil can, and plaintiff told him where he had seen it. O'Mara went and got the bucket, which contained about three quarts of oil, and as he passed the mouth of the burning kiln on which plaintiff was at work he carelessly threw the oil into the mouth of the kiln. The flames rushed up the side and front of the kiln, burning plaintiff's face and arm, causing him to jump and receive severe injuries. That it was wanton negligence on the part of O'Mara to throw the oil into the mouth of the burning kiln when plaintiff was working on the side of the kiln very near by, and that this negligent act was the proximate cause of the injury complained of, is beyond dispute. If we should concede, for the sake of the conclusion, the proposition earnestly and ably contended for by plaintiff's counsel that O'Mara and plaintiff were not, at the time of the injury, fellow servants under the doctrine announced by this court in *Union P. R. Co. v. Erickson,* 41 Neb. 1; *Union P. R. Co. v. Doyle,* 50 Neb. 555; *Norfolk Beet Sugar Co. v. Koch,* 52 Neb. 197, and *Missouri P. R. Co. v. Lyons,* 54 Neb. 633, the question would still arise as to whether or not the undisputed facts in the record show a liability for which the master must respond. Under plaintiff's theory of the facts,

O'Mara was not within the course of his employment by the master when he threw the oil from the bucket into the burning kiln. If he had been a kiln-burner and had done this act while firing the kiln, or if he had been firing his engine, then his act would have been in the course of his employment. While the evidence shows that he used the oil bucket in connection with his work around the stationary engine and on the moulding table, yet this was the only use he made of it within the line of his duties. If the master, through his vice-principal, the foreman, had ordered O'Mara to throw the oil into the kiln, although such work was outside of the course of O'Mara's employment, there would be no doubt of the liability of the master; but no such order or direction was given by the foreman. Consequently, we cannot see how the act causing the injury can be regarded as anything except the wanton negligence of O'Mara outside of the course of his employment. The rule is that a master is not liable for an independent tort committed by his servant. The only exception to this rule occurs where a contractional relation exists between the injured party and the master that imposes on the latter a very high degree of care in protecting against injury; such as the obligation which a common carrier owes to passengers, or the duty an innkeeper owes to his guests. In each of these latter cases, the master may be compelled to respond for injuries inflicted wantonly by servants outside of the course of their employment and in direct violation of the positive commands of the master. But there was no such contractual relation existing between defendants and plaintiff. Consequently, defendants are not liable for the independent tort committed by O'Mara.

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

AMES, C., concurs.

EPPERSON, C., dissents.

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

AFFIRMED.

The following opinion on rehearing was filed January 5, 1907. *Judgment of affirmance adhered to:*

1. Master and Servant: TORTS OF SERVANTS. A master is not responsible for the tortious or wrongful acts of his servant, when such acts are not directly authorized by him, nor done in the course or within the scope of the servant's employment.

2. Former opinion, *ante*, p. 528, adhered to.

BARNES, J.

The facts in this case will be found correctly stated in our former opinion herein, *ante*, p. 528. A motion for a rehearing was sustained, and the case has been reargued to the court. It appears that the district court directed the jury to return a verdict for the defendants, and this is the principal error complained of. By our former opinion the judgment of the district court was affirmed. It is now strenuously urged by counsel for the appellant, first, that the plaintiff and O'Mara, the person whose act caused the injury in question, were not fellow-servants; second, that the act in question was performed by O'Mara within the scope of his employment, or, in other words, while acting in the line of his duty to the common master, who is therefore liable for its consequences.

From the facts disclosed by the record it seems clear to us that the question of the defendants' liability does not depend on the relation which the plaintiff and O'Mara sustained to each other at the time the injury was inflicted, and we are not required to determine whether or not they were fellow servants. Indeed, so far as this decision is concerned, it may be conceded that no such consociation existed between them as would create that relation. We are thus brought face to face with the question: Was the act complained of committed under such circumstances as

to require the master to respond in damages therefor under the rule of *respondeat superior?* On the trial plaintiff testified, in substance, that he was working for the defendants at the time the injury occurred, and had been employed by them for about nine years before that time; that O'Mara was also working for them, and had been in their employ for many years; that the business in which defendants were engaged was manufacturing brick; that it was O'Mara's duty to run defendants' stationary engine, which furnished the power for that purpose, and this was the only duty performed by him; that all of the men employed in the defendants' brick-yard were under the charge of and controlled by a foreman of the name of Zarp; that plaintiff was a burner, and was engaged in that work when he received his injuries; that on the morning of the 19th of September, 1903, while he was standing on the side of the defendants' brick-kiln, near the top, his feet resting on a four-inch projection on the casing, his position being just above the second arch, and while engaged in repairing the casing to the kiln, he heard O'Mara making inquiry for the bucket, meaning a galvanized bucket used about the yard and in what was called the oil house for the purpose of mixing the oils and carrying kerosene or coal oil to the kiln with which to start the fires; that Zarp and the others said they did not know where it was; that having seen the bucket just before the injury occurred he told O'Mara that it was around on the side of the kiln near the post, or words to that effect; that O'Mara took up the bucket, which contained about three quarts of coal oil, stepped to the second arch and threw the oil on the fire. The fire was burning brightly at the time, and the result of O'Mara's act was a kind of an explosion. The flames from the burning oil ran up the kiln, both inside and outside of the casing, and burned him very severely. (Then followed a description of his injuries, together with a statement of the damages he claims to have sustained thereby.) Later on, in answer to questions propounded by his counsel, plaintiff also testified as follows: "Q. Was he in the

employ of the defendants? A. Yes, sir. Q. O'Mara? A. Yes, sir. Q. The engine which he was operating, of which he was the engineer, is it a stationary engine? A. Yes, sir, stationary engine. Q. What did that engine do, what part of the work? A. It ran the machinery that made the brick. Q. That made the brick? A. Yes, sir. Q. Can you tell what purpose the oils you say were mixed in this bucket were used for? A. Yes, sir. It was used on the roller to oil the tables. Q. And the tables were used for what purpose? A. For making or manufacturing of brick. Q. Bricks are pressed down on that table? A. Yes, sir. Pressed in it. Q. Pressed in that table? A. Yes, sir. Q. Your employment was with the burning of the kiln, only? A. Yes, sir. Q. What work did Mr. O'Mara perform other than that of firing or operating the engine? A. None. Q. What work had O'Mara to do, if anything, with the burning of the kiln? A. Nothing whatever to do. He had nothing whatever to do with the burning of the brick. Q. What work, if any, did you and Mr. O'Mara do in common with each other? A. None."

There is no evidence in the record to show, or by which it can be inferred, that it was any part of O'Mara's duty to use the oil bucket in question in any manner whatever, and plaintiff's own evidence seems to conclusively establish the fact that when O'Mara went to the kiln, obtained the bucket and threw the oil contained in it onto the fire he was not performing any duty which he owed to the defendants by reason of his employment.

It is a general rule of law that a principal or master is civilly responsible for wrongs committed by his agent or servant, while attending to his business, through inattention, negligence or want of skill. It is perhaps the only branch of the doctrine of negligence upon which all the cases unite, and as to which there is no dispute. It is a rule so plain and easy of application that it cannot be made clearer by illustration. This rule, however, implies that the master will not in any case be liable for wrongs committed by the servant, while not acting about the

master's business; or what is substantially the same thing, not acting within the scope of his authority or in the line of his duty. This rule is so reasonable that the grounds on which it rests need scarcely be suggested. In all the affairs of life, men are constantly obliged to act for or by others; but no one could venture to so act if the mere circumstance that he employed another to act for him about any general or particular business made him an insurer against all wrongs which such person might possibly commit during the period of such employment. 2 Thompson, Negligence, sec. 2,333; *Wright v. Wilcox,* 19 Wend. (N. Y.) 343; *Douglass v. Stephens,* 18 Mo. 362; *Hudson v. Missouri K. & T. R. Co.,* 16 Kan. 470; *Yates v. Squires,* 19 Ia. 26; *Porter v. Chicago, R. I. & P. R. Co.,* 41 Ia. 358; *Little Miami R. Co. v. Wetmore,* 19 Ohio St. 110. In *Hudson v. Missouri, K. & T. R. Co., supra,* Mr. Justice Brewer speaking for the court, said:

"'A master is ordinarily liable to answer in a civil suit, for the tortious or wrongful acts of his servants, if those acts are done in the course of his employment in his master's service.' * * * 'This negligence must be in the course, or, as it is sometime called, "scope" or "range" of the latter's employment.' * * * 'The true rule is, that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, *in the course of his employment as servant.*'" In applying these rules to the facts of that case it was further said in the opinion: "The gist of the complaint is very fairly and forcibly stated by the learned counsel for the plaintiff in error, when they say, 'the plaintiff at the time he received the injury complained of was rightfully in defendant's depot inquiring about and demanding the freight of his principals of and from the said agent of the defendant; and while there, in the prosecution of his duties with the said defendant, and in their depot, he received from the said agent, not the freight of his principals, but the iron poker of the defendant, causing the injury complained of.' In other words, Trotter

was employed to deliver freight; plaintiff came and demanded freight; Trotter replies to his demand with an assault. Was such assault in the course of Trotter's employment? Did it grow out of any services he was engaged in, or was it in the line of his duty? It seems to us it was clearly disconnected therefrom, and a mere volunteer assault. True, the employment may have given the opportunity and occasion, but it was not an act which in any fair sense the company could have been said to have employed him to do, or to have anticipated that he would do, nor an act which was the act of the company. * * * A party goes into a store to purchase goods, and is therefore rightfully there. He makes an inquiry as to the price of an article of a clerk behind the counter, who in reply takes a weight and knocks him down with it. Can this be said to be an act which the proprietor contemplated, when he employed the clerk? That it was in the line of the clerk's employment, and that therefore the employer was responsible? But the cases are parallel. The employment in each furnishes the opportunity and the occasion; but in each the act is not one the agent was employed to perform, nor within the scope of his employment."

So, in the case at bar, the act of O'Mara in throwing the oil upon the fire cannot be said, in view of the evidence, to have been committed in the line of his employment. If it be insisted that we should presume that O'Mara was performing a duty he owed to the master, and was acting within the line of his employment when he went to the kiln, procured the bucket, and threw the oil on the fire, the answer is, the plaintiff by his own testimony has rendered it impossible to indulge in such a presumption. He states positively that the only duty O'Mara was to perform, and did perform, for the common master was that of firing and running the stationary engine; that he performed no other duties whatsoever; that he had nothing whatever to do with the burning of the brick, and it is not shown that his employment required him to use or empty the oil bucket for any purpose whatever. As was well said in our former

opinion, the act causing the injury cannot be regarded as anything but the wanton negligence of O'Mara, outside of the course of his employment. Therefore, in view of the general rule that the master is not liable for an independent tort committed by his servant, and because the plaintiff's evidence does not bring this case within any exception to the rule, it seems clear that the defendants are not liable for the consequences of the act which is the foundation of his complaint.

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

AFFIRMED.

BROWN COUNTY V. JOHN LAMPERT.

FILED MAY 3, 1906. No. 14,327.

Counties: PRISONERS: MAINTENANCE. Where a prisoner is convicted in the first instance of a felony, and the judgment of conviction is suspended by the supreme court and he is remanded to the custody of the sheriff of the county in which the offense is alleged to have been committed, and the judgment of conviction is reversed by this court, and at a new trial the defendant is acquitted, the county in which the offense is alleged to have been committed, and not the state of Nebraska, must pay the cost of keeping and maintaining such prisoner between the time of his first conviction and the time of his final acquittal.

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

William M. Ely, for plaintiff in error.

P. D. McAndrew, contra.

OLDHAM, C.

John Lampert, defendant in error in this suit, is sheriff and *ex officio* jailer of Brown county, Nebraska. As sheriff of said county he filed his claim with the county board for

the statutory fees for keeping Fred M. Hans as a prisoner in the county jail in said county from the 7th day of January, 1904, to the 19th day of August of the same year. The claim was disallowed by the county board, and an appeal was taken to the district court for Brown county, where the action of the county board was reversed and the claim allowed. To reverse this judgment the county brings error to this court.

There is no dispute that the fees claimed are the proper statutory allowance for the keeping of the prisoner, but the county's contention is that on the 24th day of October, 1903, the prisoner Hans was sentenced by the district court for Brown county to imprisonment for life in the state penitentiary, and that from the time of his conviction and sentence until the time of his subsequent acquittal the cost of his confinement should be paid by the state, and not the county. Section 378 of the criminal code is as follows: "The cost of keeping and maintaining any prisoner after his conviction of any offense punishable by imprisonment in the penitentiary, wheresoever he may be kept and confined, shall be paid by the state, according to the rate which may be established by law at the time when such services may be rendered or expenses incurred; *Provided,* The rate so established shall not be construed to apply to any contract which the governor may make for the confinement of convicts in the penitentiary of a state."

The contention of the county is that under this section of the criminal code the state, and not the county, should pay the sheriff's claim. There is no doubt that if the conviction of Hans had been affirmed by the supreme court this contention would be well founded; but the record shows that after the conviction of Hans the judgment of conviction was suspended by order of the chief justice of this court until a hearing could be had on a petition in error; that the order of suspension recited: "It is further ordered that the said Fred M. Hans be committed to the custody of Brown county to be imprisoned in the county jail of said county until the case in error is disposed of."

It also appears from the record that at the hearing of the error proceeding in this court the judgment of the district court was reversed and the cause remanded for further proceedings (*Hans v. State,* 72 Neb. 288), and that at a new trial had in the district court at the April term thereof, 1905, Hans was acquitted of the offense charged against him. Now section 380 of the criminal code provides: "The costs of keeping and maintaining any prisoner previous to his conviction of an offense punishable by imprisonment in the penitentiary, or either before or after his conviction of an offense not so punishable, or when he shall not be convicted of any offense, shall be paid by the county in which the offense may be committed, or alleged to have been committed." While it is true that at the first trial in the district court Hans was convicted of a felony, yet by the judgment of this court such conviction was set aside and held for naught, and the case was remanded for a new trial under the opinion of this court. At the new trial Hans was acquitted, so that the charge for the cost of keeping and maintaining him while a prisoner was the cost of keeping a prisoner who was not convicted; and under section 380, *supra,* that cost should be paid by the county.

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

AMES and EPPERSON, CC., concur.

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

AFFIRMED.

JAMES S. MORRISON, APPELLANT, V. JOSHUA E. GOSNELL ET AL., APPELLEES.

FILED MAY 3, 1906. No. 14,226.

1. Appeal. "The time within which an appeal may be taken from a decree of the district court does not begin to run until such decree has been entered of record, so that it is within the power of the appellant to comply with the statute regulating appeals by filing in this court a certified transcript of the proceedings of the district court." *Bickel v. Dutcher*, 35 Neb. 761.

2. Statute of Frauds: QUIETING TITLE. Part performance on the part of a vendor, including the surrender of possession, and full performance on the part of the vendee, is sufficient to remove a parol agreement for the sale of real estate from the operation of the statute of frauds, and the vendee in possession may maintain an action to quiet title.

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

Flansburg & Williams, for appellant.

J. G. Thompson and *T. L. Porter, contra.*

EPPERSON, C.

This action was instituted in the district court for Harlan county by the plaintiff, a real estate broker. The facts alleged in the petition are substantially as follows: The plaintiff was employed by the defendants, Drew and Woodward, to sell their land, consisting of 420 acres. In the event of a sale through the plaintiff's agency, the said defendants, by parol, agreed to convey to plaintiff a ten-acre tract of land as his commission. The plaintiff procured a purchaser for the land, and said defendants and the purchaser entered into a written contract for the sale and purchase thereof. At the time such contract was made the said defendants fully recognized, and it was understood and agreed at that time, that the plaintiff had

earned his commission for making said sale and was then entitled to a deed to said ten-acre tract; that the plaintiff would then take possession of said land as owner, and that as soon as the purchaser paid the balance of the purchase money on his contract the said Drew and Woodward would convey the said ten-acre tract to the plaintiff in full satisfaction of his commission. At the suggestion of Drew and Woodward, plaintiff took possession of the said ten-acre tract and has ever since retained possession thereof. Said defendants afterwards refused to convey the remainder of the land to the purchaser procured by plaintiff, but conveyed all their land, including the ten-acre tract, to the defendant, Gosnell, who knew of the possession and rights of plaintiff. Plaintiff prayed for a judgment clearing the title to the ten-acre tract of land of the cloud occasioned by the deed from Drew and Woodward to Gosnell, and a mortgage given by Gosnell to the said Drew and Woodward. He further asked for a decree quieting title in plaintiff. To this petition the defendants filed a general demurrer which was sustained by the trial court, and a judgment of dismissal was entered. From this judgment the plaintiff appeals to this court.

1. Counsel for defendants in his oral argument objected to the jurisdiction of this court for the reason that this case was not filed until after the expiration of six months from the announcement of the judgment by the trial court. A supplemental certificate filed by the clerk of the district court for Harlan county, appearing in the records, discloses that the judgment was announced by the court below October 10, 1904, but that the journal entry of such judgment was filed in the office of the clerk October 18, 1904. The case was filed with the clerk of this court April 12, 1905, and within six months from the entry of the judgment of record in the court below. Under the rule announced in *Bickel v. Dutcher,* 35 Neb. 761, the six months prescribed by statute within which an appeal may be filed in this court begins at the time the judgment was entered of record in the lower court. This case was cited

with approval in *Ward v. Urmson,* 40 Neb. 695, and *Norfolk State Bank v. Murphy,* 40 Neb. 735. We have therefore, by the filing of the transcript herein, obtained jurisdiction of this cause.

2. It will be observed that the action is not for the recovery of a commission for selling real estate; nor is it an action for the specific performance of a contract for sale; but it is to quiet the title to a tract of land which the plaintiff claims as owner under a contract with his grantors. The petition clearly alleged that the plaintiff was the owner of the land in controversy and in possession under a contract of purchase fully executed on his part and partially executed on the part of the defendants, Drew and Woodward, who parted with possession. In the case of *Hanlon v. Wilson,* 10 Neb. 138, a very similar state of facts existed as to the nature of a contract of sale. It was there held by this court that part performance by the vendor, including the delivery of possession, and full performance by the vendee, is sufficient to take a parol contract for the conveyance of real estate out of the statute of frauds. The petition herein stated a cause of action, and the demurrer should have been overruled and plaintiff permitted to prove his alleged case.

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

AMES and OLDHAM, CC., concur.

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

REVERSED.

EDMUND C. STRODE ET AL., APPELLEES, V. JOSEPH S. HOAGLAND ET AL., APPELLANTS.

FILED MAY 3, 1906. No. 14,247.

Judicial Sale: SETTING ASIDE. The district courts of this state are vested with discretion to set aside a judicial sale, if there has been fraud or unfairness on the part of any person prejudicial to the rights of a party to the suit.

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

W. V. Hoagland, for appellants.

Wilcox & Halligan, J. E. Morrison and *E. C. Strode, contra.*

EPPERSON, C.

This is an appeal from an order of the district court for Logan county setting aside a judicial sale in a proceeding foreclosing a real estate mortgage. The mortgage in controversy was given by Joseph S. Hoagland and wife, who have continuously owned the equity of redemption. On the day preceding the sale the defendants filed objections to the appraisement for the the reasons that the action had abated, that the appraisers were not resident freeholders of the county, that the lands were appraised so far below their real value as to make said appraisement fraudulent, that a copy of the appraisement had not been filed in the office of the clerk of the court prior to the advertisement, and that the appraisement was not made upon actual view by the appraisers. At the sale the defendant's daughter-in-law was the sole bidder. She bid $670, the land having been appraised at $1,000. The executors of the estate of Martha E. Stuart, who had died since the suit was instituted, filed objections to the confirmation of the sale for many reasons; among them are the following:

That before the sale the attorney for the defendant had filed with the clerk objections to the appraisement, which motion the executors confessed; that after the objections had been filed by the defendants their attorney bid on said property in the name of his wife, and that no greater bid was made for the reason that the objections were on file. The executors do not rely upon the other objections alleged in their motion, and it is unnecessary to refer to them here. Before the filing of these objections by the executors, the defendants had withdrawn their objections to the appraisement.

The only question to be considered is whether or not the conduct of the defendants and their daughter-in-law was unfair and prejudicial to the plaintiffs to such an extent as would justify the district court, exercising sound legal discretion in setting aside the sale. That the appellant and the defendants were acting in unison there can be no doubt. The defendants employed their son as attorney in the action. Acting for them he filed objections to the sale, thereby preparing for further litigation and delay. On the day of sale, as attorney for his wife, he bid upon the property; and afterwards as attorney for the defendants, withdrew the objections previously filed. His wife then was the successful bidder, and for a sum defendants had previously alleged was so far below the real value of the property as to amount to fraud. "It is ordinarily the duty of a court, where a judicial sale is made in conformity with its decree, to ratify such sale." *Passumpsic Savings Bank v. Maulick*, 60 Neb. 469. But when one party indulges in unfair or fraudulent conduct to the prejudice of an adverse party, the trial court is vested with a discretion to set aside the sale. In the case of *Roberts v. Robinson*, 49 Neb. 717, it was held: "If there has been fraud or unfairness, irregularity, or disregard of the statute in making a judicial sale, the district court is invested with the discretion to set such sale aside." The fraud or unfairness necessary to avoid a sale is not limited to the wrongs of the officers conducting the sale, but whenever any person

does some act manifestly unfair and prejudicial, which would become effective upon confirmation of the sale, the court should intervene to prevent the consummation of the wrong.

The evidence in this case shows that one other person was disposed to bid at this sale, but having learned that objections were filed, and fearing protracted litigation, refrained from bidding. But even in the absence of evidence of this nature it is reasonable to presume that the filing of such objections will result in discouraging bidders, and a sale thus made may be set aside on the motion of the party aggrieved. The unfairness in this case is obvious. The defendants and those acting for and with them discredited the proceedings by filing objections to the appraisement, thereby threatening to litigate the rights of the purchaser. It is not even claimed that the objections were filed in good faith. The evidence of defendant's attorney as to his reasons for this conduct was that he filed their objections "with the object of raising all possible objections that might be raised in court before confirmation if facts should develop." It was his business to know the facts and not to object unless justified. Defendants depreciated the value of the land by their improper conduct, making it possible to purchase at the depreciation they caused, and their daughter-in-law cannot now claim to be a fair purchaser. Such conduct would vitiate a contract, and therefore fairly brings this case within the exeception to the rule announced in *Nebraska L. & T. Co. v. Hamer,* 40 Neb. 281, which provided: "Until a bid is accepted it is a mere proposal and may be withdrawn by the bidder. After acceptance it becomes a binding contract and cannot be withdrawn or changed except under such circumstances as would justify the rescission or reformation of other contracts."

But appellant argues, in effect, that plaintiffs were not prejudiced because they might have appeared at the sale and protected their rights by bidding a greater amount. The plaintiff's were executors of the mortgagee's estate.

They were justified in submitting to the defendants' motion to set aside the appraisement because of its extremely low and fraudulent valuation. They waived no rights by their failure to bid.

The record of the trial court shows no abuse of discretion, and we recommend that the judgment be affirmed.

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

AFFIRMED.

LETTON, J., dissenting.

There is no competent evidence in the record to show that the appellees were damaged, or that the land was worth more than it was sold for, or that it would bring more upon a resale.

UNION PACIFIC RAILROAD COMPANY V. EDWARD D. MURPHY.

FILED MAY 3, 1906. No. 14,264.

1. **Pleadings: APPEAL: CAUSE OF ACTION.** There was a variance in the time of alleged damage by fire between the petition in the county court and the petition as amended in the district court, otherwise the petition in the district court was the same as the petition in the county court; pleadings examined with reference to the facts, and *held* to state the same cause of action.
2. **The measure of damages to growing trees, having no value for purposes of transplanting, is the value of the trees with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards.**
3. **Damages: EVIDENCE.** It is not error to permit a witness to testify whether or not such growing timber is valuable as ornamental or shade trees or as a protection to the owner's premises.
4. **Evidence examined, and *held* sufficient to support the verdict.**

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

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

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

EPPERSON, C.

Murphy sued the defendant company in the county court of Dawson county, charging that on or about the 22d day of September, 1902, he suffered a loss by fire of 11 tons of hay, 155 growing trees and 35 fence posts of the aggregate value of $226.20, and that said fire was caused through the carelessness of the defendant. In his petition filed in the district court for said county, to which the case was taken on appeal, the plaintiff fixed the time of said fire as in the county court "on or about September 22, 1902." Near the close of the trial, the court permitted plaintiff to amend his petition by stating that the fire occurred on or about the 21st day of October, 1902.

1. Defendant argues that by such amendment a different cause of action was alleged. This is seriously considered because there was in fact on each of the days in controversy a fire caused by defendant, which damaged plaintiff's property. Defendant contends that by the amendment plaintiff was permitted to substitute the damage done by the fire other than the one alleged in the county court. The evidence shows that the fire of September 22d destroyed the hay on the south side of the track, and the fire of October 21st destroyed the property alleged in the petition. The damages alleged were the same in the petition filed in the county court and the amended petition filed in the district court. There was only the one fire which damaged fence posts, trees and hay. The same cause of action was alleged. Plaintiff might have recovered damages done October 21, even though he had not amended his petition, but, having chosen to amend, did not thereby lessen his rights to recover.

2. As to the measure of damages, the court instructed the jury as follows: "The court instructs the jury that, if you find from the evidence and under the instructions of the court for the plaintiff, you will assess the amount of his recovery at the amount of damage the trees sustained by reason of the fire, and this sum is ascertained by determining the value of the trees burned as standing timber with reference to the land in the situation in which they stood, less their value in their burned and charred condition after the fire." Defendant takes exception only to the clause "with reference to the land in the situation in which they stood." Otherwise, the instruction is identical with that approved by the court in the case of *Fremont, E. & M. V. R. Co. v. Crum,* 30 Neb. 70. It was there held that the measure of damages was not the market price of trees for transplanting as shade or ornamental trees, but the difference in value of such trees before and after the fire as standing timber. We cannot see that the objectionable feature varied the approved rule. There was no evidence that the trees in controversy in this case were intended for any other purpose which would permit their separation from the land, or that they were of value for the purpose of transplanting. By inserting the matter objected to in this instruction, the trial court properly limited the jury to a consideration of the one element of damage. It occurs to us that this was a matter favorable to defendant. The learned commissioner in *Kansas City & O. R. Co. v. Rogers,* 48 Neb. 653, in writing of a similar matter, used this language: "If the market value is not a proper test, and if their value must be determined as standing timber, then it follows that it is not only proper, but absolutely necessary to consider their value with reference to the land in the situation in which they stood." There was no error in the instruction complained of.

3. Upon the trial the plaintiff as a witness in his own behalf was asked this question: "State whether or not such trees as you have described were destroyed in this fire have a value as ornamental or shade trees and as a pro-

tection to the buildings and premises generally?" Again counsel cite *Fremont, E. & M. V. R. Co. v. Crum, supra.* But we do not understand that this court undertook to say that the value of ornamental and shade trees was not to be considered by a jury in ascertaining the amount of damages. But as to the trees in controversy in that case the question of the value thereof for transplanting was not to be considered. In the case at bar the question of transplanting was not considered, but the value of the trees as standing timber was to be ascertained, and the elements constituting that value were proper subjects of inquiry. The court properly overruled defendant's objection to the question.

4. Defendant requested the court to instruct the jury to return a verdict for the defendant, on the ground that there was no evidence to support plaintiff's claim that the defendant was negligent in setting out the fire on the 21st of October. The evidence clearly shows that the fire which destroyed the plaintiff's property described in the petition was on or about October 21, 1902; that the defendant's right of way abutting the plaintiff's damaged grove and hay lands was not kept clean and free from dry and combustible material; and that the fire began on the right of way soon after the passage of one of defendant's locomotives. This evidence, under the rule of this court, was sufficient to establish the plaintiff's case. *Union P. R. Co. v. Keller,* 36 Neb. 189; *Rogers v. Kansas City & O. R. Co.,* 52 Neb. 86. The evidence as to the amount of damages was conflicting, but the amount of the verdict was within the limits fixed by the several witnesses, and we see nothing in the record supporting defendant's contention that the verdict was the result of passion and prejudice on the part of the jury.

Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. PETER C. MEYER.

FILED MAY 3, 1906. No. 14,265.

1. **Evidence** examined, and *held* sufficient to sustain the verdict.
2. **Refusal to Instruct:** REVIEW. This court is not bound to review the action of the trial court in refusing to instruct the jury as requested, when no exception is taken to such refusal.
3. **Action:** PARTIES. A bailee of property having an interest therein under express contract may maintain an action to recover the value thereof against one through whose negligence or failure of duty it is lost.

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

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

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

EPPERSON, C.

The plaintiff recovered judgment in the district court for Dawson county for the killing of ten head of cattle. Plaintiff was the owner of part and bailee of part of the cattle in controversy, and also of other cattle, which were, on the morning of the accident, confined in a pasture adjoining the railroad right of way. On July 11, 1903, an unusual wind, rain and hail-storm drove the cattle through the fence onto the defendant's right of way. Plaintiff alleges that the employees of defendant negligently ran one of its trains upon the cattle, killing seven head owned by plaintiff and three head in his custody as bailee. Plaintiff had judgment, and the defendant prosecutes error to this court.

1. The first point for determination is whether the evidence is sufficient to sustain the verdict. The proof discloses that the east-bound train of the defendant, which killed the cattle, was running 45 or 50 miles an hour; that the track was straight for at least two miles west of the place of the killing, and that on a clear day the engineer could have seen the cattle in time to have stopped the train and prevented the damage. There was a conflict in the evidence as to the condition of the weather at the time of the accident. Witnesses called by plaintiff testified that the storm was of short duration; that immediately after, and while defendant's train was four miles west of the place of the accident, the rain and hail had ceased, the sun came out and the day was clear. Defendant's witnesses testified that it was yet raining at the time of the accident, and that the rain, striking the engine, produced steam, which clouded the lookout window of the engine cab, whereby the engineer in charge of the train was unable to discover the cattle upon the track until within 200 feet thereof. If the plaintiff's evidence was true, the defendant's employees were negligent as alleged in the petition, unless other duties demanded their attention at that particular time. Defendant contends that such was the case; that by reason of other duties the defendant's engineer could not sooner have discovered the cattle on the track. The evidence shows that he was employed with no particular duty at that time other than clearing the front window of his cab that he might better observe the track in front of him. This question was submitted to the jury by an instruction of the court upon its own motion. The matters complained of clearly show an issue of fact, the determination of which was for the jury.

Defendant further contends that the plaintiff was guilty of contributory negligence in that he failed to use diligence in protecting his property. The cattle divided into two herds upon defendant's right of way. Immediately following the storm, plaintiff started from his home, hastened to defendant's right of way, and drove therefrom the herd of

cattle nearer the gateway, which had been blown down apparently by the storm. He then hastened toward the other herd, which was about three-quarters of a mile west of the gateway. Before he had gone far, the train reached them and the damage was done. Defendant claims that plaintiff should have brought to his assistance a stranger and his family who were at plaintiff's house, where they had been driven by the storm. The proof fails to disclose that it was within the power of the plaintiff to procure the services of this family, or that with their assistance time was sufficient to permit a rescue; nor is it shown that plaintiff could have reached the more distant herd on the track, had he attempted so to do in the first instance. There was no evidence of contributory negligence.

2. Error is predicated upon the refusal of the trial court to instruct the jury as requested by defendant. An examination of the record discloses that no exceptions were taken to the refusal of the court to give defendant's requested instructions. Hence, under the rule often announced by this court, we cannot review the action of the district court in refusing to instruct the jury at defendant's request. *Holloway v. Schooley,* 27 Neb. 553.

3. One of the instructions refused pertained to the recovery of damages by plaintiff as bailee of the three head of cattle killed, and, as that would affect the question as to the sufficiency of the evidence to entirely support the verdict, we are required to consider the proposition, though not the alleged error as to the instruction. Plaintiff was in possession under a contract with the owner whereby he was entitled to one-half of the offspring of the cattle bailed. This question has not, to our knowledge, been decided by this court; but we believe, while that question has been considered in other courts, it has, without exception, been held that a bailee of property having an interest therein under an express contract may maintain an action for the negligent destruction of the property bailed. In *Chamberlain v. West,* 37 Minn. 54, 33 N. W. 114, it is said: "Nothing is better settled than that, in actions for torts

in the taking or conversion of personal property against a stranger to the title, a bailee, mortgagee, or other special property man is entitled to recover full value, and must account to the general owner for the surplus recovered beyond the value of his own interest; but as against the general owner or one in privity with him he can only recover the value of his special property." See also *Jellett v. St. Paul, M. & M. R. Co.*, 30 Minn. 265; *Russell v. Butterfield*, 21 Wend. (N. Y.) 300; *Mechanics & Traders Bank v. Farmers & Mechanics Nat. Bank*, 60 N. Y. 40; *Atkins v. Moore*, 82 Ill. 240; *Fallon v. Manning*, 35 Mo. 271.

Finding no reversible error in the record, we recommend that the judgment of the trial court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

ISABEL LINN, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

FILED MAY 3, 1906. No. 14,616.

1. **Municipal Bonds**: SPECIAL ELECTIONS. Under its charter the city council of Omaha may provide by ordinance a manner, not inconsistent with statutory provisions, for calling and conducting a special election for the purpose of voting upon a proposition to issue such bonds of the city as are authorized by law.
2. ———: PUBLIC BUILDINGS. The power to issue bonds for the construction or purchase of needful buildings for the use of the city, conferred by section 195 of the Omaha charter, gives that city power to issue its bonds for the purpose of raising funds with which to procure a site for any such building, the construction of which is also provided for in the same manner and as a part of the same proposition.
3. **Special Election**: ENGINE HOUSES. At a special election there was submitted to the electors this question: "Shall the bonds of the

city in the sum of $60,000 be issued for the purpose of paying the cost of constructing fire-engine houses * * * such * * * to be in the locality and at the estimated and approximate cost as follows: North 50 feet of lot 13, block 1, Armstrong's First Addition, estimated cost $30,000. For the purchase of site and the erection of a fire-engine house thereon in the district lying north of Willis avenue * * * estimated cost $30,000." *Held*, To contain but one proposition—to procure engine houses.

4. ———: VOTING MACHINES. An inscription on the ballot label of a voting machine used in elections upon questions may be abbreviated to meet the requirements of the limited space. The inscription, "Shall the city issue $60,000 fire-engine house bonds to run 20 years at 4%?" upon the ballot label of the voting machines used at the election in controversy, as an abbreviation of the proposition quoted in the last paragraph, is a sufficient statement of the question submitted.

5. A city election will not be annulled by the courts because the city council delegated to persons not members thereof the ministerial duty of assisting the city clerk in tabulating the election returns, in the absence of fraud or mistake.

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

A. G. Ellick, for appellant.

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

EPPERSON, C.

This is an action for injunction instituted by the plaintiff, who is a resident and taxpayer of the city of Omaha, to annul ordinance No. 5,613 of said city providing for a special bond election, and to declare void an election held in pursuance thereto, and to restrain the defendants as officers of the city of Omaha from executing or negotiating certain bonds of that city. A demurrer was filed to the petition and sustained by the trial court. Plaintiff, not desiring to plead further, a judgment of dismissal was entered, from which the plaintiff appealed.

The facts alleged in the petition, and necessary for our consideration, are as follows: On September 27, 1905, the

city council of Omaha passed an ordinance providing for submitting to the electors of said city at a special election the following proposition: "Shall the bonds of the city of Omaha in the sum of $60,000 be issued for the purpose of paying the cost of constructing fire-engine houses for the use of the fire department of the city of Omaha, such fire-engine houses to be in the locality and at the estimated and approximate cost as follows: North 50 feet of lot 13, block 1, Armstrong's first addition, estimated cost $30,000. For the purchase of a site and the erection of a fire-engine house thereon in the district lying north of Willis avenue, west of the east line of Sherman avenue and east of the west line of Twenty-fourth street, estimated cost $30,000." Said ordinance authorized and directed the mayor to issue his proclamation calling said special city election, and directed that said proclamation be issued at least 20 days prior to said election, and provided that, if voting machines be used at said election, the city clerk should prepare the statement of the question submitted to be inserted on the ballot label. The mayor issued his proclamation, and the proposition for such election was published as required by law. On November 7, 1905, said special election was held, at which voting machines were used instead of ballots. Upon the ballot label there was set forth the following words and figures: "Shall the city issue $60,000 fire-engine house bonds to run 20 years at 4%?" On the Thursday evening following, the city council met for the purpose of canvassing votes cast at the said election, and at the meeting the president appointed two persons to assist the city clerk in canvassing the returns. These two persons took an oath of office before the city clerk to faithfully and impartially perform their duties as canvassers, and thereupon they and the city clerk proceeded to canvass the vote. At the session of the city council on the following day, the clerk and the persons thus appointed to assist him made a report in writing to the city council that they had tabulated the vote, and found that upon said proposition there were 3,416 votes "Yes," and 1,468 "No." Upon receiving such

report, the president of the city council declared the proposition voted upon, stating the same at length, duly carried. Upon motion, and the vote of the city council, the declaration of the president was approved. On November 21, 1905, the city council duly passed an ordinance authorizing and directing the issuance of said bonds. Thereafter the bonds were offered for sale by the city of Omaha, and were sold to J. L. Brandeis & Son, and at the time this suit was instituted the defendants were preparing to execute, issue and deliver said bonds to the purchaser.

1. The plaintiff contends that the city of Omaha under its present charter has no power to submit such a question to the electors at a special election. Subdivision 28, section 144 of the city charter (Comp. St. ch. 12*a*, 1905), authorizes and empowers the city to establish fire-engine houses. Subdivision 29 of said section provides that the city may establish any useful or necessary building upon any land purchased for such purpose. Section 195 of the charter provides as follows: "The mayor and council are hereby authorized and empowered to issue bonds of the city with interest coupons annexed in such amounts and for such length of time as they may deem proper * * * for the construction or purchase of a city hall, auditorium, or other needful buildings for the use of the city." Section 197 provides: "No bonds * * * shall be issued until the electors of said city shall have authorized the same by a two-thirds vote of the electors of such city, voting on said proposition, at a general or special election of said city held after ten days' notice, published in the official paper of the city stating the maximum amount proposed to be issued and stating distinctly the purpose for which they are to be issued." Reading the several sections above cited together, it clearly appears that the city has the authority to construct or purchase useful buildings, and under the petition in this case we are required to assume that the proposed engine houses are necessary and useful. It also appears that the city officers have the power to issue bonds to raise funds for such purpose. We find no provision in the

charter providing the manner for calling the special elections authorized by section 197; but as the power was expressly conferred by the legislature, which failed to establish the manner of its exercise, the city was required to prescribe by ordinance the manner of exercising these powers. Such was done in this case by the passage of ordinance No. 5,613 set forth in the petition. Authority therefor is given by section 143 of the charter which provides: "When by this act the power is conferred upon the mayor and council to do and perform any act or thing, and the manner of exercising such power is not specially pointed out, the mayor and council may provide by ordinance the details necessary for the full exercise of such power."

2. Plaintiff contends, further, that the city of Omaha has no power to issue bonds for the purpose of purchasing a site for an engine house; and cites in support thereof *Witter v. Board of Supervisors,* 112 Ia. 380, 391, 83 N. W. 1,041, in which the supreme court of Iowa held that under the statute of that state, authorizing counties to borrow money for the erection of public buildings, and to issue bonds for such indebtedness, a county has no express or implied power to issue negotiable bonds for a debt created in the purchase of necessary real estate for a courthouse site. This case, it occurs to us, is not in point. In the opinion the court say in reference to the statutes they had under consideration:

"It is contended by the county, however, that express power so to do is conferred by sections 447 and 448 of the code, and that the power to issue bonds for the erection of a public building was also intended to include the ground upon which it is situated. A careful examination of the statute covering the entire subject leads us to a different conclusion."

A like examination of our own statutes leads us to the conclusion that a city of the metropolitan class in this state has the authority to issue bonds for the purchase of land as a site for an engine house. The statute construed

by the Iowa court, it seems, contained no provision for the purchase of the desired public building. Section 195 above quoted, it will be observed, confers upon the city officers power to issue bonds for the construction or purchase of a city hall or other needful buildings, and it seems to us that there can be no doubt but that under this provision the city would have authority to issue bonds for the purchase of an engine house, and that such purchase would include the lot or tract of land upon which the engine house had been constructed. As above shown, the city had authority to issue bonds for the construction of an engine house, and the question presents itself as to whether or not the provision of the charter is broad enough to include the purchase of the site for the proposed building. Evidently the legislature intended to provide for the procuring of all needful buildings by the issuance of bonds. We think that the intention was sufficiently expressed by the language used, and that the clause providing for the purchase of needful buildings is sufficient to authorize the purchase of a site therefor.

3. The plaintiff further contends that the question submitted at the special election contained more than one proposition, and therefore is in violation of section 194 of the charter which provides that each proposition must contain but one subject or purpose. It is argued that the construction of the engine house located at Twenty-fourth and Cuming streets is one subject; that the engine house to be located north of Willis avenue another; and that the proposed purchase of the tract of land was a third. If more than one proposition was in fact submitted the petition stated a cause of action, and the injunction should have been allowed. Many cases are cited by counsel wherein the courts of some of our sister states have disapproved similar propositions submitted in the alternative; such as: "Shall the following be adopted: To issue bonds of the city of Leavenworth in the sum of $400,000 to purchase, procure, provide or contract for the construction of waterworks?" *City of Leavenworth v. Wilson,* 69 Kan. 74.

It was held that the proposition was dual and the election void. And to the same effect were the decisions in *Elyria Gas & Water Co. v. City of Elyria,* 57 Ohio St. 374, and *Farmers Loan & Trust Co. v. City of Sioux Falls,* 131 Fed. 890. In *Kemp v. Hazlehurst,* 80 Miss. 443, a proposition to provide "for the issuance of bonds for the erection of electric lights and water-works" was held not invalid because double in its nature. In *People v. Counts,* 89 Cal. 15, the court held that a proposition to vote bonds for the construction of two separate wagon roads was not dual. A vote of the necessary majority on the question to "purchase or construct" would leave the matter undetermined and with no choice indicated by the electors. But, under an affirmative vote on the proposition to buy a lot and construct thereon a building, the electors have definitely made a choice and conferred upon the city authorities a fixed duty, in the exercise of which they have no choice. The proposition in the case at bar was not dual, neither was it stated in the alternative. It was but a single proposition definitely fixed by the ordinance and by the mayor's proclamation. It is true that the proposition contemplated the construction of two engine houses and the purchase of a site for one, but such were but detailed statements of the general proposition—to procure engine houses.

4. It is next argued that the proposition submitted to the electors was not distinctly stated upon the ballot label of the voting machines. We were not favored with an oral argument of this case, but from plaintiff's brief it appears that the basis of this contention is that more than one proposition was in fact submitted, while only one appears in the inscription of the ballot label. But as above shown the proposition was single in its nature, and for the reasons above stated the city council had the authority to submit to the voters the proposition in its entirety. The ballot label necessarily contained an abbreviated statement of this proposition. Section 125*x*, ch. 26, Comp. St. 1905, provides: "On the ballot label for questions, the

statement of the questions submitted may be abbreviated to meet the requirements of the limited space, with the words 'Yes' and 'No' for the voter to indicate his affirmative or negative vote on any such question by operating the proper device therefor." The inscription on the ballot label was not intended to furnish information to the voter in detail as to the object of the election. The proclamation was notice of the election and fully informed the electors of the object of the election. The object of the inscription was to instruct the voter as to how he might intelligently vote on the question of which the proclamation gave him notice. For this purpose the inscription was sufficient and within the provisions of the law.

5. Plaintiff finally contends that the issuance of the bonds in controversy would be illegal because the city council delegated the power of canvassing the election returns to the city clerk and two assistants. The persons appointed made a report to the city council as to the number of votes cast for and against the proposition. It does not appear that they were called upon to exercise any quasi-judicial functions, or perform other than ministerial duties. It is, we believe, without an exception, the general rule that officers may delegate to competent persons, not officers, duties such as are clerical or ministerial in their nature, unless prohibited by statute. In this case the city clerk with the assistance of the persons delegated ascertained the result of the election from abstracts returned by the several election boards and reported the result, which was announced by the president of the council. No fraud is alleged; and such irregularity is not sufficient to avoid the election.

From these facts, fully disclosed in the plaintiff's petition, we are satisfied that said petition states no legal reason why the plaintiff is entitled to the restraining order and other relief prayed for, and we therefore recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

BENJAMIN F. BREWSTER ET AL. V. JENS C. MENG.

FILED MAY 3, 1906. No. 14,171.

1. **Second Appeal.** This court on a second appeal of the same case will not reexamine questions of law presented and determined on the first appeal unless the opinion first expressed is manifestly erroneous.

2. **Remand: AMENDMENT.** A party cannot try his case by piecemeal; and where a case has been tried and appealed to this court and remanded to the district court, with directions to enter a specified decree, the defendant will not be allowed to amend his answer by alleging facts which existed and of which he had knowledge prior to the trial first had.

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

Allen G. Fisher, for plaintiffs in error.

N. K. Griggs, contra.

DUFFIE, C.

A former opinion in this case is reported in *Meng v. Coffee,* 67 Neb. 500. The case was remanded to the district court with the following directions: "To make new and further findings of fact in conformity with said opinion, and to enter a decree enjoining the defendant Wilcox from wasting or unreasonably diminishing the waters of Munroe creek, and enjoining the defendants Brewster and Coffee from consuming all the waters of Warbonnet and Hat creeks, respectively, in the irrigation of their lands, or permanently diverting in any year a greater proportion of the water in such streams for the time being

than they were accustomed to take out prior to 1893, having regard to the nature of the season and the condition of the stream at the time; that proportion and other questions of fact necessary to the rendition of such a decree to be ascertained from the evidence already taken or by taking further evidence at the discretion of the district court." Upon the filing of the mandate in the district court the defendants Brewster and Coffee asked leave to file a supplemental answer, in which it was alleged that by a finding of the state board of irrigation made in 1889 the said defendants were awarded a prior right to the waters in controversy in this action. The court refused to allow the filing of such supplemental answer or to receive any additional evidence in the case, and thereupon entered a decree conforming to the directions contained in the mandate.

The two principal questions urged on this appeal are that the former opinion is erroneous, and that the court erred in refusing to allow the plaintiffs in error to tender additional issues and to introduce evidence in support thereof. We have again examined the opinion in *Meng v. Coffee, supra,* and are entirely satisfied that the opinion correctly reflects the law applicable to the facts disclosed by the record as it then stood. It would serve no useful purpose to review the former opinion, nor, indeed, do we think that we could add anything to what is there said in support of the views announced. The case was carefully considered. The conclusion announced was unanimously adopted by the court as then constituted, and should, we think, be adhered to. Relating to the action of the court in refusing to allow new issues to be made or to receive further evidence in the case, we are satisfied that no error was committed. The finding of the state board of irrigation was made in 1889 and long prior to the commencement of this action. Whatever rights the parties may have acquired from such finding existed when this case was first tried, and, if material to the interest of the parties, should have been presented at that time. A case cannot

be tried by piecemeal. There must be an end to litigation. A party cannot be allowed to present a part only of his defense and when, after appeal, the case has been remanded for judgment, be allowed to make new issues, presenting other facts which he claims as a defense to the action, and which facts existed and were well known to him prior to the first trial. This is a rule so well known to the profession that it would be a waste of time to cite authorities in its support. Aside from this the finding of the state board of irrigation, which the plaintiffs in error now seek to introduce into the case, excludes from the water right granted them "the prior right of the owners of land bordering on this stream or through which this stream flows, to so much of the natural flow of the stream as is necessary for domestic use including stock water."

We cannot see that the finding of the state board of irrigation awards them any further or additional right than is given by the decree entered, 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.

LOYAL MYSTIC LEGION OF AMERICA V. EMMA A. RICHARDSON.

FILED MAY 3, 1906. No. 14,254.

Beneficial Associations: MEMBERSHIP. Where it appears from the constitution of a benefit society which insures the lives of its members that initiation and the payment of one advance assessment is indispensable to membership, the fact that the person's application has been accepted and his petition fee paid will not entitle his beneficiary to any insurance in the event of his death before he has been initiated and paid the one advance assessment required.

ERROR to the district court for Hall county: JAMES R. HANNA, JUDGE. *Reversed.*

Tibbets Bros. & Morey, for plaintiff in error.

W. H. Thompson, contra.

DUFFIE, C.

Article 22 of the constitution of the supreme council of the Loyal Mystic Legion of America is in the following language: "Only the supreme council or the board of directors shall have power and authority to constitute, suspend or reconstitute the subordinate councils of this order, which shall be done either by an officer of the supreme council, or by a member of the order duly commissioned by the board of directors through the supreme worthy councilor. A member so commissioned or any elective officer of the supreme council shall have power to install officers and obligate applicants for membership. Provided, that, if at the proper time for installing officers there is not present a supreme officer or a deputy of the order, then any elective officer of the council who has been regularly installed may perform the duty." Section 3 of the by-laws of subordinate councils provides for the formation of a subordinate council as follows: "Any number of persons, not less than ten, who are eligible and who shall comply with the rules and regulations of the supreme council, with the approval of the board of directors or its duly authorized representatives, may upon being duly obligated become members of this fraternity and may be constituted a subordinate council. The members of all councils will be known and designated in the ritual of the order as companions."

In November, 1901, one John Collins, a duly authorized deputy of the Loyal Mystic Legion of America, solicited applications for membership in that order and to form a subordinate council at Fort Collins, Colorado. He solicited

and received the application of Charles C. Richardson, and this application, with others, was forwarded to the supreme council at Hastings, Nebraska. The application was accepted, a certificate of membership issued by the supreme council and returned to Fort Collins. The beneficiary named in the certificate was Emma A. Richardson, mother of the applicant. November 20, 1901, was fixed on as the date to organize the subordinate council at Fort Collins, but for some reason no organization was perfected until December 30, 1901, at which time the applicants who had been passed by the supreme council, and who were present, were obligated and initiated by Collins, the deputy, the officers of the subordinate council elected, and the council duly organized. Collins at that time turned over to the worthy councilor the certificates of all applicants, and the worthy councilor and worthy secretary filled up and signed the blank certificate of membership printed on each of the certificates, Richardson's being in the following language: "Companion Charles C. Richardson became a member of Fort Collins Council No. 208 Loyal Mystic Legion of America of Fort Collins, state of Colorado, on the 30th day of December, 1901. Benjamin F. Evans, Worthy Councilor. Attest: Clyde H. Brown, Worthy Secretary." Prior to the meeting Richardson commenced work at a mill some 50 miles from Fort Collins, was not present at the meeting, was not initiated as a member and not obligated, unless, as claimed by defendant in error, the signing of his application which, we understand, contained the form of obligation administered to all members on their initiation constituted the taking of such obligation. Richardson was accidently killed on January 3, 1902, and Emma A. Richardson, the beneficiary named in his certificate, brought this action to recover from the plaintiff in error $1,000, the amount of said certificate, alleging that the deceased was a member of Fort Collins council No. 208 at the time of his death, and that each and every condition precedent on the part of the deceased and of the beneficiary had been complied with as provided in the application and

certificate, and in accordance with the constitution, rules and regulations of the order.

The principal defense was that Richardson had never become a member of the order, and that he had never complied with sections 18 and 20 of the by-laws of the supreme council, and sections 28 and 29 of the by-laws of the subordinate councils of the order. These by-laws required the payment of one advance assessment upon the receipt by a member of his certificate, the following being an extract from section 28 of the by-laws of the subordinate councils: "The applicant shall not be a member in good standing and entitled to benefits until he or she has received his or her certificate and paid one advance assessment." The following is an extract from section 20 of the by-laws of the supreme council: "Every person desiring benefits shall, on entering the order, pay one assessment, 20 per cent. of which shall be placed in the reserve fund, and after the first 12 assessments 80 per cent. of each assessment shall be placed in the benefit fund, which shall be used only to pay benefits to the members of the order in good standing holding benefit certificates." Richardson not being present when the subordinate council was organized the worthy councilor returned his certificate to Mr. Collins, the deputy organizer, who some time afterwards returned it to the worthy councilor. January 9, 1902, James T. Ogden, supreme worthy vice-councilor of the order, went to Fort Collins, and on his request Benjamin F. Evans, worthy councilor of Fort Collins council No. 208, delivered to him Richardson's certificate, taking his receipt therefor. At the date of the commencement of this action the certificate was in possession of the supreme council of the order, and on the application for membership some officer of the supreme council had indorsed the following: "Applicant failed to be present at organization of council and certificate returned and cancelled." A trial of the case resulted in a verdict for Mrs. Richardson, the beneficiary, and the supreme council has taken error from a judgment rendered thereon.

It is insisted by the defendant in error that Charles C.

Richardson was a member of the order notwithstanding his failure to be present at the organization of Fort Collins council No. 208, and notwithstanding he was never regularly initiated and obligated. In the application signed by Richardson is printed the following obligation: "I, the undersigned, in the presence of these witnesses and the Eternal God, do most solemnly promise that I will not reveal, but ever hold in strict confidence, the mysteries and secret work of the Loyal Mystic Legion of America; that I take this obligation of my own free will; that I will be faithful to and abide by the constitution and by-laws of the supreme, grand, and subordinate councils of the order; that I will strive to promote harmony and friendship among its members, deal justly and honestly with each member and family; that I will, to the best of my ability, aid in all proper ways to promote the interests of the order; that should I ever become delinquent or be suspended, and thereby forfeit my good standing in the order, I will regard this obligation just as binding upon me then as I do at this hour. To all of which I do hereby solemnly pledge my sacred honor. I hereby agree to the above conditions and obligations, and accept notice of the fact that no subordinate council has power or authority to waive the same."

Defendant in error insists that the signing of the application containing this form of obligation is, as to charter members, a taking of the obligation within the meaning of the constitution and by-laws of the order. We cannot agree with this contention. The application bears upon its face evidence that it is the form of application furnished by the grand council of the order to all applicants, those applying for membership in a council already organized, as well as those seeking to constitute and organize a new council. It contains blanks for the report of an investigating committee and for the report to be made by such committee. There is also the blank to be filled in by the secretary showing when the application was received by the council and the date of the election of the applicant. It is quite evident from an inspection of the application that the

obligation required on initiation is included therein that proposed members may be informed of the vow which they will be required to take in case they are accepted into the order. Section 22 of the constitution of the supreme council, and section 3 of the by-laws of subordinate councils directing the proceedings to form a subordinate council, make it quite plain that each of the charter members shall be present at the organization and be duly obligated, and that until this is done the applicant cannot be considered a member of the order. As said in *Matkin v. Supreme Lodge,* 27 Am. St. Rep. 886, 82 Tex. 301.

"Where it appears from the constitution and by-laws of a secret order or benefit society which insures the lives of its members that initiation is indispensable to membership, and that it is only upon the death of a member that his beneficiary is entitled to receive his insurance, the fact that a person's application for membership has been accepted, and his 'proposition fee' paid, will not entitle his beneficiary to any insurance in the event of his death before he has become initiated as a member of the society."

The best consideration which we have been able to give this case satisfies us that, under the rules and regulations of the order as defined in its constitution and by-laws, Richardson never became a member of the society and that his certificate never had any life or vitality. This conclusion renders it unnecessary to discuss other questions raised by the record and discussed in the briefs of counsel.

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 of the district court is reversed and the cause remanded.

REVERSED.

JOSEPH W. THOMAS, APPELLANT, V. FARMERS LOAN & TRUST COMPANY ET AL., APPELLEES.

FILED MAY 3, 1906. No. 14,281.

Tax Title: SETTING ASIDE. A party who seeks the aid of the court to contest and invalidate the claim of one claiming title and possession of land under a sale for delinquent taxes must show that all taxes justly thereon have been paid either by himself or the party through whom he claims.

APPEAL from the district court for Knox county: JOHN F. BOYD, JUDGE. *Affirmed.*

Joel W. West, for appellant.

W. L. Henderson, E. A. Houston and *M. J. Sweeley, contra.*

DUFFIE, C.

In April, 1896, one James F. Toy, acting for the Farmers Loan & Trust Company, obtained a tax deed to a quarter section of land in Knox county, the title to which is involved in this action. Afterwards, in 1901, the Farmers Loan & Trust Company contracted to sell the land to the defendant Nellis, who paid $175 of the agreed consideration, took possession of the land and was in possession at the date of the commencement of this action. Plaintiff and appellant, claiming to be the owner of the patent title, brought this action to quiet his title, to set aside the treasurer's deed and the contract of sale to Nellis, and also a quitclaim deed made by a former owner of the land after he had conveyed by warranty deed to the plaintiff's immediate grantor, but which deed of warranty was not of record when the quitclaim deed was made.

Several questions are raised by the parties, but we think that the decree of the district court dismissing the plaintiff's petition must be affirmed, for the reason that when

the action was commenced there were two or three years' unpaid taxes standing against the land. Section 221, art. I, ch. 77, Comp. St. 1905, provides: "In all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially as aforesaid by the treasurer the person claiming the title adverse to the title conveyed by such deed shall be required to prove * * * that all taxes due upon the property had been paid by such person or the persons under whom he claims title as aforesaid." This section was adopted from the Iowa statute, and in *Maxwell v. Palmer,* 73 Ia. 595, the supreme court, in construing it, held that the purpose of the provision that no person shall gain the title acquired by a treasurer's deed, without showing that all taxes upon the property have been paid by him or the person under whom he claims, is to enforce the payment of taxes and stimulate landowners to discharge the duty imposed on all citizens to pay taxes levied upon their lands. It is not sufficient in the petition attacking a tax title to offer to pay taxes if plaintiff is found to be entitled to redeem. The purpose of the statute is beneficial to the public interest. It recognizes the equity of requiring a party who seeks the aid of the courts of the state to reclaim his land sold in consequence of his failure to pay his share of the public burden, to discharge all unpaid taxes standing against the land as a condition precedent to invoking the assistance of the court. It is true that the tax deed in the case at bar is void for want of a seal, but the party claiming title through it was in possession, and the deed gave him color of title which would ripen into a perfect title if not dispossessed for ten years. It cannot be said, therefore, that the treasurer's deed was ineffectual for all purposes, and before the party in possession under it can be disturbed the conditions of the statute should be complied with. We recommend an affirmance of the judgment of the district court.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

JOHN MANNION V. W. R. TALBOY.

FILED MAY 3, 1906. No. 14,288.

The instructions of the court should direct the attention of the jury only to facts in support of which evidence has been introduced upon the trial. When an instruction is not founded upon the evidence, and is calculated to mislead the jury in considering the facts of the case, the judgment must be reversed.

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

W. E. Gantt and *George W. Argo,* for plaintiff in error.

McCarthy & McCarthy and *John V. Pearson, contra.*

DUFFIE, C.

The plaintiff, Mannion, in his petition filed in the district court, alleges that on or about September 15, 1899, he was lawfully standing on the sidewalk on the west side of Louis street and near the east side of a store building occupied by one Hoy, in the village of Newcastle, Dixon county, Nebraska; that the defendant, Talboy, without any notice or warning to plaintiff, and unlawfully, wrongfully and maliciously, with force and violence, pushed and shoved a man, whose name plaintiff has been informed is John Coleman, against and on the plaintiff, causing plaintiff to be thrown violently into a narrow hole in said sidewalk and against said brick store building aforesaid; that in his fall the plaintiff's left foot and leg went down into the said hole, while his right foot and leg remained on the sidewalk; that he was severely and permanently injured

thereby; that his head struck against the side of the brick building with such force and violence that his left ear and ear drum were permanently injured and the hearing thereof affected; that his back and spine were permanently injured, and other severe and permanent bodily injuries sustained. The answer admits that the plaintiff was standing on the sidewalk, and that he stepped or slipped into a hole or opening in the walk. It denies every other allegation in the petition contained. Defendant further alleges that plaintiff was, at the time of the injury complained of and for a long time prior thereto had been, suffering from the effects of disease and of injuries with which the defendant had no connection; that for a long time prior to the injuries complained of plaintiff had been suffering from afflictions such as are described in his petition; that the same were the result of disease and injuries sustained long prior to the time of the accident described in the petition; that plaintiff was never in any manner injured or damaged in stepping or slipping into the hole in the walk. A second defense raised the question of the plaintiff's contributory negligence; and a third defense is pleaded to the effect that any damage or injury sustained by the plaintiff was the direct and proximate result of the carelessness and negligence of a third person, not the servant or agent of the defendant, and without any fault or negligence of any kind on the part of the defendant. A reply put in issue the affirmative matters set out in the answer. A trial resulted in a verdict for the defendant, and from a judgment entered on the verdict the plaintiff has taken error.

Exceptions are taken to the eighth instruction of the court which is in the following language: "You are instructed that if you believe from the evidence that defendant did not push a third person against the plaintiff, or that plaintiff was thrown into said alleged opening in said sidewalk by some person other than defendant, or by the careless or negligent acts of the plaintiff he fell into said hole and was injured, then plaintiff cannot recover and your verdict should be for the defendant." The ninth

paragraph of the charge, to which exception is also taken, is as follows: "You are instructed that if you believe from the evidence that defendant pushed a third person against plaintiff in any manner so as to precipitate him into the opening in the walk as alleged, and resulting therefrom plaintiff was injured as alleged, and if you believe that said injuries were the result in whole or in part of the careless and negligent act of plaintiff contributing thereto, or that he was not at the time exercising ordinary care to avoid personal injury, or that he in fact sustained no injury from the fall, then plaintiff cannot recover and your verdict should be for the defendant."

We have read the evidence with some care. It shows that at the date of the accident complained of the plaintiff was standing on the sidewalk described in the petition talking with one Coleman; that a number of other persons were standing or sitting on the walk; that the defendant, in passing by, gave Coleman a push, and it tends to show that as the result Coleman was shoved against the plaintiff who was pushed back into the hole in the walk in the manner described in the petition. There is no word of evidence in the record tending to show that the plaintiff himself was guilty of any negligence. There is no evidence tending to show that he himself contributed to the injury. There is no evidence tending to show that the accident occurred in consequence of the act of any third party. Under these circumstances it was error for the court to frame his instructions in such a manner as to allow the jury to infer or find facts of which there was no evidence. The charge of the court to the jury should always be founded on and applicable to the testimony, and when it is not, and is calculated to mislead the jury in considering the facts of the case, the judgment ought to be reversed. *Kilpatrick v. Richardson,* 37 Neb. 731; *Farmers & Merchants Bank v. Upham,* 37 Neb. 417; *Esterly H. M. Co. v. Frolkey,* 34 Neb. 110; *Farmers Loan & Trust Co. v. Montgomery,* 30 Neb. 33; *City of York v. Spellman,* 19 Neb. 357.

There are other errors alleged relating to the admission

of evidence, but, as the case will have to be reversed and remanded for a new trial, they are not likely to again occur and do not require a discussion in this opinion. For the errors above pointed out, 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.

THOMAS D. MURPHY COMPANY V. EXCHANGE NATIONAL BANK OF HASTINGS.

FILED MAY 3, 1906. No. 14,305.

Sale: ACTION. Before a seller can maintain an action on the contract for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title and vest the ownership of the property in the purchaser. If the possession and the title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained.

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

J. W. James, for plaintiff in error.

Tibbets Bros. & Morey, contra.

DUFFIE, C.

On April 4, 1902, The Exchange National Bank of Hastings, Nebraska, gave an order to the Thomas D. Murphy Company for 250 calendars and 250 tubes to be deliv-

ered on or about December 1 of that year. The order provided that it was not subject to countermand and that neither party should be bound by any verbal contract. On April 28, 1902, the bank wrote the Murphy company as follows: "We wish hereby to countermand our order for calendars placed with your Mr Kain on April 23. Total amount of bill $28.50. Please take notice." In reply to this letter the Murphy company refused to cancel the order, and sometime in the latter part of November shipped the goods to Hastings, Nebraska, where they were tendered to the bank, which refused to accept them. Thereafter this suit was brought by the Murphy company for the contract price of the goods, amounting to $28.50. A trial was had to the court without a jury and judgment entered for the defendant.

The Murphy company insist that judgment should have gone in its favor; that the rule obtains in this state that, where a party refuses to accept goods which have been ordered, the other party may keep the goods and sue for his damages or, upon tender of the goods and refusal to accept them, may sue upon the contract for the agreed price. It may be that some of our former decisions support this view, but we think the rule has now become well established that, where title to the goods has not passed, where the contract, as in this case, is executory, the only remedy of the vendor, where the vendee refuses to accept the goods, is to sue for his damages for breach of the contract. The rule is well stated in *McCormick H. M. Co. v. Balfany,* 78 Minn. 370, 79 Am. St. Rep. 393, in the following language:

"Before a seller can maintain an action for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title and vest the ownership of the property in the purchaser. If the possession and the title remain in the seller, and the purchaser renounces his contract, the law requires the seller to treat the property as his own, and to sue, if at all, for the damages he has sustained."

Whatever doubt may have existed in relation to the rule in this state was set at rest by the opinion in *Funke v. Allen,* 54 Neb. 407, where it is said:

"If a vendee in an executory contract of sale, or where the title of the property has not passed to him, refuses to perform, a right of action for damages arises in favor of the vendor for the injury or loss he has sustained by reason of the breach of the contract, and this is ordinarily or generally the difference between the market value of the property at the time and place of delivery, and the price fixed by the contract."

This rule was followed and approved in *Backes v. Black,* 5 Neb. (Unof.) 74. The latest expression of this court is found in *Hixson Map Co. v. Nebraska Post Co.,* 5 Neb. (Unof.) 388, where it is said:

"Either party to an executory contract may abandon or renounce his contract at any time before performance is due, on the usual terms of compensation to the other for damages which the law recognizes and allows, subject to the jurisdiction of equity and decree of specific performance in proper cases."

The contract sued on is clearly executory. The goods were to be manufactured and delivered at a later day. Title had not passed to the vendee, and title was not to pass until delivery of the goods about December 1 of the year in which the contract was made. As early as April the vendee gave notice of its intention to abandon the contract. It is probable, under the holding in *Hixson Map Co. v. Nebraska Post Co., supra,* that action for breach of the contract could not be maintained until the time for delivery had passed, and that until that time the vendee might have withdrawn its refusal to proceed with the contract. The vendee, however, did not recant, but stood upon its notice of refusal to receive the goods. In this condition of the case no action can be maintained on the contract by the vendor. It has a right of action for damages for breach of the contract, but not upon the contract for the agreed price of the goods.

The judgment of the district court is clearly right, and we recommend its affirmance.

ALBERT and JACKSON, CC., concur.

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

AFFIRMED.

WILLIAM A. FOSTER, ADMINISTRATOR, v. DENNIS MURPHY.

FILED MAY 3, 1906. No. 14,301.

1. **Probate Court: APPEALABLE ORDER.** An order of a probate court requiring one who had formerly been administrator of an estate to turn over to his successor certain money, claimed by the former to have been given to him as a gift from the intestate, but by the latter that it came to him as administrator of the estate, is appealable to the district court.
2. **Decedents: GIFT.** Evidence examined, and *held* sufficient to sustain a finding that the money in question had come into the hands of the former administrator personally as a gift by the intestate, and not as a part of the assets of the estate.
3. **Witnesses: COMPETENCY.** The interest of the former administrator's wife in the result of such contest is not a direct legal interest within the meaning of the statute which prohibits a person from testifying to any transaction or conversation had with a deceased person, where the adverse party is the representative of such deceased person.
4. **Gift.** The indorsement and delivery of a certificate of deposit, with the intention of making a gift of the deposit thereby represented to the party to whom the certificate is thus delivered, operates as a gift of the fund itself.

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

E. M. Bartlett and *W. N. Chambers*, for plaintiff in error.

F. C. O'Halloren and *E. C. Page, contra.*

ALBERT, C.

On the 30th day of September, 1902, Dennis Murphy, the defendant, filed a petition in the county court of Douglas county for letters of administration on the estate of his brother, Edmund Murphy, deceased. His appointment followed, and afterwards on the 29th day of October, 1902, he filed an inventory, listing certain real estate, and showing that $600 represented a certain certificate of deposit, and $12.58 found on the person of the deceased had come into his possession as assets of the estate. Afterwards, on the 6th day of November of the same year, he filed an amended inventory, again listing the real estate, but omitting the money listed in the former inventory and noting that it had been there listed by mistake. For reasons not necessary to mention he was afterwards removed from his trust, and William A. Foster, the plaintiff, was appointed in his stead. It does not appear that the defendant ever made, or was ever asked to make, a settlement of his accounts as administrator. On the 13th day of May, 1903, the plaintiff made application in writing to the county court for an order requiring the defendant to pay over to him, as administrator, the $600 listed on the first inventory as the proceeds of a certificate of deposit and part of the assets of the estate. The defendant filed an answer, alleging that the certificate of deposit had been indorsed and transferred to him by the deceased during his last illness as a gift and in expectation of death, and that he retained possession thereof until after the death of the deceased. The answer further alleges that in listing the proceeds of the certificate as part of the assets of the estate he acted in ignorance of his rights, and upon the advice of the clerk of the county court and at the request of the bank who had issued the certificate. The county court found that the money belonged to the estate, and entered an order requiring the defendant to pay it over to the plaintiff as the administrator thereof. The defendant appealed to the district court, whereupon the plaintiff filed a motion to

dismiss the appeal on the ground that the order was not a final order or determination of the rights of the parties. The motion was overruled and a hearing had on the merits. The district court found for the defendant, and gave judgment accordingly. The plaintiff brings error.

It is insisted that the finding of the district court is not sustained by sufficient evidence. The deceased was a bachelor. His next of kin are the defendant, who resides in Omaha, and two sisters in Ireland. During his last illness he was an inmate of St. Joseph's Hospital in Omaha. Before entering the hospital he deposited $600 in a bank of that city, receiving therefor a certificate of deposit. Aside from some real estate of small value he had no other property, save a trifling amount of money found on his person after his death. He was a laboring man and uneducated. The defendant's wife was sworn as a witness in his behalf. The plaintiff objected to her competency, basing his objection on section 329 of the code, which provides that "no person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." The objection was overruled, and the witness testified in effect that about two weeks before the death of the deceased she called upon him at the hospital, and he told her that he wanted the defendant to come to the hospital and have the certificate of deposit in question signed over to him; that she and her husband called that evening, and, upon their arrival, the deceased asked one of the attendants to bring him his belongings; that thereupon the attendant retired and soon returned with a pocketbook which she placed in his hands; that he took therefrom the certificate of deposit and handed it to the defendant, saying, "What is there is yours, and if anything should happen you will know what to do with it"; that he then asked an attendant to bring pen and ink, and, when it was brought, asked the defendant to indorse the certificate for him, whereupon the defendant wrote the de-

ceased's name on the certificate, the latter holding the pen at the same time; that he then handed the certificate to the defendant who retained it until after the deceased died. Two of the attendants of the hospital were also sworn and examined on behalf of the defendant. Both corroborate the wife as to the visit of herself and husband to the deceased on the evening in question. One of them testified that on the occasion of that visit the deceased called for his belongings, and she brought him his pocketbook, placed it in his hands and withdrew from the room. The other testified to his request for pen and ink at that time; that she brought them for him, and, like the other, immediately withdrew from the room in accordance with some rule of the hospital. She also testified to a previous conversation with the deceased in which he expressed an intention to give the property to the defendant. The substance of defendant's explanation of his listing the proceeds of the certificate as a part of the assets of the estate is as follows: That he presented it to the bank, but the bank refused to cash it, fearing some trouble in case it did. He then went to the office of the county judge, where he found a clerk to whom he explained the situation with respect to the certificate, and told him that the bank had directed him to get an order from the county judge with respect to its payment. The clerk told him he could not get an order of that kind, and that he had better "put his certificate in for probate." He then made application for letters of administration, and, after his appointment, listed the certificate as cash in the bank. In order to get the money he afterwards indorsed the certificate as administrator. The evidence is ample to show that the defendant included the $600 in the first inventory simply because he was ignorant of his rights, and that he undertook to correct his error in that regard by the amended inventory as soon as he was duly advised.

The indorsement and delivery of the certificate of deposit to the defendant, during the lifetime of the deceased, is conclusively established. That it was thus indorsed and

delivered by the deceased with the intention of making a gift of the deposit thereby represented, is clear. That being true, it acted as a gift of the fund itself. *Crook v. First Nat. Bank,* 83 Wis. 31, 35 Am. St. Rep. 17, and extended note. Whether it be regarded as a gift *inter vivos* or *causa mortis* is immaterial for present purposes, because, as said in the case cited, quoting Cole, J., in *Wilson v. Carpenter,* 17 Wis. 516, "Delivery is essential both at law and in equity to the validity of a parol gift of a chattel or chose in action; and it is the same whether it be a gift *inter vivos* or *causa mortis.* Without actual delivery the title does not pass." The defendant's rights are not prejudiced by his subsequently listing the money as assets of the estate. His doing so was owing to a lack of experience in such matters, and in ignorance of the consequence of such a step. No estoppel arises therefrom, because no one, because of such act, changed his position to his prejudice.

It is also contended that the order of the county court requiring the defendant to pay over the $600 is not a final order, and, consequently, that the district court erred in overruling the motion to dismiss the appeal. The order has all the elements of one that is final. The issue presented by the pleadings was whether the $600 was a part of the assets of the estate or a gift to the defendant by the deceased during his lifetime. The county court found that the money belonged to the estate and entered an order accordingly. We know of no reason why such order would not be final and conclusive unless reversed on appeal or error. It is suggested, however, that the defendant instead of taking an appeal might have paid over the $600 and filed a claim against the estate therefor. Our answer to that is that the county court had already determined that the money belonged to the estate. That question was foreclosed by the order in question, and certainly no claim against the estate could arise from the payment to the administrator of money belonging to it.

Another contention is that the defendant's wife was incompetent to testify in his behalf, her relation to the

defendant being such as to give her an interest in the result of the controversy. The statute prohibiting a person testifying to any transaction or conversation had with a deceased person, where the adverse party is the representative of such deceased person, applies only to those having a direct legal interest, and not to those whose interest is indirect or remote. In *Gillette v. Morrison,* 9 Neb. 395, the court said:

"Counsel for the defendant make the point that plaintiff offered no testimony as to demand of payment of the note of Mumford and notice on Heffley, except Lee P. Gillette, the husband of plaintiff. That under the laws of 1873, Gen. St. p. 582, section 329, this witness, being the plaintiff's husband, and having a direct legal interest in the result of the suit, was incompetent. That hence the plaintiff offered no testimony on that point. The section referred to reads as follows: * * * 'Nor shall any person, having a direct legal interest in the result of any civil cause or proceeding, be a competent witness therein when the adverse party is an executor, administrator, or legal representative of a deceased person.' The note sued on has been treated throughout the controversy as the separate property of the plaintiff. It has not been shown to have been in the possession of Lee P. Gillette, except for the purpose of presentation for payment, which he swears he did by authority of the plaintiff. If it is her separate property, then her husband has no direct legal interest in the result of the suit."

In *Hiskett v. Bozarth,* 75 Neb. 70, it was held that the husband's contingent right of curtesy in the land would not bring him within that section, in an action brought by his wife against the representatives of a deceased person for the specific performance of a contract of the deceased for the sale of land to her. If the husbands were competent witnesses in those cases, we are unable to see why the wife should be held incompetent in this. Counsel rely on *Kroh v. Heins,* 48 Neb. 691. The cases are not parallel. There the witness was not held incompetent because of her indirect interest as mother of the infant defendants, but

because of a direct, personal interest in the subject matter of the suit.

We discover no error in the record, and therefore recommend that the judgment of the district court be affirmed.

JACKSON, C., concurs.

DUFFIE, C., not sitting.

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

AFFIRMED.

WILLIAM H. THORNHILL V. ALFRED E. HARGREAVES ET AL.

FILED MAY 3, 1906. No. 14,313.

1. **Appearance.** The word "appear," when used to designate a step taken in litigation by a defendant, means the act or proceeding by which he places himself before the court and submits to its jurisdiction. It does not necessarily imply the actual physicial presence either of the party or his attorney before the court.

2. ———: CONFESSION OF JUDGMENT. Plaintiffs filed a petition against the defendants in the county court (a term case) stating a cause of action on a past due note. A paper signed by the defendants, duly entitled and filed in the cause, contained a waiver of service of process and a confession of the debt, and authorized the court to enter judgment against them thereon. Neither of the defendants nor any attorney acting for them were ever actually in the presence of the court in the cause. *Held*, That such paper, when filed, constituted a personal appearance on the part of the defendants within the meaning of section 433 of the code authorizing judgments by confession, and that the defendants thereby submitted themselves to the jurisdiction of the court.

3. **Appeal:** DISMISSAL. Where the plaintiff in a civil action appeals from the judgment of the county court to the district court, he has the same right to dismiss his action without prejudice as though it had originated in the district court.

4. **Judgment:** RES JUDICATA. In such case the dismissal does not

operate as an affirmance of the judgment of the inferior court, and such judgment is not available in bar of a future action on the same demand.

5. ———: REVIVOR. Where an order of revivor by apt language shows a revivor of the judgment, the fact that it does not expressly award execution does not invalidate it.

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

W. F. Button, F. I. Foss and *C. W. Shurtleff,* for plaintiff in error.

W. S. Morlan, contra.

ALBERT, C.

In the several proceedings in the lower court hereinafter mentioned, Alfred E. and Walter B. Hargreaves were plaintiffs, and William H. Thornhill and Winniford G. Hills were defendants, and for convenience we shall thus designate them here as we may have occasion to refer to them from time to time. On the 16th day of April, 1894, the plaintiffs filed a petition in the county court of Hitchcock county, asking judgment against the defendants on a certain promissory note, then past due, for $802.09, with 10 per cent. interest thereon from the 7th day of July, 1893. On the same day a writing signed by both of the defendants was filed in the cause. It is as follows: "In the County Court of Hitchcock County, Nebraska. Alfred E. Hargreaves and Walter B. Hargreaves, trading as Hargreaves Bros., Plaintiffs, v. William H. Thornhill and Winniford G. Hills, trading as Thornhill & Co., Defendants. Confession of Judgment. Come now the above named defendants and enter their voluntary appearance in the above entitled cause. The issuance and service of summons is expressly waived, and said defendants confess that they are indebted to the plaintiffs in the sum of $802.09 on a certain promissory note made by said defendants and in favor of the plaintiffs. Defendants are justly

indebted to the plaintiffs in said sum, with interest thereon at the rate of 10 per cent. per annum from the 7th day of July, 1893. The defendants further authorize and empower the said court to render a judgment against them and in favor of the plaintiffs for said sum of $802.09, and the interest thereon and the costs of suit. The intention being to authorize the court to act as fully in the matter as if summons had been issued and served upon them. In witness whereof said defendants have hereunto set their hands to this confession of judgment of their own free will and accord. W. H. Thornhill, W. G. Hills. In presence of W. Q. Bell, as to Thornhill, D. L. Grum witness to W. G. Hills."

Afterwards, on the same day, the county court entered the following judgment: "And now on the 16th day of April, A. D. 1894, it appearing to the court that the plaintiffs had filed their petition in this cause, and the defendants by their confession of judgment, having waived process and entered their appearance in this cause, and with the consent of the plaintiffs, confess they are indebted to them upon said promissory note in the sum of $802.09, and ask to have judgment rendered against them therefor, as per confession recorded herein. It is therefore considered by me that the said plaintiffs, Hargreaves Bros., recover from said defendants the sum of $863.94 the debt so as aforesaid confessed, with interest at 10 per cent. per annum from this date, and also their costs herein expended, taxed at $1.80." No execution was ever issued on this judgment, and the 3d day of May, 1904, the plaintiffs made an application to have it revived. A conditional order was made, and service thereof had on the defendant Thornhill. He entered an appearance, and resisted the application on substantially the same grounds as those upon which he resisted a second application, and which will be stated hereafter. The county court found that the judgment was void on the ground urged by the defendant Thornhill and denied a revivor thereof. Thereupon the plaintiffs appealed to the district court, but before trial

filed a motion to dismiss their application for revivor, without prejudice to a future application in that behalf. The motion was sustained, and the application dismissed without prejudice.

Afterwards, on the 29th day of December, 1904, the plaintiffs again applied to the county court for a revivor of the judgment. A conditional order of revivor was made, and served upon the defendant Thornhill; the return of the sheriff showing that the defendant Hills could not be found in the county. The defendant Thornhill answered, resisting a revivor of the judgment on the following grounds: (1) That the judgment was void for the reason that it was rendered without jurisdiction over either of the defendants, in that there had been neither issuance nor service of process upon either of the defendants in the action in which the judgment was rendered, nor had they or either of them personally appeared in said action, nor was the confession made by an attorney, acting in their behalf, upon a warrant of attorney filed as required by law; (2) that the judgment was upon a joint note, and his codefendant Hills was a nonresident of the state, and no service of the conditional order was made upon him either personally or by publication; (3) that the application was barred by the judgment of the county court denying the former application to revive; (4) that the application was barred by the statute of limitations, in that more than five years had elapsed since its rendition, and no execution had ever issued thereon, nor had any part thereof been paid. A trial was had and the matters of record hereinbefore referred to were shown in evidence. In addition to such evidence the defendant Thornhill was sworn and examined as a witness in his own behalf. He testified that he was not present in the county court of Hitchcock county on the 16th day of April, 1894, when the judgment was rendered, and that he never appeared in said action and confessed the judgment in question. He admitted, however, that he signed the written confession of judgment hereinbefore set out at length. The district court found in favor of the

plaintiffs, and entered the following judgment: "It is therefore considered, ordered and adjudged that the said judgment be, and the same stand, revived for the sum of $863.74, with interest at 10 per cent. from the 16th day of April, 1894, and costs of this proceeding taxed at $——." From the foregoing judgment, defendant Thornhill prosecutes error to this court.

It is now contended that the county court was without jurisdiction to render the original judgment by confession, because the defendants neither appeared personally, nor by attorney acting under a proper warrant of attorney to confess the judgment. It is conceded that the confession filed in the cause, and upon which the judgment is based, was signed by the defendants, but it is insisted that the statute authorizing the taking of a judgment by confession and without service of process requires either the actual physical appearance of the debtor himself, or of an attorney acting under due warrant of attorney to confess the judgment. The provisions of the code relied on are as follows:

Section 433. "Any person indebted or against whom a cause of action exists may personally appear, in a court of competent jurisdiction, and, with the assent of the creditor or person having such cause of action, confess judgment therefor, whereupon judgment shall be entered accordingly."

Section 436. "Every attorney who shall confess judgment in any case shall, at the time of making such confession, produce the warrant of attorney for making the same to the court before which he makes the confession, and the original, or a copy of the warrant, shall be filed with the clerk of the court in which the judgment shall be entered."

The proceedings in this case are not necessarily limited by section 433. This was not a confession of judgment without pleadings and process. The action was regularly begun by the filing of a petition. The paper filed by the defendants was properly treated as an affirmance and admission of the allegations of the petition. In such

case it is not essential that the defendant be physically present before the court. 11 Ency. Pl. & Pr. 973, par. IX and note. *Rosebrough v. Ansley,* 35 Ohio St. 107. The act or proceeding by which a defendant places himself before the court and submits to its jurisdiction does not necessarily involve the actual, physical presence either of the party or his attorney before the court. It is well known that the filing of a motion, demurrer or other pleading constitutes an appearance although the party may never have been actually in the presence of the court. In *Salina Nat. Bank v. Prescott,* 60 Kan. 490, 57 Pac. 121, a paper signed by a defendant and properly entitled and filed in a cause, wherein he waived the service of process and recited that he entered an appearance, was held to constitute an appearance on the part of such defendant. In this case the plaintiffs filed their petition against the defendants. It will be conceded that if, instead of filing the paper acknowledging the debt and authorizing the court to enter a judgment against them for the amount thereof, the defendants had answered, denying any liability to the plaintiffs and objecting to judgment against them on such debt, they would have thereby submitted themselves to the jurisdiction of the court, and a judgment against them would not have been void for want of jurisdiction. Common sense rebels at the suggestion that a denial of liability is more effective for jurisdictional purposes than a confession.

Counsel rely with much confidence on *Howell v. Gilt Edge Mfg. Co.,* 32 Neb. 627, but that is not a parallel case. There the debtor was a corporation. As a corporation of necessity must always act through its agents, it is incapable of appearing personally, hence, a compliance with section 433 in that respect was impossible. The only way left for it to appear was by attorney. But section 436 provides that, when the confession is by attorney, he shall produce his warrant of attorney, and that the same or a copy thereof shall be filed in the case. In that case no warrant of attorney was produced or filed, and the judg-

ment was rendered without service of process and upon the bare confession of one claiming to act as "general manager" for the corporation. This court held that the record failed to show jurisdiction and that the judgment was void. That case is governed by section 436, and is clearly distinguishable from the present which shows a compliance with section 433.

It is contended, further, that the application for revivor is *res judicata*. The argument in support of this contention is based on the proposition that, judgment having gone against the plaintiffs in their first application in the county court, and the plaintiffs after an appeal to the district court having dismissed such application, the judgment of the county court on the first application is in full force and effect, and constitutes a bar to the present application to revive the judgment. In this argument counsel do not appear to distinguish between the dismissal of an appeal and the dismissal of a cause of action pending on appeal, because many of the cases cited deal only with the effect of the former. Section 26, ch. 20, Comp. St., provides that in civil actions brought in the county court either party may appeal from the judgment of the county court, or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace. Section 1010 of the code provides that in case of appeal to the district court the parties shall proceed in all respects in the same manner as though the action had been originally instituted in said court. Section 430 provides that an action may be dismissed without prejudice to a future action by the plaintiff before the final submission of the cause to the jury, or to the court, where the trial is by the court.

But counsel contend that the dismissal of the first application in the district court was after its final submission to the county court, and, consequently, that the statutory provision quoted does not apply. This court held otherwise, in *Home Fire Ins. Co. v. Deets*, 54 Neb. 620, but counsel contend that the case should be overruled.

No authorities have been presented supporting that contention, nor have we been able to find any. The argument in support of it is far from convincing, because it proves too much. Carried to its logical conclusion it would show that a plaintiff could not dismiss without prejudice after a disagreement of a jury or the granting of a new trial. But this court has held that the right to dismiss his cause may be exercised by a plaintiff after reversal and remand for a new trial. *Adams v. Osgood,* 55 Neb. 766. See, also, *Currie v. Southern P. Co.,* 23 Or. 400, 31 Pac. 963; 14 Cyc. 406. The right to dismiss without prejudice is coexistent with the right to submit the cause on the merits, and, as the latter right unquestionably existed in this case, the plaintiff could exercise the former as an alternative. We are satisfied with the rule announced in *Home Fire Ins. Co. v. Deets, supra,* and know of no good reason why it should be overruled.

Another contention of the defendant is that the county court of Hitchcock county had nothing before it, in the way of an affidavit or other evidence, to show that the judgment sought to be revived was unpaid, but we do not know whether it had or not. The certificate of the clerk does not purport to set out the complete transcript of the proceedings had in the county court. Consequently, the effect of the omission to file such affidavit in the county court, if there was such an omission, is not presented by the record. We might add, however, that such affidavit is not commonly regarded as jurisdictional.

It is further contended that the judgment having been rendered on a joint liability, and being joint in form, the judgment of revivor, which was rendered on service had upon one of the defendants, is therefore erroneous. The action proceeded in form against both of the defendants. The conditional order was served upon one of them, and the return of the officer shows that the other could not be found in the county. The defendant who was served answered, alleging the nonresidence of his codefendant in the state. The rules of procedure in original actions, so far as

applicable, govern proceedings to revive. In an original suit on a joint obligation the action must proceed in form against all of the joint obligors. But section 84 of the code provides that, if the action be against defendants jointly indebted upon contract, the plaintiff may proceed against the defendant served, unless the court otherwise direct. In *Fox v. Abbott*, 12 Neb. 328, the foregoing provision was held applicable to proceedings to revive a joint judgment.

The judgment of the district court is next assailed on the ground that it does not provide for the issuance of an execution on the judgment. In support of this contention many cases are cited, none of which, to our minds, appear to be in point. The proceeding is aptly called a proceeding to revive a judgment. As applied to a dormant judgment the word "revive" means to restore or bring the judgment to life. As the judgment stood originally it carried with it, as one of its incidents, the right to have it enforced by the process of the court. The order of revivor, hereinbefore set out at length, restores it to life with all its original qualities, and it is now enforceable in precisely the same way it was enforceable before it became dormant—by execution. Even were we to concede that the court should have expressly awarded execution, we are not quite clear as to how the defendant is in any way prejudiced by the omission. But we do not concede that. In our opinion, it is no more necessary to expressly award execution in an order of revivor than in the original judgment. Other questions are discussed, but we think they are disposed of by what has already been said.

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

JACKSON, C., concurs.

DUFFIE, C., not sitting.

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

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY v. CHARLES H. KING.

FILED MAY 3, 1906. No. 14,324.

1. **Railroads: FENCES: INJURY TO STOCK.** Section 1, art. I, ch. 72, Comp. St., making railroad companies liable for injuries to stock upon their failure to maintain fences along the right of way and cattle-guards at highway crossings was not intended to provide a penalty for failure to maintain such safeguards, but merely to render such companies liable to the owner of stock injured in consequence of such failure.
2. **A petition** for damages for the loss of stock based on said section, which contains no allegation tracing such loss to the failure of the railroad company to maintain fences or cattle-guards, is fatally defective.
3. **Petition** examined, and *held* that the facts therein stated are insufficient to constitute a cause of action.

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

J. W. Dewcese and *F. E. Bishop,* for plaintiff in error.

Starr & Reeder, contra.

ALBERT, C.

The petition filed in the court below is as follows: "(1) That the defendant, The Chicago, Burlington and Quincy Railway Company, is a corporation incorporated under the laws of the state of Iowa and doing business under the laws of the state of Nebraska. (2) That on or about the 24th day of August, 1903, said defendant was operating a railroad through Red Willow county, Nebraska (said railroad having been opened and operated for more than six months in said county), and while so operating said road, at the time above stated, at a place on said road therein where said road crosses a public highway, running north and south between sections 9 and 10, in township 3 north

of range 27 west of the sixth principal meridian, in Nebraska, where said road is required by law to provide suitable crossings and guards, suitable and sufficient to prevent cattle from getting onto said railroad, but had failed to do so, said defendant, by its agents and employees, ran an engine and train of cars over and upon nine head of two year old steers, being the property of the plaintiff, and of the value of $270, by reason of which said stock was killed, to the damage of the plaintiff in the sum of $270. Wherefore plaintiff prays judgment against said defendant for his damages herein sustained, for the sum of $270 and costs of suit." An answer was filed, admitting the corporate character of the defendant, and that at date alleged in the petition it was, and for more than six months had been, operating the railroad described in the petition, but denying each and all of the other allegations of the petition. Subsequently, and before the trial, a motion for judgment on the pleadings and an objection to the introduction of any evidence by the plaintiff, for the reason that the facts stated in the petition were not sufficient to constitute a cause of action, were successively filed by the defendant and overruled by the court. A trial to a jury resulted in a verdict and judgment for the plaintiff (the defendant in error in this court), and the defendant brings error.

The sole question presented by the record is whether the facts stated in the petition are sufficient to constitute a cause of action. The action is based on section 1, art. I, ch. 72, Comp. St. 1905, which is as follows: "That every railroad corporation whose lines of road or any part thereof are open for use shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitable and amply sufficient to prevent cattle, horses, sheep and hogs from getting on the said railroad, except at the crossings of public roads and

highways, and within the limits of towns, cities and villages, with openings, or gates, or bars at all the farm crossings of such railroads, for the use of the proprietors of the lands adjoining such railroad, and shall also construct, where the same has not already been done, and hereafter maintain at all road crossings, now existing or hereafter established, cattle-guards suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting onto such railroad, and so long as such fences and cattle-guards shall (not) be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, are not in sufficiently good repair to accomplish the objects for which the same is herein prescribed, is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines or trains of any such corporation, or by the locomotives, engines or trains of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep or hogs thereon; and when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or wilfully done." The object of the foregoing section was to prevent cattle from straying from adjoining lands to the track or right of way of railroads, and to prevent them from passing from the public highway, at railroad crossings, to the railroad track or right of way at either side, and to provide a remedy for the owner of stock injured in consequence of the omission of a railroad company to maintain the fences and guards thereby required. But there is no allegation in the petition that the failure of the railroad company to maintain suitable cattle-guards at the crossing in question was the proximate, or even the remote, cause of the injury to cattle, nor that such injury is in any way traceable to the company's omission in that regard.

The plaintiff contends, however, that his petition is in the language of the statute, and that his right to recover

under the statute is not dependent upon whether the injury to his stock is traceable to the defendant's omission to maintain cattle-guards at the crossing. This, as all other statutes, must be given a reasonable construction. It was not intended to provide a penalty for a failure to maintain cattle-guards, but compensation for the owner of stock injured in consequence of a failure on the part of a railroad company to take statutory precautions to prevent such injury. And a petition based upon this statute, which contains no allegation tracing or tending to trace the injury of the stock to a failure of the railroad company to take such precautions, is fatally defective. Such is the condition of the petition in this case, and the judgment based thereon is erroneous and should be reversed.

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

JACKSON, C., concurs.

DUFFIE, 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 according to law.

REVERSED.

CHARLES S. JOSLIN ET AL., TRUSTEES, V. DORA E. WILLIAMS.*

FILED MAY 3, 1906. No. 14,258.

1. **Receivers: DAMAGES.** In an action for damages growing out of the wrongful appointment of a receiver, the rental value of the property sequestered during the period of the receivership and the value of the services of counsel employed to procure the vacation of the order appointing the receiver are elements proper to be considered in determining the measure of damages.

* Rehearing allowed. See opinion, p. 602, *post*.

2. ———: APPROVAL OF ACCOUNTS. The approval of the accounts of a receiver wrongfully appointed does not adjudicate the question of damages between the litigants in the action in which the receiver was appointed, where the party resisting such appointment and procuring a reversal of the order making the appointment does not participate in the accounting and receives no advantage therefrom.

3. ———: DAMAGES. The fact that the supreme court, in vacating an order appointing a receiver, puts its decision upon a ground different from the one urged by counsel does not deprive the party procuring the vacation of the order of the right to recover, in an action for damages, the value of the services of his attorney in procuring the judgment of vacation.

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

Hamilton & Maxwell, for plaintiffs in error.

B. N. Robertson, contra.

JACKSON, C.

In July, 1901, Charles S. Joslin and Suviah Joslin, as trustees under the will of John J. Joslin, deceased, procured the appointment of a receiver in an action to foreclose a mortgage, wherein they were the plaintiffs and Dora E. Williams et al. were defendants. Upon appeal to the supreme court the order appointing the receiver was vacated and the petition for the appointment dismissed. *Joslin v. Williams,* 3 Neb. (Unof.) 194. In that proceeding the Fidelity and Deposit Company of Maryland was surety on the bond of the applicants for the appointment. The receiver made report to the district court showing the collection of rents amounting to $257.60, and disbursements to the amount of $143.41, including his fees, and the remainder, by direction of the court, was paid over to the clerk subject to the order of Dora E. Williams, and that fund still remains in the custody of the court; and thereupon Dora E. Williams brought suit against the Joslins and their surety on the bond for

damages because of the wrongful appointment of the receiver, and recovered judgment, from which error is prosecuted on behalf of the Joslins and their surety. In the discussion of the case the parties will hereafter be designated as they were designated in the court below.

The principal questions presented for determination in this court may be summarized, first, as to the effect of the order approving the report of the receiver and directing the disbursement of funds upon plaintiff's claim for damages by reason of the wrongful appointment; and, second, as to the measure of damages. It is urged on behalf of the defendants that the order confirming the report of the receiver and directing the disbursement of funds in his hands amounts to an adjudication of the rights of the plaintiff. This contention cannot be sustained, except upon the theory that the plaintiff was compelled to litigate in that action her right to the damages involved in this action; and it would seem that a bare statement of the proposition ought to be sufficient to dispose of that question. The accounts of the receiver are not involved, nor was there involved in the accounts of the receiver any question of damages which might arise by reason of his wrongful appointment. The appointment of a receiver adjusts and determines the right of no party to the proceedings, and grants no final relief, directly or indirectly. *Vila v. Grand Island E. L., I. & C. S. Co.*, 68 Neb. 233. The discharge of the receiver and the settlement of his accounts was a necessary result of the appointment, and was, of course, conclusive as between the parties litigant and the receiver himself, but did not have the effect of determining the question of damages as between the litigants, any more than the dissolution of an injunction or the discharge of an attachment would determine the question of damages in actions where relief by injunction or attachment is sought.

By section 269 of the code, it is provided that every order appointing a receiver shall require the applicant to give a good and sufficient bond, conditioned to pay all

damages which the other parties to the suit, or any of them, may sustain by reason of the appointment of a receiver, in case it shall be finally decided that the order ought not to have been granted. This provision is similar in effect to those provisions of our code requiring bonds to be given in attachment proceedings and upon the procuring of temporary orders of injunction, and, while the liability on the bond follows as a result of the final judgment in such cases, the extent of such liability and the measure of damages remains to be determined in an independent action on the bond. That is equally true in cases of a bond given by the applicant for the appointment of a receiver. The case is not one where the appointment of a receiver was acquiesced in or agreed upon by the parties, or where it was finally determined that the appointment was justified. The appointment in this case was resisted at the outset, and the right to such appointment was contested at every stage of the proceedings; and, while the rights and liabilities of the receiver were determined upon the settlement of his account, the liabilities of the parties to each other, growing out of the appointment, were in no sense determined or adjudicated. Authorities are cited to the effect that the plaintiff should not be held responsible for losses which result from the wrongful acts or negligence of the receiver. They are not applicable, however, to this case, where the wrong does not arise out of the misconduct of the receiver. The damages here result from the wrongful appointment procured at the instance of the defendants Joslin.

At the trial the plaintiff was permitted to prove, over the objections of the defendants, the rental value of the premises during the period when the receiver collected the rents and profits, and the value of the services of counsel employed in her behalf in procuring the vacation of the order appointing the receiver. It is urged that the rental value of the premises was not a proper measure of damages under the allegations of the petition, and that attorney's fees in procuring the vacation of the order

should not be considered as an element of damages. The petition contains a recital of the appointment of the receiver, a copy of the bond, the appeal to the supreme court and the order there made, the mandate of the supreme court requiring the district court to carry into effect the judgment of the supreme court, that the plaintiff was compelled to and did employ an attorney to prosecute the appeal to the supreme court, and the obligation to pay for the services so performed, together with the personal expenses of her attorney, which she was required to pay. It recites her title to the property and that she was entitled to the possession and the rents and profits; that the receiver entered upon the discharge of his duties, demanded and received the rents during the entire period of his receivership, and that he used and appropriated the rents and income arising therefrom; that the fair rental value of the premises was $24 a month and that the receiver collected the sum of $360 as such rents and profits. The contention that the rental value of the premises during the period of the receivership was not a proper measure of damages doubtless arises from the construction placed upon the allegation of the petition by the defendants. We have no hesitancy in saying that the rental value of the premises was a proper measure of damages, and that the allegation in the petition showing the amount of rents collected by the receiver is entirely immaterial. What the result would have been had the plaintiff accepted the remainder of the rents and profits paid into court by the receiver, or had the plaintiff procured or participated in the proceedings resulting in the statement of the receiver's account, it is unnecessary to determine; nor is it important to the inquiry that she might still apply to the clerk of the district court and receive the remainder from his hands. It is sufficient to state that she did not procure the accounting by the receiver and has not received any part of the funds collected by him; nor is it important that the defendants have permitted that fund to remain in the custody of the clerk.

There is no statute expressly authorizing the allowance of attorney's fees as an item of damages where it is finally determined that a receiver should not have been appointed. That is true, however, of every other element of damages. The statute does not undertake to define the damages which the applicant for the appointment of a receiver may be called upon to pay in the event that the receiver is improperly appointed. That is equally true in cases of the allowance of a temporary injunction and the attachment of property under the provisions of the code. It is now, however, the settled rule of this state that attorney's fees are properly allowable in such cases as an element of damages, and there seems to be no good reason why they should not be allowed in case of the wrongful appointment of a receiver. But it is said that this rule is a hardship on the defendants, as illustrated by the fact that the item of attorney's fees charged exceeds the entire amount of the rents and profits. Any other rule, however, would work a hardship on the plaintiff, whose property was sequestered and who was obliged to and did employ counsel in order that the wrong might be righted, and it should be the policy of the law, where hardship must be suffered by some one, to relieve the litigant who is free from wrong and to cast the onus upon the one out of whose wrongful acts the hardship arises.

Furthermore, it is insisted that in the appellate proceedings from the order appointing the receiver counsel for plaintiff presented the case upon the theory that the property was the homestead of the plaintiff, whereas the appellate court finally put the decision upon the ground that the plaintiff's right of possession was by reason of the provisions of section 17, ch. 36, Comp. St. 1901. That course of reasoning does not impress us with very much force. The fact remains that the plaintiff contended that the character of the property was such as to prohibit the appointment of a receiver. That contention was sustained in the appellate court, although upon a ground different from the one urged. That would not militate, however,

against the plaintiff's demand for damages; the result was the same, notwithstanding the erroneous reason. In *Haverly v. Elliott,* 39 Neb. 201, an action on a bond given in a case where the receiver was wrongfully appointed, it is said:

"The law of the state, and the bond given by Haverly and his sureties as well, provided that if it should be finally decided that this receiver was wrongfully appointed, then that Haverly would pay Mrs. Elliott all damages which she might sustain by reason of the appointing of such receiver. The word 'all' does not mean some, nor a part, but means the whole, the entire damage, every item of injury."

The rule there stated is justified by the language of the statute, and, to say the least, is a common sense rule.

It is contended that the court erred in denying an offer on the part of the defendants to put in evidence the report of the receiver and the order of the district court thereon. In view of the conclusion already reached, however, we must hold that the objection to the introduction of this record was properly sustained.

In the answer of the defendants a counterclaim is set out for costs paid by the defendants in the foreclosure proceedings, which were adjudged against the plaintiff. It appears that upon the trial of the foreclosure proceedings on its merits the district court found for the defendants in that proceeding and dismissed the plaintiff's petition. Upon appeal to the supreme court that decree was reversed at the cost of the appellee, amounting to $21. It was adjudged by the decree of foreclosure that, in default of the payment by the defendant of the amount found due on the mortgage, with interest and costs of suit (alleged to amount to $127.71, including the item of $21, costs in appellate court), the property should be sold as upon execution for the satisfaction thereof, and this, it is said, is a personal judgment against the plaintiff, which she has not satisfied, although the costs were paid out of the proceeds of the sale of the mortgaged property. No de-

ficiency judgment, however, was or could be entered in the foreclosure proceedings, and, in our opinion, no execution could issue upon the judgment for costs, other than an order for the sale of the mortgaged premises.

In the instructions to the jury given by the court on its own motion, the court advised the jury as to the allegations of the petition and of certain admissions contained in the answer, but neglected to state that the answer contained a general denial. It is complained that the instruction is erroneous and prejudicial. That the instruction is open to criticism may be conceded. In view, however, of the other instructions to the jury, we do not think that the failure to call the attention of the jury to the general denial was prejudicial. The court instructed the jury that the burden of proof was on the plaintiff to establish the allegations of her petition by a preponderance of the evidence. This instruction was certainly as favorable to the defendants as the pleadings would justify, and necessarily had the same effect as a statement from the court that the allegations of the petition were denied. In instruction No. 3 the court said: "You are further instructed that the court did not permit evidence to be introduced in support of the cross-demand or other defense to said bond, alleged in the answer of said defendants, for the reason that, as a matter of law, said allegations in said answer are not a defense to this action upon this bond in controversy, and you will therefore not consider the same." This instruction is also open to criticism because of the use of the words "or other defense," but, in view of the state of the record, cannot be said to have been prejudicial. All of the rulings of the court in the matter of the introduction of evidence, to which our attention has been called, were proper; and all offers of evidence on behalf of the defendants which were excluded on objection were properly excluded, and no prejudice to the defendants could possibly arise out of the instructions complained of.

In defining the elements of damage for which the plaintiff was entitled to recover, they were stated thus by the

court: "First. Of the injury to her possession during the time she was deprived of the occupation of said premises. Second. The actual and necessary expenses which she incurred in the employment of an attorney, if any, to resist said receivership, and of the natural and necessary expenses of said attorney in going to Lincoln to attend the supreme court in the matter of resisting said appointment of a receiver, and of the costs of court which she expended in said resistance to the appointment of said receiver." It is said that this instruction is erroneous, in that it submits to the jury the question as to the value of the services rendered by plaintiff's attorney to resist the receivership, whereas the allegations of the petition relative to the services of an attorney in the district court were stricken out on motion. The court, however, by another instruction, told the jury not to consider any services rendered by the attorney for plaintiff in the district court. In instruction No. 6 the court directed the jury to return a verdict for the plaintiff and assess her damages at such sum as they might find from the evidence, under the instructions, she was entitled to recover, not exceeding the penalty in the bond. This instruction was entirely proper. Under the pleadings and evidence no verdict could stand except one favorable to the plaintiff. All other objections to the instructions are disposed of in the previous discussion of the case.

We find no reversible error in the record, and recommend that the judgment of the district court be affirmed.

ALBERT, C., concurs.

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

AFFIRMED.

The following opinion on rehearing was filed May 24, 1907. *Judgment of affirmance adhered to:*

1. Homestead: FORECLOSURE: RECEIVERSHIP, COST OF. The value of a mortgagor's homestead interest and right of possession of the

mortgaged premises pending foreclosure proceedings cannot be diminished by the costs of a receivership, the fees of the receiver, or the money not necessarily paid out by him for repairs on the premises, where it has been finally decided that the receiver ought not to have been appointed.

2. **Receiver's Bond:** ACTIONS: CROSS-DEMAND. In an action on the bond given to obtain the appointment of the receiver, in such a case, defendants cannot by way of cross-demand recover the costs of the foreclosure proceeding for which the owner of the homestead interest was not personally liable.

BARNES, J.

This is an action on a bond given by the plaintiffs in a foreclosure suit to obtain an order appointing a receiver to take possession of the mortgaged premises, collect the rents and profits thereof pending the litigation, and apply them to the satisfaction of the mortgage debt. The plaintiff herein had judgment in the court below, which was affirmed by our former decision, *ante,* p. 594. The case has been reargued to the court on a rehearing, and the question now is, shall we adhere to our former judgment?

It appears that the bond in question was given under the provisions of section 269 of the code, and was conditioned: That the plaintiffs in that suit should pay to the defendant, plaintiff herein, all damages which she might sustain by reason of the appointment of the receiver, if it should be finally decided that the order ought not to have been granted. By the judgment of this court it was finally decided that the order should not have been made, and that branch of the foreclosure suit was dismissed and the proceeding wholly terminated. *Joslin v. Williams,* 3 Neb. (Unof.) 194. It further appears that the plaintiff herein was the surviving mortgagor of the house and lot, the subject of the foreclosure suit, which was her homestead, and was therefore entitled to the undisturbed possession, use and enjoyment thereof until after sale and confirmation under decree of foreclosure; that the receiver took charge of the property over the plaintiff's objection, deprived her

of the use and possession thereof, collected the rents and profits, which she was clearly entitled to receive, and which, but for such wrongful appointment, she would have received for her own use and benefit. That the plaintiff can maintain this action seems clear; so the only question for our determination is the proper measure of her damages.

It is contended by the defendants that the plaintiff is not entitled to recover the rental value of the premises in question during the time she was wrongfully deprived of her right to the possession thereof, for the reason that from the nature and character of the receivership proceedings the possession of the receiver was her possession; that he was her receiver, and not the representative of the plaintiffs in the foreclosure suit. In support of this contention counsel quote from *Wiswall v. Sampson*, 14 How. (U. S.) *52, *65, as follows:

"The effect of the appointment is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered his receiver."

An examination of the case from which the above quotation is taken shows that it was an action in ejectment. The plaintiff claimed title through an execution sale of the real estate in question based on a judgment at law; while the defendant claimed title through a sale made by a master in chancery in an action to set aside a conveyance of the real estate as fraudulent, and subject it to the payment of a judgment upon which an execution had been issued and returned unsatisfied. It appears that in the equity proceeding a receiver was appointed to take charge of the property after the rendition of a decree adjudging the conveyance fraudulent as to creditors and ordering that the property be subjected to the payment of the judgment or judgments in question. There was no contention that the receiver was not rightfully appointed, and the

excerpt relied on is only a part of the reasoning of the court to uphold its judgment. The thing actually decided in that case was that, where real estate is in the custody of a receiver appointed by a court of chancery, a sale of the property under execution issued by virtue of a judgment at law is illegal and void. And the proper proceeding to be pursued by any person claiming title to such property either by mortgage, judgment or otherwise was there pointed out. So it may be said that the decision does not support the defendants' contention.

Again, it would seem clear that before a receiver could be said to be the receiver of any party, especially of a party opposing his appointment at all stages of the proceedings, he must have been rightfully appointed. In the case at bar the plaintiff never acquiesced in the appointment of the receiver, but on the other hand protested against such appointment, and took the proper steps to reverse the order of the district court in that behalf. She was successful; and the rule invoked that the receiver who was wrongfully appointed must be accepted by her as her receiver is so absurd we cannot give it our approval. It seems to us that this case is ruled by *Haverly v. Elliott*, 39 Neb. 201. There the plaintiff owned and conducted a confectionery store, and manufactured and sold ice cream and soda water. She also owned a stock of confections and a miscellaneous lot of furniture and fixtures used in her business. One Haverly held a lien against this property and brought suit in equity to foreclose it. He obtained the appointment of a receiver, who took possession of the plaintiff's property and place of business, held them for some days, and then sold the property to pay the Haverly lien. It having been finally decided that the order appointing the receiver ought not to have been granted, the plaintiff sued Haverly and his sureties on the bond given to obtain the appointment of such receiver. We held that the value of her interest in the property sold by the receiver at the time he took possession of the same, and the actual loss she sustained by the suspen-

sion of her business during the time she was prevented from carrying it on, by reason of the possession held by the receiver of her property and place of business, was the correct measure of damages. In the case at bar the plaintiff was entitled to the possession of her home until after sale and confirmation upon a decree of foreclosure. The defendants Joslin wrongfully obtained the appointment of a receiver and thus deprived her of her right of possession. The value of her possession was the fair rental value of the premises during the time they were held by the receiver. She was entitled to such rental value, and it could not lawfully be diminished by the costs and expenses of the receivership which, including his fees, he deducted from the amount of rent collected by him.

Again, a party could not lawfully be required in such a case as this to expend any of the money which she was entitled to receive as the rental value of the premises in improvements or repairs thereon of any kind. Of course, it might not be for her interest to make repairs on the property. Unless the debt was paid she was only entitled to the use and enjoyment of it until sale and confirmation, after which she would be required to surrender all her rights to the purchaser. She was not required to improve the property or to repair the same for the benefit of such purchaser; and this is especially so because of the fact that, whether the premises brought much or little at the sale, no deficiency judgment could have been rendered against her. So the amount of the receiver's fees and the costs of that proceeding, together with the money expended for repairs out of the rentals of the property, were wrongfully taken from her and converted to another's use. It is insisted, however, by counsel for the defendants that the approval of the account of the receiver, and his discharge by the order of the district court, was binding on the plaintiff to the extent, at least, of compelling her to receive the small remainder which he paid into court in full compensation for her interest in the mortgaged premises while she was wrongfully

deprived of the use and benefit thereof. To so hold would amount to a reversal of our judgment in her favor declaring that the receiver was wrongfully appointed. When the order relied on was made there was no receiver in the foreclosure proceeding. Long before that time he had been discharged, and the judgment appointing him had been reversed and set aside. So it seems clear that the plaintiff was not bound by that order, but has the right to proceed against the defendants on the bond given by them to secure the appointment of the receiver, and recover all the damages that she has thereby sustained.

Lastly, the defendants contend that they were entitled to recover of the plaintiff the costs in the foreclosure proceeding, or a part of them, on their cross-demand in this case. It is urged as a reason for the contention that a large part of the costs in that proceeding was advanced by them, and that the court erred in denying them the right to recover the costs so advanced. This contention cannot be sustained. The decree of the district court in the foreclosure case provided that out of the proceeds of the sale of the mortgaged premises the costs should be first paid, and that the remainder of such proceeds should be applied to the payment of the amount found due the plaintiffs therein. So the plaintiff herein was not made personally liable for any part of the costs, and no personal judgment could have been rightfully rendered against her therefor. As we understand it, it is not now contended that she can be compelled to pay any part of the costs of the foreclosure proceedings by execution or otherwise, and we fail to understand how the value of her right of possession of the premises in question during the pendency of the foreclosure proceedings can be diminished by requiring her to pay any part of the costs of that action. We are asked, however, in case we adhere to our former decision, to make some order with reference to the disposition of the money deposited in court by the receiver, so that the plaintiff may not have double rent from the property in question. It would seem that this

is a matter for the consideration of the district court; that if the defendants desire to have the money there deposited paid to the plaintiff they should make an application to that court for an order on the clerk to turn over the fund to the plaintiff as a payment *pro tanto* upon her judgment. Or, if they see fit to do so, they may obtain an order permitting them to withdraw the money for their own use and benefit, and in that event execution should be awarded to the plaintiff for the full amount of her judgment herein.

For the foregoing reasons, our former judgment is adhered to.

AFFIRMED.

SEDGWICK, C. J., dissenting.

The defendant in the foreclosure proceedings, who is now the plaintiff in this action, was entitled to the possession and use of the premises while the foreclosure proceedings were pending. Of this use and possession she was deprived by the appointment of a receiver. It was finally determined that the receiver ought not to have been appointed. The condition of the plaintiffs' bond given upon the appointment of the receiver has therefore been broken and the plaintiff is entitled to recover thereon. The question is as to the measure of damages.

When a court of competent jurisdiction, and with jurisdiction of the parties and to determine the necessity and propriety of a receivership, makes an order appointing a receiver, the receiver so appointed is an officer of the court. He is such officer of the court not only in the ordinary sense, but also in a special and peculiar sense. The actions of the receiver are the actions of the court. He performs those actions under the general orders of the court, and they are as much the acts of the court as though there had been a special order for the performance of each individual act, so far as the receiver acts only within the scope of the order appointing him. When it is finally determined that the order appointing the

receiver ought not to have been made, this is a determination that the court has made a mistake, and it cannot be true in any ordinary sense that either the court or the receiver is a trespasser. The statement therefore in the opinion in *Haverly v. Elliott* 39 Neb. 201, that the judgment of the court that the receiver was wrongfully appointed put the receiver in the position of a trespasser is not to be applied in a general sense. The meaning of the writer of that opinion must have been that, in that particular case, the rules for estimating damages applicable to trespassers who had converted property were also applicable to the case then being considered.

A court is not to be held to be a trespasser because of an error of judgment in exercising a lawful jurisdiction, and the officer of the court executing that order cannot, for the same reason, be held to be a trespasser. A receiver acting under the orders of the court made within its jurisdiction is generally considered to be the receiver for all parties to the litigation. If under the orders of the court he takes possession of property belonging to a party to the litigation, he holds that property under the orders of the court for the party to whom it belongs, to be delivered to that party when the rights of the parties are determined. And in this case, when this receiver under the orders of the court took possession of the property in controversy, the plaintiff in this case was at all times in legal right entitled to have that property returned to her by the receiver, and in that sense the receiver held the property for her and was her receiver. When it was determined that the receiver ought not to have been appointed this plaintiff was entitled to an order upon the receiver to return the property to her, and of course she was entitled to an order to return the proceeds of that property which had accrued while in the hands of the receiver; and so when the receiver held the rentals of this property, he held them for this plaintiff as her receiver, and, when he ceased to be receiver, ought to have returned these rentals to this plaintiff. This is all

that the receiver could return to the plaintiff and was not sufficient to satisfy her just claim for damages. If the amount which the receiver held for her and returned into court to be paid to her was equal to all of the damages which she had sustained, she manifestly could not have recovered in this action; or, more correctly stated, so far as the receiver accounted for and paid over to her, or paid into court for her, the money equivalent of the use of the premises of which she had been deprived, she was not damaged by the appointment of the receiver. In other respects the measure of damages adopted by the trial court appears to be correct. She was deprived of the use of the premises to which she was entitled. She was therefore entitled to recover the value of such use, less the amount which the receiver accounted for to her. The claim of the defendants to offset against her the amount of costs which had been adjudged against the property in the foreclosure proceedings was correctly refused. In these foreclosure proceedings no deficiency judgment could have been rendered against this plaintiff, who was defendant there, and the judgment for costs was strictly a judgment against the property and was not a personal judgment against this plaintiff. The property was afterwards sold and the proceeds applied upon the mortgage claim. The costs accrued in the foreclosure proceedings were a part of the mortgage claim, and the proceeds were first applied in payment of these costs, and afterwards upon the indebtedness, and the remaining deficiency would not be a personal claim against the defendant in those proceedings.

The improvements made upon the property by the receiver ought not to be charged to this plaintiff. These improvements, no doubt, enhanced the value of the property and so benefited the defendants and not the plaintiff. The plaintiff does not get the property, but only the use thereof until the title passed to the defendants under the foreclosure sale. It is not claimed that the rental value during the time plaintiff was entitled to

the same was increased by these improvements. Apparently the plaintiff was allowed to recover only the rental value of the property as it was when she was dispossessed by the receiver, and, if so, she was in nowise benefited by the improvements. It devolved upon the defendants to allege and show that the making of these improvements lessened the plaintiff's damages. This they have failed to do.

The costs paid out by the receiver ought not to be charged to this plaintiff. No doubt this plaintiff, and all other parties to the suit in which the receiver was appointed, are bound by the final adjustment of the receiver's accounts by the court. This settlement of the receiver's accounts shows that these costs were occasioned by the appointment of the receiver. The appointment was wrongful; and that unnecessary costs would be caused by this appointment, and this plaintiff damaged thereby, must have been within the contemplation of the principal and sureties on the bond in suit when the bond was given. If the plaintiff had paid these costs she could, of course, have recovered the amount on this bond. So far as the plaintiff has failed to get the value of the use of the premises that she would or might have received if no receiver had been appointed, she has been damaged by the appointment.

Under the judgment of the district court in this case, as affirmed by the majority opinion, the plaintiff recovers the full amount of the rental value of the property, and the money that is paid into court by the receiver goes to the defendants. If the law had been strictly observed upon the trial, the plaintiff would have been allowed to take the money paid into court by the receiver, and that amount would have been deducted from the damages she would otherwise have been allowed to recover. Possibly, this error might require a reversal of the judgment, and, if so, the costs of this court would fall upon the defendants, and they would be allowed a retrial of the plaintiff's claim of damages. Apparently the result would be sub-

stantially the same, and, if so, no injury has been done the defendants. It may therefore be said that I dissent from the reasoning of the opinion and concur in the result.

SCHOOL DISTRICT OF SOUTH OMAHA V. LEONARD A. DAVIS.

FILED MAY 3, 1906. No. 14,293.

Contract: CONSTRUCTION. A contract will ordinarily be construed as it was understood and construed by the contracting parties.

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

A. H. Murdock, Lambert & Cohn and *A. C. Pancoast,* for plaintiff in error.

T. J. Mahoney, contra.

JACKSON, C.

On the 13th day of June, 1900, L. A. Davis, an architect, entered into a contract in writing with the school district of South Omaha, of which the following is a copy: "In Duplicate. Agreement. Whereas, at a regular meeting of the board of education of the school district of the city of South Omaha, Nebraska, held on the 4th day of June, 1900, L. A. Davis was duly elected architect for the said district for the period of one year, commencing June 27, 1900, and ending June 27, 1901, and, at a subsequent meeting of said board, the officers of said board were duly authorized for and in behalf of the said district to enter into a contract with the said L. A. Davis for the period of one year at a compensation for his services of 5 per cent. of the cost of the improvements in buildings or other erections, the construction of which, as such architect, he may supervise,

payments of which shall be made monthly as the improvements may progress. Now, therefore, it is agreed by and between the school district of South Omaha, Nebraska, and L. A. Davis that said school district does hereby employ said L. A. Davis as architect for it for the year commencing June 27, 1900, and ending June 27, 1901, at a compensation for his services of 5 per cent. of the cost of all the buildings or other erections which he, as such architect, may supervise the erection of, payable in monthly instalments, as the work progresses, on the first day of each month; and the said L. A. Davis agrees to draw all plans, specifications, and details for all buildings or alterations that the said board may require, and supervise all the said work during the said period, when authorized and directed so to do by a majority of the said board. And said L. A. Davis hereby accepts said position for the term above stated, and at the compensation above fixed, and agrees to perform the duties of architect for said district as above stated. In witness whereof, the parties hereto have set their hands this 13th day of June, 1900. The School District of the City of South Omaha, in the county of Douglas, in the state of Nebraska. J. H. Bulla, Pres't; Wm. Brennan, Sec'y. L. A. Davis."

He performed certain services, which it is agreed were within the terms of the contract, and received compensation amounting to the sum of $1,000.

It appears that at the annual school meeting of that year the board of education were authorized to purchase a site for a high school building, with the view of erecting such a building in the near future. It was not contemplated that the building should be erected during the period covered by the contract with Davis, and in fact it was not erected during that period. At a meeting of the board of education held on November 19, 1900, the record discloses this proceeding: "Motion by Lochner and Miller that the architect, Mr. Davis, be hereby instructed to draw plans for a high school building to be

erected on the lately purchased Hoctor site. Motion carried; seven members voting aye, Brennan and Roberts, no." At a meeting held on February 4, 1901, the record discloses that "Architect Davis submitted plans for a new high school. Motion by Lochner and Lott that the plans for a new high school presented by Mr. Davis be adopted. Motion carried; seven members voting aye; Brennan and Roberts, no." The board allowed and paid Mr. Davis $1,900 in fees for the plans so adopted; and on August 6, 1903, the school district instituted this action in the district court to recover from Davis the amount of fees paid him for the plans, on the theory that the services performed were within the terms of the contract, and that, as the building was not erected during his term and the work not supervised by him, the money was improperly paid and the school district was entitled to recover. There are some allegations of fraud in the petition, which were denied in the answer, and at the trial no evidence was offered in support of such allegations. The answer pleaded a contract with the board independent of the one of June 13, 1900, the performance of the contract on his part, and payments thereon to the amount of $1,900. The reply was a denial. At the close of the plaintiff's evidence, the court directed a verdict for the defendant, and the plaintiff appeals.

When the case was called for trial in the district court, plaintiff filed an affidavit for a continuance because of the absence of two witnesses. The affidavit set out in detail what facts it was expected to prove by the absent witnesses, and the absence of the principal counsel for the plaintiff was urged as another reason for the continuance. The defendant, however, admitted that the absent witnesses, if present, would testify to the facts as stated in the affidavit, and the application for continuance was denied. The record discloses that these affidavits were read in evidence, and that the counsel, on account of whose absence the continuance was asked, was present and participated at the trial. One of the absent witnesses

was the secretary of the board of education, and it is urged with considerable force that his presence was especially important for the purpose of identifying records and papers at the trial; however, the defendant admitted the identity of all records and papers offered in evidence, and it does not appear that the plaintiff was in any manner prejudiced on account of the absence of witnesses.

The other reasons urged for a reversal of the judgment are that the services performed in preparing the plans were performed under the provisions of the contract of June 13, and that the defendant was not entitled to recover extra compensation therefor; and if they were not so performed, but were the result of an independent agreement, that such agreement was void because of the fact that the amount involved exceeded the sum of $200 and the contract was not in writing; and, third, that no appropriation had been made to pay for the plans and the board of education was without authority to contract for them. It would be unreasonable to hold with the plaintiff on its first contention. So far as the record discloses, the entire compensation paid the defendant for the services performed within the terms of the contract of June 13, during the period of the contract, was the sum of $1,000. If the construction contended for by the plaintiff were adopted, then the defendant might have been busily engaged on behalf of the plaintiff preparing plans and specifications during the entire period of the contract, without ever being entitled to compensation therefor, because it would be necessary that he should supervise the erection or repairing of the buildings themselves before he could receive compensation, and the compensation would then be based on the cost of the repairs or the new buildings. All that could be required of the architect under his contract for the year, in the matter of drawing plans and specifications, was that he should prepare plans and specifications of such repairs or new buildings as he would be called upon to supervise, and such as he would be entitled to compensation for. It

is the duty of the court to construe the contract as it was understood and acted upon by the parties, and the record leaves no room for question that the parties themselves understood and acted upon the contract for the plans and specifications as an independent agreement.

As to the claim that the contract, if an independent one, is void under the statute, we think that the resolution of the board instructing Mr. Davis to prepare the plans, the presentation of the plans at a later date to the board and the record of the adoption of the same, and the approval and the allowance of bills are sufficient to bring the contract within the statute. The record discloses that at the close of the fiscal year within which the services were performed and paid for, there was a balance in the treasury of the district of $9,318; there were ample funds available to pay for the plans, and it was entirely competent for the school board, as a preliminary step to the submission of the proposition for the erection of a high school building at the annual meeting in 1901, to prepare and submit plans and specifications for the proposed building. *Fiske v. School District,* 58 Neb. 163.

We find no error in the record, and recommend that the judgment be affirmed.

DUFFIE, C., concurs.

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

AFFIRMED.

HAZZARD P. STRYKER V. MICHAEL L. MEAGHER ET AL.

FILED MAY 3, 1906. No. 14,297.

1. **Section Line:** ACTION: INSTRUCTION. In an action to establish a controverted section line, where the trial is conducted by both parties on the theory that the corner established by the government surveyors was not a lost corner, it is not error to charge

the jury that they are to determine the location of the original boundary line, even though evidence was admitted that a corner had been established by the county surveyor who proceeded on the theory that the original corner was lost.

2. **Adverse Possession:** INSTRUCTION. It is not error to charge the jury that the title to land becomes complete in the adverse occupant when he and his grantors have maintained an actual, continued, notorious and adverse possession thereof, claiming title to the same against all persons, for ten years.

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

H. M. Sinclair and *E. A. Cook,* for plaintiff in error.

Warrington & Stewart, contra.

JACKSON, C.

The action arose out of a controversy over the boundary line between sections 15 and 22, in township 10 north of range 19 west, in Dawson county. The plaintiffs are the owners of the south half of section 15, and the defendant owns the north half of section 22. The controverted tract is triangular in form, it contains 45½ acres, and extends the entire length of the section line. The plaintiffs proceeded by ejectment. The defense was a plea of title and adverse possession. The finding of the jury and the judgment of the court were favorable to the plaintiffs' claim as to the true location of the section line, but favorable to defendant on his claim of adverse possession as to that part of the disputed tract lying west of the quarter section line extending north and south through section 15. The defendant prosecutes error, and urgently insists that the verdict and judgment are not supported by the evidence. A careful examination of the record has convinced us that the findings of the jury ought not to be disturbed in that respect. As usual in such cases many witnesses testified in behalf of either party. The testimony is direct and conflicting. It presented for determin-

ation a question of fact purely within the province of the jury.

Complaint is made of instruction 5, wherein the court said: "You are instructed that the first question for you to decide in this case is the location of the original boundary line, established by the government between the respective tracts of land between the parties to this litigation." It is said that this instruction is erroneous because of the fact that a certain witness Beatty testified to having established a section corner for the northeast quarter of section 22, on the theory that the corner established by the government could not be found. The instruction was, without doubt, a correct statement of the law. The original corners and boundary lines established by the government surveyors are the true boundaries. Beatty was a civil engineer, without authority to change the location of such original boundary lines. Furthermore, the case was tried by both parties on the theory that none of the original corners were lost, and the instruction was in line with that theory.

Error is predicated upon the giving of instructions 10 and 12 of the charge. The complaint about these instructions arises out of the use of the word "title." In substance the charge is that adverse possession must be based upon a claim of title, and it is said that this in effect took from the jury all question of right arising under claim of adverse possession. The contention of counsel for plaintiffs in error is that there can be no title to real estate in this state except by some evidence in writing, as a deed or decree of court. Title is defined by Bouvier as "the means whereby the owner of lands hath the just possession of his property"; and he continues: "The lowest and most imperfect degree of title is * * * the *mere possession,* or actual occupation of the estate, without any apparent right to hold or continue such possession; this happens when one man disseises another." By Webster it is defined as that which constitutes a just cause of exclusive possession, that which is the founda-

tion of ownership of property, either real or personal. He also defines ownership as the state of being an owner, the right to own, exclusive right of possession, legal or just claim or title, proprietorship; so that claim of ownership, as used in our former adjudications, is synonymous with claim of title. In *Lantry v. Parker*, 37 Neb. 353, it was held that the operation of the statute of limitations is to vest absolute title in the occupant when he has maintained an actual, continued, notorious and adverse possession under claim of ownership for the statutory period, and the title so acquired may be made the basis of affirmative claim for relief, as well as it may be interposed as a defense, following former decisions of this court. This rule was adhered to in *Twohig v. Leamer*, 48 Neb. 247.

But, whatever merit there may be in the technical definition of title found in the brief of plaintiffs in error, the instruction was clearly without prejudice to the defendant and does not constitute reversible error, because under these instructions the jury found for the defendant on his claim of adverse possession as to that part of the disputed tract lying west of the quarter section line, and the character of the defendant's title to the northeast quarter of section 22 is the same as that of his title to the northwest quarter of that section, so that the jury was neither misled nor confused by the use of the word "title" as it is found in the instructions.

By instruction 15 the court instructed the jury as follows: "In conclusion you are instructed that, in determining the issue of fact in this case, you will take into consideration all the evidence bearing upon the respective questions. The evidence is not what counsel on either side stated to you in the opening statement they expected the testimony to show; nor what they have stated to you in the course of the argument, or to the court in your presence; nor is it what I may have stated to you or in your presence that my recollection of the testimony was. The opening statement is made to enable you to better understand the testimony as it is offered; the arguments are made to

enable you in reaching a proper conclusion; the instructions of the court are to give you the law which will guide you in your deliberations; the evidence is what the witnesses have been permitted to say to you on the witness stand." The claim of error in this instruction is based upon the contention that the effect was to exclude from the consideration of the jury the testimony of certain witnesses contained in depositions read in evidence on behalf of the defendant, and all documentary evidence. The language employed by the trial court is incorrect and unfortunate, but the error does not seem to have influenced the jury. The objection, if well taken, would have excluded documentary evidence offered and received on behalf of the plaintiffs to establish their claim of title put in issue by a denial, and the finding of the jury could be supported upon no other theory than the one that documentary evidence was considered by them.

Upon the oral argument it was insisted by counsel for plaintiffs in error that the judgment does not correspond with the verdict of the jury, in that it gives to the plaintiffs a somewhat larger tract of land than they are entitled to under the verdict, and it was finally conceded by counsel for defendant that this objection was well taken, and for the purpose of correcting the judgment so that it may correspond with the verdict, we recommend that the judgment of the district court be reversed and the cause remanded, with instructions to enter judgment accordingly.

ALBERT, C., concurs.

DUFFIE, 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, with instructions to enter judgment conforming to the verdict of the jury.

JUDGMENT ACCORDINGLY.

MODERN WOODMEN OF AMERICA V. MAGGIE TALBOT.

FILED MAY 3, 1906. No. 14,304.

1. Insurance Certificate: PROHIBITED OCCUPATIONS. A life insurance certificate issued by a fraternal benefit society, which provides that if the member should engage in an occupation prohibited by the by-laws of the society the certificate should become *ipso facto* void as to any claim on account of the death of the member traceable to employment in such hazardous occupation, does not become void for all purposes in case the member engages in a prohibited occupation, but the society is exempted in such case from all liability on account of the death of the member by accident directly traceable to such prohibited employment, and the certificate remains in full force except as to the hazards of such occupation.
2. Assessments: ESTOPPEL. The society is not estopped from insisting upon its exemption from liability for the death of the member, due to his engaging in a prohibited occupation, by accepting his dues and assessments, with knowledge that he had entered upon such occupation.
3. ———. In such case the same consideration remained for the payment of dues and assessments as would have existed had the member not engaged in a hazardous and prohibited occupation.

ERROR to the district court for Polk county: ARTHUR J. EVANS, JUDGE. *Reversed.*

B. D. Smith and *Talbot & Allen,* for plaintiff in error.

E. E. Stanton, contra.

JACKSON, C.

On January 24, 1900, the Modern Woodmen of America issued to Charles F. Talbot a benefit certificate containing a contract for life insurance payable to Maggie Talbot, mother of the insured. One of the conditions of the certificate was: "If said member shall enter upon or follow any of the employments or occupations mentioned in section 14 of the by-laws of this society now in force, or as hereafter amended, this certificate shall, so far as the same

is intended to provide for the payment of benefits, become *ipso facto* null and void as to any claim growing out of or made on account of the death of said member by accident, directly traceable to employment in such hazardous occupation, or from any disease directly traceable thereto." Among the prohibited occupations mentioned in section 14 of the by-laws of the society is that of railroad brakeman on all trains, except passenger trains using air brakes only. Talbot died on the 7th day of June, 1903, and prior to his death had made payment of all dues and assessments maturing during his lifetime. His mother, as beneficiary, brought suit on the policy, and recovered judgment for the amount of insurance contracted for, with interest and costs, and the society has instituted this proceeding to reverse the judgment so obtained.

The defense interposed by the society is that the insured came to his death by accident while employed as brakeman on a construction train, and that his death was directly traceable to such employment. The case was tried upon a stipulation of facts, from which it appears that at the time the certificate was issued the insured was employed as a common laborer; that he came to his death at Promontory Point, Utah, on the line of the Southern Pacific Railroad Company, by being crushed between the bumpers of two freight cars which he was attempting to couple, and that he was at that time engaged in performing his duties as a railway brakeman on a construction train; that his death was directly traceable to his employment as such brakeman, and the fact that he was so employed was known to the clerk of the camp to which the insured belonged, and while so employed the clerk, knowing the character of his employment, accepted from the insured dues and assessments payable under the provisions of the policy. The correctness of the judgment depends upon the construction to be placed upon the contract of insurance. As we view the contract, it did not become void by reason of the insured being engaged in the prohibited employment. It was in full force and effect as to all risk which the society

assumed by its contract of insurance, and had the insured met his death while so engaged, on account of any cause within the terms of the contract, the contract would have been enforceable, notwithstanding his employment as a railway brakeman, but the death of the insured on account of any cause directly traceable to a prohibited employment is one of the risks not assumed by the society. There is in this case no question of waiver by reason of the acceptance of dues and assessments by the society, the same consideration remained for the payment of dues and assessments as would have existed had the insured not engaged in a hazardous and prohibited employment. *Abell v. Modern Woodmen of America*, 96 Minn. 494. 105 N. W. 65.

The case does not fall within the rule of *Modern Woodmen of America v. Lane*, 62 Neb. 89, or *Modern Woodmen of America v. Colman*, 64 Neb. 162. In the former case the rules of the society required a member to be in good standing in order to change the beneficiary by surrender of certificate and the issuance of a new one. It was held that, where the representative of a mutual benefit insurance company, within the scope of his authority, accepts a surrender of a benefit certificate and a fee for the issuance of a new one, with knowledge that the holder of the certificate is in arrears for dues or assessments, it was a recognition of the continued validity of the certificate, and was a waiver of the forfeiture as a matter of law. In the latter case the policy contained the provision: "If, after a person has become a member of this fraternity, he engages in any of the employments or occupations enumerated in section A, division 1, of the fundamental laws, his certificate thereupon shall be forfeited by such act, and the same shall be null and void. *Provided, however,* that a neighbor may, after becoming such member, without invalidating his certificate, be employed as railway brakeman, engineer, fireman * * * if he shall, before entering upon any of the above mentioned occupations, file with the head clerk a written waiver of any liability of this

order under his certificate of membership, for loss or death as the direct result of his being engaged in such prohibited occupation." Fireman on a locomotive was one of the prohibited employments. The deceased in that case was run over and killed by an engine on which he was employed as fireman, and during the time that he was so employed the camp clerk, knowing the character of his employment, accepted assessments and dues as they matured, without requiring the waiver of liability provided for by the contract, and it was held that the acceptance of the assessments and dues amounted to a waiver on the part of the association. There, however, it will be observed, the provision for a forfeiture was absolute and covered loss by death from any cause, and while the association, with knowledge of the facts constituting the forfeiture, might properly have declined to receive payment of dues and assessments, it continued to receive payment, and by so doing created an estoppel to deny liability. Contracts similar in effect to the one in suit are uniformly held to be legal and binding upon the parties who choose to enter into them, and in the absence of facts constituting waiver or estoppel are always enforced. The limitations as to prohibited employment established by the terms of the contract are legitimate and proper for the protection of all members of the association, and should in all proper cases be enforced.

Under the admitted facts, the judgment of the district court should be reversed and the cause remanded. We so recommend.

ALBERT, C., concurs.

DUFFIE, 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.

REVERSED.

ST. JAMES ORPHAN ASYLUM ET AL. V. CHARLES G. MCDONALD, ADMINISTRATOR.*

FILED MAY 3, 1906. No. 14,315.

Decedent's Estate: ATTORNEY'S FEE. A decedent's estate is properly chargeable with fees paid to counsel for services rendered in successfully defending the will against attack, and this rule ordinarily should not be departed from in a case where the contest is instituted by the person named in the will as executor, and the defense is conducted by counsel employed on behalf of a legatee.

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

Smyth & Smith and *John C. Cowin,* for plaintiffs in error.

McDonald & Woodland and *Henry P. Stoddart, contra.*

JACKSON, C.

The plaintiffs in error made a claim against the estate of Joseph Creighton, deceased, for attorney's fees on account of services performed by them in litigation arising out of a contest of Mr. Creighton's will. Their claim was rejected in the county court and an appeal taken to the district court, where their petition was dismissed on general demurrer. From the judgment of the district court dismissing their petition they prosecute error.

Briefly stated the cause of action set out in the petition is: That Joseph Creighton died on October 16, 1893, leaving a will. Mary B. Shelby, a daughter, was his only heir at law and was named as executrix. By the terms of the will property to the value of $50,000 was devised to the children of Mrs. Shelby, subject to a charge of $15 a week for the support of the testator's sister-in-law, and property to the value of $150,000 was devised to the Right Reverend James O'Connor, Roman Catholic bishop of Omaha, in trust for such charity as he might designate, an orphanage preferred, and in the event that the testator

* Rehearing allowed. See opinion, p. 630, *post.*

should survive Bishop O'Connor, the property devised to him in trust should go to his successor as bishop of Omaha; the property so devised was substantially all of his estate. Bishop O'Connor died during the lifetime of Mr. Creighton and was succeeded by Right Reverend Richard Scannell. Mrs. Shelby refused to accept the trust of executrix under the will. Bishop Scannell conveyed the trust property left to him under the terms of the will to the St. James Orphan Asylum. Bishop Scannell, in conjunction with the orphan asylum, submitted Mr. Creighton's will to the county court for probate, and in that behalf employed the plaintiff Smyth as an attorney to conduct the probate proceedings. Mrs. Shelby contested the will and was successful in the county court, an appeal was taken to the district court, where after three separate trials she was again successful, and the case was then appealed to the supreme court, where the judgment of the district court was reversed and the cause remanded. Another trial resulted in a verdict favorable to the validity of the will, which upon appeal to the supreme court was affirmed. In the meantime Mrs. Shelby had been appointed administratrix of her father's estate, and conducted the administration thereof until the validity of the will was established and it was finally admitted to probate, when Richard S. Berlin was appointed administrator with the will annexed. A controversy over the settlement of the accounts of Mrs. Shelby as administratrix resulted in further litigation, conducted, as the petition alleges, on behalf of the orphan asylum by Mr. Smyth, assisted by Mr. Cowin who became associated as counsel after the appeal to the district court from the order of the county court refusing to admit the will to probate. This litigation resulted in a judgment against Mrs. Shelby for something over $5,000, which was paid. Mr. Berlin died, and Chas. G. McDonald succeeded him as administrator. A guardian *ad litem* was appointed in the probate proceedings for the beneficiaries under the will who were minors. He filed an answer in behalf of his wards and procured one

expert witness to testify in support of the will. No other service was performed by him. The litigation extended over a period of several years, and Messrs. Smyth and Cowin were required to devote a large amount of time in the preparation and conduct thereof. The beneficiaries and Messrs. Berlin and McDonald, as administrators, accepted the benefits of the litigation and adopted the services of the plaintiffs in that behalf.

No question is raised as to the sufficiency of the petition, if, as a matter of law, it is within the power of the court to require the payment of fees to counsel for the successful litigant out of the funds belonging to the estate. The matter of allowing costs and attorney's fees to an unsuccessful litigant in a proceeding to contest a will has several times been before the court. In *Mathis v. Pitman*, 32 Neb. 191, an order of the district court taxing costs against the estate was affirmed. In *Seebrock v. Fedawa*, 33 Neb. 413, costs and fees of counsel for the unsuccessful contestant were both allowed as a charge against the estate. In *Wallace v. Sheldon*, 56 Neb. 55, *Mathis v. Pitman* and *Seebrock v. Fedawa, supra*, were expressly overruled, and it was held that the courts are not invested with the discretion to award costs and attorney's fees to an unsuccessful contestant of a will, solely for the reason that he undertook the contest in good faith, Mr. Justice NORVAL dissenting. In *Atkinson v. May's Estate*, 57 Neb. 137, the court followed its holding in *Wallace v. Sheldon, supra*, and it was there broadly stated that "the estate of a decedent is not liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will in a contest thereof." In that case, like all others determined in this court, the question was one of the allowance to the unsuccessful litigant, and we do not regard it as so conclusive of the case, where the question involved is the allowance of attorney's fees to the successful litigant, as to preclude further investigation. We do not doubt the power of the court to allow attorney's fees out of the estate of a decedent in proper cases involving the

contest of a will. Had some one other than Mary B. Shelby instituted the contest proceedings, and she, as executrix, had employed counsel to defend the will and succeeded in the conduct of the defense to the extent of securing the will to be admitted to probate, the fees of her counsel would be a proper charge against the estate. *McIntire v. McIntire,* 192 U. S. 116.

It is urged in behalf of the plaintiffs in error that their position is the same as though they had been employed by the executrix to defend the will. This claim has considerable merit. In the case of *McIntire v. McIntire, supra,* speaking of the item of attorney's fees, it is said:

"On the allowance of the account it was charged against the estate. We are of opinion that the charge was proper. There is no contest over the amount. It was the proper business and duty of the administrator to defend the will, and he was entitled to a reasonable allowance for what he had to pay in doing so. The only just alternative would be to charge counsel fees as costs against the losing party, which would have been less favorable to the appellant. The general proposition is not disputed, but it is said that in this case the legatees retained the counsel and therefore ought to pay them. The other legatees as well as the administrator no doubt had a share in calling the counsel in. But that did not matter. The services were services to the estate in maintaining the testator's will, they were adopted by the administrator, and the usual rule must prevail."

The services performed by counsel in resisting the contest of the will, and the results obtained, were the same as they would have been had they been performed at the solicitation of the executor. The estate of Joseph Creighton was left in trust for certain purposes, and it is a general principle that a trust estate must bear the expenses of its administration. *Stone v. Omaha Fire Ins. Co.,* 61 Neb. 834. In that case counsel was consulted and finally employed to secure the appointment of a receiver for an insolvent corporation. A receiver was appointed, who

afterwards retained the services of the same counsel, and it was held that he was entitled to compensation out of the trust fund, not only for his services as attorney for the receiver, but for services performed by him in consultation and securing the appointment of the receiver. The case was determined upon the broad principle that, where one of many parties having a common interest in a trust fund, at his own expense, takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement either out of the fund itself or by proportionate contributions from those who accept the benefit of his efforts. Mr. Commissioner SEDGWICK, the present chief justice of this court who wrote the opinion in that case, cited the cases of *Mathis v. Pitman* and *Seebrock v. Fedawa, supra,* as sustaining the general proposition, recognizing the similarity of principle involved in those cases with the one then in hand. The case presented by the petition is one, in our judgment, that requires an equitable apportionment of the costs and attorney's fees. In the brief of defendant is contained a recital of certain facts, outside the record of course, but worthy of notice in view of our conclusion that the judgment of the district court must be reversed. They relate to the depleted condition of the specific devise to the children of Mrs. Shelby, owing to the expensive litigation in which the estate has been involved, including compensation to counsel other than plaintiffs' and it may be that when all the facts are fully disclosed it would be found inequitable to compel a contribution on the part of the minor litigants. These, however, are matters proper for consideration upon an investigation into the merits. The case before us is determined upon the record as it stands, and we are agreed that upon that record the judgment of the district court should be reversed and the cause remanded for further proceedings. We so recommend.

ALBERT, C., concurs.

DUFFIE, 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.

The following opinion on rehearing was filed January 5, 1907. *Former judgment vacated and judgment of district court affirmed:*

1. Decendent's Estate: ATTORNEY'S FEE. The estate of a decedent is not ordinarily liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will, in a contest thereof. *Atkinson v. May's Estate*, 57 Neb. 137.
2. Former opinion, *ante*, p. 625, overruled.

BARNES, J.

This case is now before us on a rehearing. Our former opinion will be found *ante*, p. 625, where the facts involved in this controversy are stated. By referring to that statement it appears that by the will of the late Joseph Creighton about three-fourths of his large estate was given to one Bishop O'Connor, and his successors, in trust, to establish or endow an orphanage; that by a conveyance or assignment made by one Bishop Scannell, who was the successor of Bishop O'Connor, said legacy was given to the St. James Orphan Asylum. By the terms of the will the daughter of the deceased, Mary B. Shelby, who was his only heir-at-law, was disinherited, and the remainder of the estate was given to her children. She was named as executrix of the will, but refused to act in that capacity and declined to have the will probated. The St. James Orphan Asylum presented the will for probate. Mrs. Shelby contested, and was successful in the county court. After much litigation, however, the will was finally admitted to probate, and one Richard Berlin became the administrator thereof, but was later on succeeded by one Charles G. McDonald. The St. James Orphan Asylum

employed Mr. Smyth of the Omaha bar as its attorney to establish the will, and secure for it the legacy mentioned therein. During the pendency of the proceedings Mr. Cowin was employed to assist Mr. Smyth in conducting the litigation, at the conclusion of which they filed their claim in the county court of Douglas county, asking for an allowance of $7,000 as counsel fees, and that the same be made a charge against the estate. The claim was resisted by the administrator, and was disallowed by the county court. An appeal was taken to the district court, where a demurrer to the claimants' petition was sustained and their action witnessed. They thereupon brought the action, by appeal, to this court, and in our former opinion it was held that "a decedent's estate is properly chargeable with fees paid to counsel for services rendered in successfully defending the will against attack, and this rule ordinarily should not be departed from in a case where the contest is instituted by the person named in the will as executor, and the defense is conducted by counsel employed on behalf of a legatee." This holding seems to have been based on the decision in *McIntire v. McIntire,* 192 U. S. 116, 48 L. ed. 369. A careful examination of that case inclines us to the belief that the learned commissioner who wrote our former opinion misapprehended the nature and scope of that decision. What was really held therein was that a decedent's estate is properly charged with counsel fees paid to counsel for services rendered for an administrator with the will annexed in defending the will against attack, although certain of the legatees, as well as the administrator, had a share in calling in such counsel. That this rule should not be applied to a case where the services were not rendered for the administrator and legatees jointly seems clear. In the case at bar the services were rendered for and at the instance and request of the principal legatee under the will and against the executrix named therein, who refused to accept the trust, and contested the validity of the will. It is true that in the case of *Mathis v. Pitman,* 32 Neb. 191, and in *Seebrock v. Fedawa,*

33 Neb. 413, 29 Am. St. Rep. 488, counsel fees for the unsuccessful contestant were allowed as a charge against the estate. But in *Wallace v. Sheldon,* 56 Neb. 55, both of those decisions were expressly overruled, and it was held that the courts are not invested with the discretion to award attorneys' fees to an unsuccessful contestant of a will solely for the reason that he undertook the contest in good faith. Later on, in *Atkinson v. May's Estate,* 57 Neb. 137, it was broadly stated that "the estate of a decedent is not liable to an attorney for services rendered by him for, and at the request of a legatee under decedent's will in a contest thereof." And this has become the settled law of this state on that question. Not only is this the better rule, but it is supported by the great weight of authority in this country. In *In re Donges's Estate,* 103 Wis. 497, it was held that in a proceeding for the construction of a will counsel fees, except those of an executor, are not taxable as costs against the estate. And it was said in the opinion:

"In suits for construction of wills it is proper for the executor, whether plaintiff or defendant, to employ counsel to the end that the questions of law involved may be properly brought before the court. Whether he should employ counsel to present in the spirit of advocacy one or other or both of the antagonistic interests which may be involved by the construction, will often be a question of difficulty. Too often the counsel employed by the executors are in practical effect the ardent advocates of one side of a controversy between individual interests, in which the executor, as such, should have no choice. Obviously, such advocacy should not be compensated out of the common fund if its opposition is not to be also, and courts should be cautious in allowing for services ostensibly rendered to executors, but in spirit and effect rendered to one of the opposing interests, which should bear its own expenses. The field of discretion in controlling and approving conduct of executors and trustees is a broad one, however, and the court in each case must be guided by the

conditions and circumstances there present. In the case at bar, in this court at least, the services of counsel on both sides have been rendered, not to the executors, but to the respective claimants upon this estate, who should each bear the expense therefor which he has incurred."

It must be conceded that there is no statutory authority in this state for the allowance of the claim in question against the estate. But it is argued that the court in the exercise of its general equity powers may treat the estate as a trust fund and make such allowance. This contention was denied in *Estate of Cole,* 102 Wis. 1, where the following cases were cited as a basis for that opinion: *Rose v. Rose Benefcent Ass'n,* 28 N. Y. 184; *Downing v. Marshall,* 37 N. Y. 380; *Devin v. Patchin,* 26 N. Y. 441; *Lee v. Lee,* 39 Barb. (N. Y.) 172. Indeed, it seems settled by the weight of authority that the allowances which can properly be made against the estate in such cases are counsel fees for the executor, and the claim for what is known as taxable costs, or in other words, the statutory fees incurred in the litigation. It seems to us that the rule announced in *Atkinson v. May's Estate, supra,* is not only supported by the great weight of authority, but is a most just and equitable one. In the case at bar Mrs. Shelby certainly was not benefited by the establishment of the will of her deceased father. If she had succeeded in defeating it, or if there had been no will at all, she would have inherited the whole of the estate, and her children, at her decease, probably would have received it, less the portion expended during her lifetime. So it seems clear that the proponent of the will, the St. James Orphan Asylum, was the party most beneficially interested in establishing its validity and having it probated. Through the efforts of the claimants herein, it succeeded in obtaining the legacy in question, which was, as before stated, about three-fourths of the whole estate. To tax the balance of the estate with the payment of counsel employed by the proponent, or with any portion thereof, would seem to be unjust and inequitable, and in direct opposition to the rule announced in

the case last above mentioned. So we are of the opinion that the claim in question should not be made a charge upon the estate, but that the St. James Orphan Asylum, the party benefited by the services rendered by counsel, should be required to pay such claim out of the legacy which it secured through the efforts of its attorneys. This evidently was the view of the matter entertained by the district court and this meets with our approval.

For the foregoing reasons, our former judgment is vacated and the judgment of the district court is hereby affirmed.

JUDGMENT ACCORDINGLY.

MICHIGAN TRUST COMPANY, EXECUTOR, APPELLANT, V. CITY OF RED CLOUD ET AL., APPELLEES.

FILED MAY 3, 1906. No. 14,474.

1. **Trusts: SUIT TO ENFORCE: JOINDER.** Where different persons convey their property in trust for the purpose of securing the same debt, it is not a misjoinder of causes of action to unite them all as parties in a single action for the purpose of enforcing the conditions of the trust.

2. **Limitation of Actions.** A debtor in an action instituted in his own behalf is not entitled to appeal to the statute of limitations, in an action to relieve his property from a trust relation, in the absence of fraud, unless it appears that the conditions of the trust have been performed.

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

Tibbets, Morey & Fuller, for appellant.

Bernard McNeny, J. R. Mercer and *John O. Yeiser, contra.*

JACKSON, C.

It is not our purpose to enter into an extended statement of the facts and circumstances involved in this controversy. They are detailed at length in former opinions of this court. *Michigan Trust Co. v. City of Red Cloud,* 3 Neb. (Unof.) 722; 69 Neb. 585. Briefly stated, in 1893, the Farmers & Merchants Banking Company, located at Red Cloud, closed its doors, and for the purpose of liquidating its indebtedness entered into an agreement with the creditors for one year's time with which to meet their demands. Certificates of indebtedness were issued, payment of which was guaranteed by certain of the officers and stockholders other than John W. Moon. The persons who thus pledged their personal credit conveyed in trust real estate owned by them to secure payment. John W. Moon, who owned $10,000 of the stock of the bank, resided in the state of Michigan. He owned real estate in Red Cloud, and, joining with his wife, conveyed this real estate in trust as further security for the payment of the bank's indebtedness. C. W. Kaley was named as trustee, the trust deeds were placed in the hands of Charles Weiner to be delivered to Kaley, who refused to accept the trust, Weiner removed from Red Cloud, and the deeds fell into the possession of Isidore Freymark. By the terms of the trust the property of the bank was to be first sold, and the proceeds applied to the payment of the debts of the bank; second, the property of those officers and stockholders other than Moon, and lastly, if a deficiency existed, Moon's property was to be sold and the proceeds, not exceeding the sum of $10,000, applied to the satisfaction of the debts of the bank. The City of Red Cloud was a creditor, a portion of its claim has never been paid, the unpaid balance was reduced to judgment against the bank in January, 1898, execution was issued thereon and returned unsatisfied for want of property upon which to levy. Thereupon Moon commenced an action in the district court against Isidore Freymark for the surrender and cancelation of the deed.

The City of Red Cloud intervened in that action for the purpose of resisting the surrender and cancelation of the deed and having the trust property sold and applied to the satisfaction of its judgment. At the same time it instituted an independent action seeking the same relief. In the meantime Moon died, and the Michigan Trust Company, as executor of his estate, was substituted as a party to the action. The two cases were consolidated, and all of the issues involved are presented in the consolidated action. A former decree was reversed in this court, and before the second trial, agreeably to the suggestion in our opinion, 69 Neb. 585, additional parties were brought into the case, viz., those claiming to own the title to real estate formerly owned by the bank, and those representing the trust property conveyed by the officers and stockholders of the bank other than Moon. The second trial has resulted in a decree favorable to the city of Red Cloud, and the Michigan Trust Company, as executor of Moon's estate, and Robert and Mary Damerell, who claim title to the trust property conveyed by Moon, appeal.

The decree involves property formerly owned by the bank and the trust property conveyed by the officers and stockholders, including Moon, and, following the terms of the contract, directs that the property involved shall be sold in the following order: First, the property of the bank; second, the trust property conveyed by the officers and stockholders of the bank other than Moon; and lastly, if a deficiency remain, the trust property conveyed by Moon, and the proceeds applied to satisfy the demand of the city of Red Cloud. The questions involved in the appeal of the trust company are a misjoinder of causes of action, a defect of parties, the statute of limitation, laches, and the pendency of another action for the collection of the debt. Many assignments are made, but we think all are included under those headings.

The first two will be disposed of together. It is said there are several independent and distinct causes of action set out in the bill on behalf of the city, because the city

seeks in this action to foreclose its lien on property owned by the bank, the separate property of stockholders of the bank other than Moon, as well as property belonging to Moon's estate. There are two reasons why this contention should not be sustained. When Moon instituted the action to procure the cancelation and surrender of the trust deed executed by him, the city was forced to take action in order to preserve its security. It did so, both by intervention and independent action, the proceeding was equitable in its nature, and the court having acquired jurisdiction should retain it for all purposes. Furthermore, all of the property involved was pledged to secure the claim of the city, the trust created should be enforced according to its terms, and in order to do so it was quite necessary that all of the trust property should be before the court. This was clearly pointed out in our opinion, 69 Neb. 585.

As to the plea of the statute of limitations, it appears that the present proceedings were instituted less than two years after the judgment at law was obtained, besides this action was originally instituted by Moon to relieve his property from the terms of the trust. That the indebtedness of the bank to the city remains in part unpaid is beyond controversy, and equity will not relieve his property at his instance from the lien voluntarily created, unless it appears that he has fulfilled his obligation by payment of the debt. The doctrine of laches as applied to the facts in this case was fully discussed and disposed of in 3 Neb. (Unof.) 722, and has become the law of the case.

It is disclosed by the record that at the time the amended bill was filed the city of Red Cloud had instituted proceedings to subject certain property formerly belonging to the bank to the payment of its judgment against the bank, and that action was pending at the time the amended bill was filed, and it is alleged that such proceeding was an action at law within the meaning of the statute, and was a bar to the present proceeding. In view

of the conclusion already reached this contention is without merit. The property of the bank was involved in the trust agreement, and in an action to enforce the performance of a trust each and every item involved therein became a proper subject matter to be dealt with by the court, and the entire matter might be properly disposed of in one action. The issues involved were by the amended petition ingrafted into this action, and we think properly.

But it is said that one of the conditions attached to the delivery of the trust deed by Moon is that his property should not be sold until after all the property belonging to the bank and its resident stockholders, and that the evidence discloses that such property has not been sold. That provision of the contract has been observed and safeguarded by the decree. Again it is said that the guarantee by John W. Moon is void under the statute of frauds, the contract being to answer for the debt or default of another, and that it is not in writing. In connection with this contention it is urged that the finding by the court that Moon was a stockholder in the Farmers & Merchants Banking Company to the amount of $10,000 is unsupported by the evidence. The record contains an admission that Moon was a stockholder in the bank, evidence of his declaration that he had secured the depositors to the full extent of his liability as a stockholder, and the direct evidence of George O. Yeiser that Moon had stock in the bank to the extent of $10,000. It is evident to the writer that the purpose of Moon was to secure the depositors to the extent of his statutory liability as a stockholder, although a different conclusion seems to have been reached in 69 Neb. 585. Upon either theory, however, the statute of frauds cannot be held to apply.

Upon the appeal of the Damerells we think the finding of the trial court that they are not innocent purchasers of the Moon property is amply supported by the evidence. The bill of exceptions in this case contains 621 pages, considerable of that space is devoted to the recording of objections and exceptions necessary, perhaps, to preserve for the consider-

ation of this court the questions involved. This is the fourth time the case has been the occasion of consideration in this court, and there should somewhere be an end of the litigation. In our judgment every issue has been fully and fairly met by the trial court, and rightfully determined under the law and the facts.

We recommend that the decree be affirmed.

ALBERT, C., concurs.

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

AFFIRMED.

IN RE WILLIAM A. SIMMONS.

FILED MAY 17, 1906. No. 14,472.

Inebriates: COMMITMENT: PROCEDURE. The statute providing for the commitment of inebriates to the state hospital for the insane requires that an application "in the nature of an information" be filed with the commissioners of insanity, alleging that the person in whose behalf the application is made is a dipsomaniac or inebriate and a fit subject for treatment in the hospital. There must be a hearing upon the information, and a finding by the commissioners that the information is true. A commitment without such information and finding is void.

ORIGINAL application for a writ of habeas corpus. *Writ allowed.*

Allen G. Fisher, for relator.

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

SEDGWICK, C. J.

This is an application to this court, in its original jurisdiction, for a writ of habeas corpus. The respondent,

Dr. James L. Greene, is superintendent of the hospital for the insane at Lincoln, Nebraska. In his petition the relator alleges that he is restrained of his liberty by the respondent "upon the charge that he was a person who by reason of his habits relative to the use of intoxicating liquors came within the inhibition of an act of the legislature of Nebraska enacted, signed and approved on April 4, 1905, whereby are conferred powers in relation to dipsomaniacs, etc., * * * and that he is now deprived of his liberty unlawfully by Dr. J. L. Greene, superintendent of the said hospital." The respondent filed a general demurrer to the petition of the relator. With the petition there was filed a paper purporting to be the return of a physician to the commissioners of insanity of Dawes county and the record of the proceedings of the commissioners therein; and attached to the demurrer is a paper purporting to be a copy of a commitment to the hospital for the insane. This paper is executed by C. L. Freeman, who signs himself as clerk, and shows that a seal was attached to the original. These papers were referred to by both parties in their briefs and also upon the argument, and will therefore be treated as a part of the showing in the case. From the paper which purports to give the proceedings of the commissioners of insanity of Dawes county, it appears that the commissioners examined four or five witnesses who testified "that they knew him (the relator) to be an habitual excessive user of alcoholic stimulants, and that they believed it was impossible for him to control the appetite for intoxicants. Not only they, but each member of the board has been personally acquainted with the patient for several years, knows that it is practically impossible for him to come to town without getting drunk and that he is a public nuisance when he is drunk." Then follows a statement that "it is admitted by the defense that the above facts could be established by a great number of winesses." The record then states: "The board finds him a fit subject for treatment for the liquor habit at the state hospital for the in-

sane, and imposes a sentence of two years." In the paper, which purports to be the clerk's warrant of commitment, it is said "that the said commissioners find William A. Simmons to be an inebriate, and a fit subject for custody and treatment in the hospital."

It is urged that this statement in the commitment ought to be taken as establishing an additional finding of the commissioners, but we think that it cannot be so regarded. The statute under which the proceedings were brought provides: "Applications for admission of such persons to the hospital must be made in writing in the nature of an information, verified by affidavit; such information must allege that the person in whose behalf the application is made is believed by the informant to be a dipsomaniac or inebriate or addicted to the excessive use of morphine, cocaine or other narcotic drugs and a fit subject for treatment in the hospital." Comp. St. 1905, ch. 40, sec. 64. And in section 66 it is provided: "If, upon the investigation, the commissioners shall find the information to be true, they shall impose upon the person in whose behalf the application is made, a sentence of detention in the hospital until the patient is cured, and not exceeding three years." It is also provided (section 65): "The commissioners shall hear testimony for and against such application, and the parties may be represented by counsel upon the hearing." From these provisions of the statute it appears that, when a citizen is charged with being a dipsomaniac or an inebriate, there must be a trial and findings of fact, and there must be, of course, a record of this trial and of these findings, and this record must be kept with sufficient formality to show the jurisdiction of the commissioners in the premises, and also to show the action that was taken by the commissioners upon the complaint. In order to justify the commitment of the person charged, this record must show that from the evidence the commissioners found the facts to exist that would require such commitment. This the record before us fails to do. There is no finding that the person

charged is an inebriate, and without such finding the conclusion of the commissioners that he is a fit subject for treatment in the hospital is wholly unwarranted. It would seem that the commissioners have overlooked the importance of proceedings under which a citizen is to be deprived of his liberty, and have failed to appreciate the great responsibility that is placed upon them by the statute in question.

The manner in which the case has been presented here is not such as to justify us in discussing and passing upon the various important questions that were with more or less sincerity presented upon the argument. We do not find it necessary to determine in this proceeding whether the statute in question is unconstitutional, or whether, if the statute is constitutional, the party charged must in some stage of the proceeding be allowed a trial by jury. It is said that the same proceedings are required as upon application for the commitment of an insane person. If this is granted, the question would remain whether upon an application for the commitment of a person charged with being insane such person can be wholly deprived of the right of trial by jury. Section 40, ch. 40, Comp. St. 1905, provides: "All persons confined as insane shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be decided at the hearing." Long before the adoption of our constitution guaranteeing the right of trial by jury, that right existed in proceedings of this nature: "If any person be, or shall be, untruly found lunatic * * * be it enacted * * * that every person and persons, grieved or to be grieved by any such office or inquisition, shall and may have his or their traverse to the same immediately or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden." 2 Edw. VI, ch. 8, sec. 6. In some jurisdictions in this country it is held that the court may exercise a discretion in the matter of allowing a traverse of the inquisition of lunacy, so far as to ascer-

tain whether the person charged "is really desirous of a traverse and has mind enough understandingly to make such a request of the court"; but exercising such a discretion is very different from refusing a jury trial when there is reasonable doubt of insanity. How far such suggestions should be considered in construing this new statute for the detention of inebriates has not been seriously discussed in the case at bar. We do not find it to be our duty to decide them, or to do more than to suggest them here. There is not sufficient substance or regularity in these proceedings to warrant the detention of the relator.

The writ is allowed, and the relator discharged.

WRIT ALLOWED.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. MABEL P. OGDEN.

FILED MAY 17, 1906. No. 14,140.

1. **Beneficial Associations:** ASSESSMENTS. Where the constitution and laws of a fraternal-beneficiary association provide that the members shall pay one assessment each month, unless certain designated officers determine its payment unnecessary, the payment of such assessment, when called, cannot be resisted on the ground that it was not lawfully made.
2. ———: ACTION ON CERTIFICATE: ANSWER. An answer in an action on a beneficiary certificate, which sets forth the delinquency of the member in the payment of his assessments, the constitution and laws of the association which expressly declare a suspension of membership and a forfeiture of the beneficiary certificate therefor, together with the proceedings of the association constituting a valid call for the delinquent assessment, states a valid defense to such action. *Chapple v. Sovereign Camp, W. O. W.*, 64 Neb. 55, followed.

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

Brome & Burnett, for plaintiff in error.

Joel W. West, contra.

BARNES, J.

On the 9th day of May, 1899, the Sovereign Camp of the Woodmen of the World, a fraternal-beneficiary association organized under the laws of this state, accepted the application of Charles Ogden, then residing in the city of Omaha, to become a member of said association, and on said day issued to him its certain beneficiary certificate by which it was provided that at his death the association would pay to Mabel P. Ogden, his wife, the sum of $2,000. Said Ogden thereafter became a member of Omaha Camp No. 16 of said fraternity, and paid all of the dues, charges and assessments required to continue him a member thereof in good standing until the assessment of Nov. 20, 1903, which he failed and neglected to pay. Thereafter, on the 25th day of January, 1904, he died a natural death from an attack of apoplexy, and his widow, in whose favor the beneficiary certificate above mentioned was issued, commenced an action in the district court for Douglas county to recover the amount alleged to be due thereon. Her petition was in the usual form, and was sufficient in substance to state a cause of action against the association. It was alleged therein, among other things, that at the time of his death her husband, Charles Ogden, was a member of said fraternity in good standing, and had paid all of the dues, charges and assessments made against him by said association. To this petition the association filed its answer, by which the allegation above quoted was denied, and it was affirmatively alleged that at the time of the death of the said Charles Ogden he had been and was suspended for the nonpayment of his December, 1903, assessment. The answer was full and complete, and set forth the articles of incorporation, the constitution and laws of the association, together with the call made for the delinquent assessment. It appears from the answer that the assessment in question was due on the first day of December, 1903; that payment of the same could be made at any time before the first day of January thereafter; that

such payment was not made, and the assured became and was suspended by operation of the articles of incorporation, constitution and by-laws of the association, and was no longer entitled to participate in any of the benefits of the fraternity. To this answer the plaintiff filed a general demurrer which was sustained by the court, and judgment was thereupon rendered against the defendant for the amount named in the beneficiary certificate. From that judgment the association brings the case to this court by a petition in error.

It is contended that the answer states a perfect defense to the plaintiff's cause of action, and therefore the district court erred in sustaining the demurrer and rendering judgment against the association. We think this case is ruled by *Chapple v. Sovereign Camp, W. O. W.*, 64 Neb. 55. The only difference between the facts in that case and the one at bar seems to be that there the member was delinquent in the payment of two or three assessments, while in the instant case he was delinquent in the payment of but one. In that case it was held that, when the by-laws of such an association expressly declare that the fact of delinquency in the payment of an assessment shall work a forfeiture of membership, no action of the camp is required to suspend such a member, and that he loses all his rights to the benefits of the fraternity by such delinquency.

It is contended by the defendant in error that the delinquent assessment of November 20, 1903, was not lawfully made, therefore Ogden could not be suspended for its nonpayment. The argument is that the assessment in question appears to have been made by the sovereign commander and the chairman of the finance committee, and not by the sovereign camp or the board of directors, when such camp was not in session. Section 56 of the constitution and the laws of the association set forth in its answer provides, in substance, that in order to pay death losses, disability benefits, monument obligations and emergency fund, and sovereign camp general fund dues, every applicant admitted to membership prior to September 1, 1901,

is required to pay assessments upon their ages respectively when becoming members of the order, except as otherwise provided by sections 43 and 67 of said constitution and laws, and that at the age of 42 years (the age of the said Ogden) the rate of assessment on a $2,000 certificate is $1.95. It is provided by section 108 of said laws: "On or about the 20th day of each month the sovereign commander and chairman of the sovereign finance committee shall determine the number of assessments, if any, necessary to provide for the payment of death benefits, monuments, and total disability claims, and shall so notify the sovereign clerk." It is further provided by section 109: "Every member of the order shall pay to the clerk of his camp each month one assessment payment as required in section 56, which shall be credited to a fund known as the sovereign camp fund, and he shall also pay such camp dues as may be required by the laws of his camp. He shall pay any additional assessments for the sovereign camp fund and camp dues, or either, which may be legally called. If he fails to make any such payments on or before the first day of the month following he shall stand suspended, and during such suspension his beneficiary certificate shall be void." It is further provided that a member suspended for nonpayment of assessments or dues is not entitled to any of the benefits of the order. Construing all of the provisions of the constitution and laws together, it seems clear that each member of the association was required to pay at least one assessment each month, unless he should be notified that the sovereign commander and the chairman of the finance committee had determined that the payment of such assessment was unnecessary; and it was the duty of the deceased to pay his December assessment, amounting to $1.95, as above stated. It also appears that the assessment in question was not made or called by the sovereign commander and the chairman of the finance committee, but was provided for by the constitution and laws of the association. It was a standing monthly assessment which was to be paid by each member of the associa-

tion, unless he should be notified that the officers above named had determined such payment unnecessary. It may be further said that, if it were the fact that the assessment in question had been called by those officers instead of the sovereign commander or the board of directors, still it would have been valid under the rule announced in *Chapple v. Sovereign Camp, W. O. W., supra.* For it was there held that the empowering of two designated officers of the society to make an assessment on a certain day in each calendar month, and requiring the clerk of the superior branch of the order to immediately give notice of the making of the same to the clerks of the inferior associations, is a sufficient compliance with the laws of the association to uphold the assessment. It is alleged in the answer that on the 20th day of November, 1903, the sovereign commander and the secretary of finance of the association determined that the payment of the assessment in question would be necessary; and it is not claimed that the deceased was entitled to have notice of that fact, or that he was without such notice. When he failed to pay his assessment at some time during the month of December, 1903, as alleged in the answer, he became suspended by operation of the laws of the association of which he was a member and by which he was bound. And he was not thereafter entitled to share in any of the benefits of the association. It appears that Ogden died while so suspended and such facts constitute a complete defense to an action on his beneficiary certificate, and the demurrer to the answer should have been overruled.

Therefore the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

BERTHA GETZSCHMANN ET AL., APPELLANTS, V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY ET AL., APPELLEES.

FILED MAY 17, 1906. No. 14,037.

Taxation: DELINQUENT TAX LIST: PUBLICATION: INJUNCTION. Section 196, art. I, ch. 77, Comp. St. 1905, after providing for the publication of the delinquent tax list in a newspaper published and of general circulation in the county, to be designated by the county board, contains the further provision that "if there be published in said county newspapers printed in the German, Swedish or Bohemian languages, having been regularly published in said county for ten successive years or more, and having a daily, semi-weekly or weekly circulation among regular, *bona fide* subscribers of fifteen hundred copies or more, the said notice shall also be published in a newspaper in each of said languages, to be designated by the board of county commissioners." *Held*, That where the evidence shows that a hearing was had before the county board as to the qualifications of certain rival newspapers and that there was an actual controversy upon good grounds as to whether certain papers possessed the necessary requirements, and the board acted upon conflicting evidence in good faith in designating the newspapers, a court of equity will not interfere by injunction to restrain or control its action.

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

Charles W. Haller, for appellants.

James P. English, Frank L. Weaver, W. W. Slabaugh and *Frank A. Shotwell, contra.*

LETTON, J.

This action was brought by the plaintiff Getzschmann, who is the owner and publisher of a weekly newspaper, named the "Nebraska Tribune," printed in the German language in Douglas county, and by the Pokrok Publishing Company, which is the owner and publisher of a weekly newspaper named the "Pokrok Zapadu," printed in the Bohemian language in the same county, to enjoin the de-

fendant county board from entering into a contract with the defendants Simmons and the National Printing Company, owners respectively of the "German Westliche Presse," a weekly newspaper printed in the German language, and the "Osveta Americka," a weekly newspaper printed in the Bohemian language, both published in that county, for the publication of the delinquent tax list in said papers, or from paying the defendants any sum for the publication thereof, and to restrain the defendant county treasurer of Douglas county from delivering the delinquent tax list to either of these papers for publication. The district court denied the relief prayed, and the plaintiffs bring the case here on appeal.

1. Section 196, art. I, ch. 77, Comp. St. 1905 (Ann. St. sec. 10595), providing for the publication of the delinquent tax list, is as follows: "The county treasurer shall cause said list and accompanying notice to be published once a week for three consecutive weeks prior to the date of sale, commencing the first week in October, in a newspaper published in said county having a general circulation therein, which newspaper shall be designated by the county board, and if there be published in said county newspapers printed in the German, Swedish or Bohemian languages, having been regularly published in said county for ten successive years or more, and having a daily, semi-weekly or weekly circulation among regular, *bona fide* subscribers of fifteen hundred copies or more, the said notice shall also be published in a newspaper in each of said languages to be designated by the board of county commissioners; Provided, however, that if the total cost of such publication in all of said newspapers shall exceed the total amount herein provided to be taxed against the lands and lots so advertised, then the said publication shall be made only in the said newspaper printed in the English language, and shall also cause to be posted up in some conspicuous place in his office, a copy of said list and notice. The treasurer shall add to each description of lands so advertised, other than town

lots, the sum of twenty cents, and for each town lot the sum of ten cents, to defray the expenses of advertising, which sum shall be added to the amount due on said land or town lot for taxes and collected in the same manner as taxes."

The plaintiff's contention is that the respective newspapers belonging to them are the only newspapers in Douglas county which comply with the requirements of the law, and that the county board was without power or jurisdiction to designate the newspapers owned by the defendants as proper papers in which to publish the delinquent tax list. Each of the four papers mentioned made application to the county board to be designated by such body as one of the papers in which the delinquent tax list of the county should be published. The plaintiffs' application was denied and the papers owned by the defendants were selected. The plaintiffs contend that the power of the county board to designate papers printed in a foreign language to publish the tax list is limited to such as have been regularly published in the county for ten successive years or more, and that it does not appear that the papers designated by the board had been published for that period. It appears from the evidence that at the time the newspapers were selected by the county board a hearing was had as to whether or not the designated papers complied with the statutory requirements, and that there was a conflict of testimony upon that point. The successful applicants maintained that their papers were continuations of papers which had been published under other names successively for the period required, though it was admitted that they had not been published for the requisite length of time by the same name under which they now appeared. However, the evidence before the board not being preserved, it is impossible to tell exactly how much evidence was produced. Sufficient of the evidence presented to the board appears in the case, however, to show that there was an actual controversy upon good grounds as to the mooted question.

It may be questioned whether, if the same evidence had been submitted to a jury or to this court in the first instance, the same conclusion would have been reached as that which the board adopted, but, upon the whole, it appears that there was evidence enough before the board to justify its finding that the papers selected fulfilled the statutory requirements, even though the papers had not always been published independently or under the same names for the statutory period. It would seem, therefore, that the board acted in good faith in considering that the designated papers complied with the statutory requirements. In the exercise of the power reposed in the board to determine whether the papers seeking to publish the tax list fell within the class which are eligible under the statute, infallibility of judgment is never expected nor required. The most that can be required is that it act in good faith, and not in an unwarranted and arbitrary manner and without regard to the evidence before it. If it had been shown that the commissioners were proceeding under a mere pretense of right, or wilfully in violation of the statute, a different case would be presented. In such case a court would interfere to restrain the plain violation of law. The district court found specially that the papers owned by the defendants had both been in existence for a period of ten years prior to the 5th day of September, 1903, and generally upon the other issues for the defendants. There is sufficient evidence to support the finding, and hence sufficient to justify the action of the county board.

The judgment of the district court is

AFFIRMED.

SARAH M. PETERSON V. ESTATE OF JOHN H. BAUER ET AL.*

FILED MAY 17, 1906. No. 14,312.

1. **Testamentary Bequest: EVIDENCE.** An alleged oral contract to adopt a child of a stranger and to make a testamentary bequest of an aliquot share of one's estate in his behalf, at the expense of children of the blood, or to make him a joint and equal heir with such children, must be established by clear and satisfactory evidence.

2. ———: **REMEDY.** A proceeding to enforce such an alleged contract is in substance a suit for specific performance, which is not litigable in the ordinary course of probate jurisdiction or in an action at law, but in proceedings in equity.

3. **Trial: REVIEW.** In the trial of such a suit the functions of a jury, if one is called, are advisory only, and the court cannot commit reversible error in the giving or refusal of instructions.

4. **Trial to Court.** The prosecution of such a claim is an appeal to the conscience of the trial judge, who should admit in evidence every matter having a fairly ascertainable tendency to enlighten his understanding as to the situation and circumstances of the parties.

ERROR to the district court for Cass county: PAUL JESSEN, JUDGE. *Reversed.*

P. A. Wells and *Fawcett & Abbott,* for plaintiff in error.

Jesse L. Root and *Jesse B. Strode, contra.*

AMES, C.

John H. Bauer, a resident of Cass county in this state, died in said county in June, 1903, leaving a will, afterwards duly admitted to probate, by which he bequeathed all his personalty to his son John Albert, and devised to him all his real estate for life, remainder in fee to his issue. Afterwards, during the progress of administration, there was filed in the county court a claim of which the following is a copy: "That the said estate of John H.

* Rehearing allowed. See opinion, p. 661, *post.*

Bauer, deceased, is indebted to Sarah Matilda Peterson for 20 years' labor performed for and services rendered to John H. Bauer, deceased, during his lifetime, at the instance and request of said John H. Bauer, deceased, in the sum of $9,000, for which services the said John H. Bauer, deceased, on or about February, 1872, orally promised and agreed to pay plaintiff by devise or bequest in his last will and testament, and which payment said John H. Bauer agreed should amount to and be not less than a sum equal to the value of one-half of the entire estate which he might leave at his death; said deceased having failed to provide for the payment of said claim in his will, and the value of the estate of said John H. Bauer at the time of his death being the sum of $18,000, there is now due and owing to said Sarah Matilda Peterson from the estate of John H. Bauer, deceased, for such labor and services, the said sum of $9,000; no part of which has been paid. Wherefore, plaintiff prays judgment against the defendant for said sum of $9,000, together with interest thereon from the 29th day of June, 1903, and for costs." The agreement thus set forth, if it existed, was undoubtedly testamentary in its character. *Teske v. Dittberner,* 65 Neb. 167, 70 Neb. 544. The county court allowed the claim for an amount approximating $6,000, and the administrator appealed to the district court, where issues were made up, and the result of a trial to the court and a jury was a verdict and judgment for the defense, from which the plaintiff prosecutes error in this court, alleging certain errors in instructions and in the exclusion of evidence offered in her behalf. Our attention is, however, not called to sufficient competent evidence in the record tending to prove the making of any such agreement as is set forth in the petition by or on behalf of the plaintiff with the deceased.

In 1872 the father of the plaintiff was a widower residing in Cass county, and the father also of a large family of children, among whom was a daughter named Mary, who has since married, and who is the principal witness for the plaintiff. In fact she is the only witness for the

plaintiff who assumes to testify with any distinctness as to what occurred or what conversation was had between her father and the deceased, at the time alleged in the petition, concerning the custody by the latter of the plaintiff, who was then a child seven years of age. She testified that she was present at the only interview concerning the matter in controversy shown to have been had between the deceased and her father, and that the former then said that he would like to have the girl as his own child and she should have half he had at his death. "Q. Did he say how he would leave it to her? A. She was to be adopted by him. Q. Did he say he would adopt her? A. Yes, sir. Q. And he would leave her half? A. Yes, sir. Q. Mr. Bauer voluntarily said there that he would leave half he had to this little girl if she would go and live with him? A. Yes, sir." This is the substance of the testimony of this witness, which she repeated two or three times, but it will be observed that the answers to the last two questions were put into her mouth by counsel and are entitled to but little, if any, weight. Several other witnesses on behalf of the plaintiff testified to divers conversations with the deceased, extending over a series of years, after she became an inmate of his household, in which he expressed satisfaction with her character and conduct and considerable affection for her, and in which he was importuned to make provision for her at his death, and in which with some reluctance, or at least with hesitation, he said that he intended that she should have "her share" or her "equal share" or that "he meant to divide equally between her and Ally," meaning his son. The girl was, in her ninth year, baptized with the ceremonies of the Congregational church by the family name of her foster-parents, by which she was always afterwards, until her marriage, commonly known, and she customarily spoke to and of them as her "papa" and "mamma" and they of her as their daughter, and the conduct of the parties in all other respects simulated that relationship. But it does not appear that there was ever any agreement or conversation

between the deceased and the plaintiff concerning any pecuniary provision to be made by him for her, and there is no evidence that he ever admitted having made any pledge or promise to her, or to anyone else, that he would make any testamentary disposition of his property for her benefit. His reluctantly expressed intent that she should be in some way provided for, so far from being such an admission, indicates on the contrary that both he and his interlocutors were aware that he was not already under legal obligation so to do, otherwise his natural and probable response to their importunities would have been that he had bound himself in conscience, if not in law, and would abide by his agreement. She remained in the home of the deceased for 18 years, being clothed, educated and treated in all respects as a social equal, until her marriage at the age of 25 or 26, in 1890, shortly prior to which event he conveyed to her a tract of real estate of a value at that time variously estimated at from $1,000 to $3,000. It is plain that she has made no great sacrifice and has suffered no great wrong or hardship such as, it is said, sometimes leads the courts to announce "bad law." It may well enough be said that the deceased believed that he had fully satisfied his expressed intent to make suitable and adequate provision for her out of his estate, the more especially as the will admitted to probate superseded one made at a time about half way between the marriage and his death, in which no provision was made for her.

We do not think it worth while to treat of the alleged agreement to adopt the plaintiff, which, however, is emphatically denied by the only other living witness who was present at the interview at which it is represented to have been made, and who says that the only promise that deceased made was that he would rear and educate and clothe and care for the child until she should attain her majority. It is quite obvious that an agreement to adopt is an entirely different thing from an agreement to bequeath or devise. A legal adoption, under the forms pro-

vided by the statute, would have given the plaintiff nothing more than the *status* of a child of her foster-father born in wedlock, and would have conferred upon her no interest in his estate, except in case of intestacy, which has not occurred. It may be added, however, that the story of an agreement either to adopt or make a testamentary provision for the plaintiff with the effect of a partial disinheritance of the deceased's own son is destitute of much inherent probability. Bauer and Nix, the father of the child, were not only not related by blood or affinity, but appear to have been utter strangers, as were also the former and the plaintiff, until the occasion of the interview at which the supposed agreement in question is alleged to have been made. Bauer, it seems, made known to a neighbor woman, named Smith, his desire to adopt a girl, at least such is the story of the latter, and she, with a friendly disposition to please, introduced him to Nix and his family, much as she might have introduced a man desiring to purchase a horse to one whom she knew to be the owner of a large number of such animals, ten to be exact, some of which, she presumed, he would be willing to sell. That the child should have been inspected and irrevocably purchased at a price relatively so high, at this first brief interview, and without any knowledge by hearsay or otherwise of her disposition, character or capabilities, and without apparent knowledge on the part of her father of the character and moral responsibilities of the purchaser, is such a transaction as appears to us to be so extremely unusual, if it ever happens, as to require to be established by evidence more cogent than the testimony of interested witnesses and of neighboring gossips after the lapse of more than 30 years from the date of the supposed event. Rather, in such a case, we think, would the proposed foster-parent have exercised at least the prudence of an ordinary purchaser of a family nag, namely, he would have taken the child home with him and introduced her to his wife, and have ascertained by acquaintance and experience her fitness for the contemplated relation with him-

self and family, and would have reflected somewhat upon the extent, if any, to which he could afford, or it would be prudent, to obligate himself and his estate in her behalf. And this, we are convinced, is precisely what was done, or at any rate it is the only conclusion to which, in our minds, the evidence points. Even Mary, the sister of the plaintiff and her principal witness, testifies that the matter was not finally concluded at this interview, but that the father was "to go over to Mr. Bauer's afterwards and fix up the papers" of adoption. And afterwards there were frequent conversations by the witness and the neighbors with Bauer about the girl and her conduct, and about his making some contract or arrangement by which to insure her a share of his estate, all of which tends to show that no definite or final arrangement or provision had been previously made.

Counsel for plaintiff relies chiefly upon the decision of this court in *Kofka v. Rosicky,* 41 Neb. 328. But the circumstances of that case were, we think, materially different from those in the present one. The child was an infant, a few months old, and the parents and foster-parents near relatives, the latter not having or having hope of issue of their own, and the purport of the agreement was indicated in a written declaration in the form of a will by the foster-mother made after the death of her husband and in contemplation of her own speedy dissolution. And the relation which had been assumed toward the child had been frequently recognized and talked about by both in their social intercourse with neighbors and friends. Presumably not all the facts and circumstances which influenced the mind of the court are set forth in the opinion, which in such cases it is almost impossible to do, but that it was not intended to open a door for vague inferences from doubtful or ambiguous testimony of more or less interested or meddlesome witnesses concerning oral conversations alleged to have taken place at a time long past (in this case nearly a third of a century) is evident from the following excerpt:

"There is a line of authorities emanating from some of our able courts of last resort, most notably those of Indiana, Illinois, and Iowa, which denies the right to specific performance of a contract similar to the one under which the claim in this case arises mainly upon the ground that the statute was enacted to cover just such cases; that it will work no hardship to require parties to put all such agreements in writing and that the testimony of witnesses should not be received, probably several years after the happening of the event, to establish a contract by parol, by which the course of the descent of lands will be changed. These are strong and cogent reasons, and it is not our province to attack or attempt to refute them. As we understand it, they are the underlying, principal reasons for the rule as embodied in the statute; but we do not think the rule should be so rigidly adhered to as to accomplish a fraud as against one of the persons affected by the contract to which it is to be applied."

In harmony with the foregoing expression this court held in *Teske v. Dittberner,* 65 Neb. 167, that such an agreement as is here contended for "is in contravention of the letter both of the statute of frauds and of the statute of wills, and should be closely scrutinized, so that the transaction may not be made the means of the exercise of undue influence or the practice of fraud or other abuses." The pretty nearly, if not quite, universal attitude of the courts toward such contentions as that brought forward in this case is forcibly but accurately expressed by the supreme court of Illinois in *Dicken v. McKinley,* 163 Ill. 318, 54 Am. St. Rep. 471, as follows: "Such contracts are looked upon with suspicion, and are only sustained when established by the clearest and strongest evidence." And in *Kinney v. Murray,* 170 Mo. 674, 700: "But, the proof of such a contract must be so cogent, clear and forcible as to leave no reasonable doubt in the mind of the chancellor as to its terms and character." See also *Knight v. Tripp,* 121 Cal. 674; *Hamlin v. Stevens,* 177 N. Y. 39; *Newton's Executor v. Field,* 98 Ky. 186; *Wall's Appeal,* 111 Pa. St.

460, 56 Am. Rep. 288; *Eastwood v. Crane,* 125 Ia. 707. Tested by the rules promulgated in these decisions, which have twice received the implied approval of this court, the evidence of the plaintiff falls far short of establishing her alleged cause of action.

There remains for decision a matter of vital importance to this case and to future controversies of like kind, and also two assignments of error upon which counsel for plaintiff places great reliance; one having reference to an instruction given to the jury, and the other with respect to a ruling on an objection to evidence. The proceeding is in the form of an action at law, having originated in the district court in an appeal from an allowance by the county court of a money demand filed against the estate of the deceased, but the nature of the claim, notwithstanding its form, is really and practically a suit to compel a specific performance of the alleged contract and like all such demands is addressed to the conscience of the trial judge sitting as a chancellor. The issue is one with which from its very nature and essence a court of law is incompetent to deal, and the present attempt to litigate it in such a tribunal is, so far as our information goes, without precedent. Counsel for neither party has cited to us any authority for such a proceeding and we doubt exceedingly if any can be found. The suit is one to bind specifically the estate, real and personal, of the deceased with a contract alleged to have been made by him in his lifetime, which is confessedly void by positive statute both in form and in substance, but which it is contended that equity will nevertheless enforce for the purpose of preventing fraud and doing exact justice. To such a suit the persons claiming title to the lands of the decedent as heirs or devisees, and asserting rights as distributees of the personalty by will or by statute, are indispensable parties without whose presence a final determination of the controversy cannot be made. It follows that such a claim is not litigable in the ordinary course of probate administration, but must be prosecuted, if at all, in a court of original

and general equitable jurisdiction and powers, the executor or administrator being a proper but not in all instances a necessary party. This principle is distinctly announced in *Kofka v. Rosicky, supra,* in which it is said: "It is a matter of discretion in the court which withholds or grants relief, according to the circumstances of each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties," citing 2 Story, Equity Jurisprudence (13th ed.), sec. 742; *Clarke v. Koenig,* 36 Neb. 572, and several other authorities at considerable length. It further follows that, when a jury is called in the trial of such a case, its functions are advisory only, and the court cannot commit reversible error in the giving or refusal of instructions. The point is well illustrated by one of the assignments of error before referred to. The court gave to the jury the rule of law approved by all the above cited authorities as applicable to the trial of such issues, viz., that the plaintiff in order to prevail must establish her contention "by clear and satisfactory proof." That such an instruction in the trial of an action at law would be reversible error goes, in this state, without saying; yet, if a jury may try and determine the issues in such a case as this, it must be given or there will be danger of a complete failure of justice.

The court refused an offer by the plaintiff to prove that John Albert, the alleged son and sole beneficiary in the will of Bauer, is not his son but a stepson, that is, the son of his wife by a former husband. We think that the evidence ought to have been admitted. It might, in some circumstances, have an important bearing upon the motives and intent of the deceased, and upon the decision of the probability of his having entered into the alleged agreement. The inquiry, as has been often said, was addressed to the conscience of the court and nothing should have been excluded which had a fairly ascertainable tendency to enlighten his understanding as to the situation and circumstances of the parties.

We do not think it necessary to discuss the case at greater length at this time. The district court rendered a judgment for the defendant upon the merits. This, we think, he was without jurisdiction to do, and we recommend that the judgment be reversed and the action dismissed at the costs of the plaintiff, but without prejudice to a new action against the administrator and the real parties in interest.

EPPERSON, 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 action dismissed at the costs of the plaintiff, but without prejudice to a new action against the administrator and the real parties in interest.

REVERSED.

The following opinion on rehearing was filed March 21, 1907. *Former judgment adhered to:*

1. **Heirship:** EQUITY. The right of heirship in an estate can only be established in an action in equity; an action at law cannot be maintained to recover the value of an undivided half of an unsettled estate on the ground that the decedent agreed in his lifetime to make the claimant his heir.
2. **Syllabus of former opinion explained.**

LETTON, J.

The issues involved in this case have been stated in a former opinion, *ante,* p. 652. The correctness of the statements of fact and conclusions of law found in the opinion of Mr. Commissioner AMES were strongly attacked by a brief upon motion for rehearing. A rehearing was granted and the case is again before us for consideration.

In the former opinion, *ante,* p. 652, it was said: "Our attention is, however, not called to sufficient competent evidence in the record tending to prove the making of any such agreement as is set forth in the petition." This statement has been assailed by plaintiff's counsel. The agree-

ment set forth in the petition was that, in consideration of services to be rendered by the plaintiff, "John H. Bauer, deceased, orally promised and agreed to pay plaintiff by devise or bequest in his last will and testament, and which payment said John H. Bauer agreed should amount to and be not less than a sum equal to the value of one-half of the entire estate which he might leave at his death." The evidence on plaintiff's behalf, standing alone, tends only to prove that there was an agreement that Bauer should leave the plaintiff one-half of his estate, which is a very different thing from proving that he agreed to pay by devise or bequest, a sum equal to the value of one-half his estate. The one is an agreement to pay in money, the other to pay in property. A plaintiff seeking to recover upon a promise to pay a sum equal to the value of a certain horse would not be entitled to succeed in his action if he proved a promise to pay by the delivery of the horse, since his allegations and his proof would not agree, hence the language criticized is not unwarranted under the proof offered.

In the brief and argument on rehearing, severe criticisms were made upon the statements of fact in the opinion. It is sufficient to say that some minor errors occurred, but in the main the statement of facts reflects the evidence. It may be said, however, that the writer does not view the evidence on the part of the plaintiff in the unfavorable light in which it plainly appeared to Mr. Commissioner AMES, and upon another trial, with evidence introduced which we have held was erroneously excluded at the former trial, the entire testimony should receive the careful and candid consideration of the trial court, unbiased and uninfluenced by any statements or conclusions as to the facts expressed in either of the opinions of this court, and should be tried *de novo* in all particulars. Whether or not the evidence will sustain an action for specific performance, or an action for the value of the services, is a matter which is left open for future determination upon such evidence as may be produced.

The proposition that the alleged contract must be established by clear and satisfactory evidence is very vigorously attacked by plaintiff, and it is contended that a preponderance of the evidence is all that is required in any civil action, and that a requirement that the evidence be "clear and satisfactory" requires more than a preponderance and requires it to be established beyond a reasonable doubt, citing *Stevens v Carson,* 30 Neb. 544; *McEvony v. Rowland,* 43 Neb. 97; *McCord-Brady Co. v. Moneyhan,* 59 Neb. 593; *Western Mattress Co. v. Potter,* 1 Neb. (Unof.) 627. It may be said, however, that, while it is true that a preponderance of the evidence is all that is required of the plaintiff in any civil action, yet the nature of some cases is such that the probative force of testimony may be weakened or counterbalanced to some extent by the existence of legal presumptions or other circumstances which may affect its credibility. Where it is sought to establish a resulting trust by parol evidence, or where it is sought in effect to evade the statute of wills or the statute of frauds in like manner, or where conveyances have been made by parties in failing circumstances to near relatives, the circumstances of the case require that the proof be clear and satisfactory in order to overcome the presumption which the circumstances raise. The nature of the case demands a closer scrutiny of the evidence than in an ordinary controversy, but if after testing it by these canons it preponderates in favor of the plaintiff it is sufficient to justify and sustain a finding in his favor. *Veeder v. McKinley-Lanning L. & T. Co.,* 61 Neb. 892; *Doane v. Dunham,* 64 Neb. 135. The former opinion is correct in requiring that the proof in such a case as this be "clear and satisfactory."

We think it is unnecessary at this time to reexamine the questions passed upon in the cases of *Kofka v. Rosicky,* 41 Neb. 328, 25 L. R. A. 207; *Teske v. Dittberner,* 65 Neb. 167, 70 Neb. 544, and *Pemberton v. Pemberton's Heirs,* p. 669, *post.* As was pointed out in the opinions in these cases, it is impossible to reconcile the views of the various

courts of the United States upon the questions presented, but this court has adopted the rule in *Kofka v. Rosicky, supra,* and we are content to abide by the doctrine of that case as being the most apt to prevent injustice and to do equity. In such a case, if the trial court, bearing in mind the ease with which claims may be presented when the other party to the alleged contract is dead, carefully scrutinizes the evidence and weighs the same, taking fully into consideration the nature of the claims and the known inaccuracy of memory with reference to oral statements made years before the time of the trial, we think the evil consequences to estates which may accrue, and which the counsel for the defendant so strongly sets forth, may be greatly minimized. The difficulty of proving contracts made many years before, when the lips of both participants are sealed, one by death and the other by the law, operates to the disadvantage of the claimant, and it may prevent a just recovery in as many cases as the ease with which claims may be trumped up may operate to spoliate estates; though claims of this kind are always dangerous.

The contention of the plaintiff briefly stated is: That John H. Bauer agreed to leave the plaintiff one-half of the value of his estate in consideration for services to be rendered; that the services were rendered; that he broke the contract by failing to leave her one-half of his estate; that she was entitled to her election of two remedies, either to bring an action for specific performance, or to recover damages for the breach of the contract; that in an action for the breach of the contract the measure of damages is the value of the property to which the plaintiff was entitled, but which she failed to receive. In support of this position the plaintiff cites *Sharkey v. McDermott,* 91 Mo. 647; *Frost v. Tarr,* 53 Ind. 390; *Burlingame v. Burlingame,* 7 Cow. (N. Y.) 92; *Malaun's Adm'r v. Ammon,* 1 Grant Cas. (Pa.) 123, and other cases. *Sharkey v. McDermott, supra,* was an action for specific performance under circumstances similar to those in *Kofka v. Rosicky, supra.* The case was decided upon a demurrer to the petition, and,

since the petition did not state whether the contract was in writing or not, the court held that it would be presumed to be in writing. This case throws no light upon the point involved. The facts in *Frost v. Tarr, supra,* were very similar to those alleged in this case. An action at law was brought for damages for breach of the contract, and it was held that the damages may be measured by the value of the portion of the estate promised. This is in line with the plaintiff's contention in this case. Nine years later the case of *Wallace v. Long,* 105 Ind. 522, came before the same court. In the opinion the prior cases in Indiana and other states are reviewed, and it is pointed out that *Malaun's Adm'r v. Ammon, supra,* had been overruled in *Hertzog v. Hertzog's Adm'r,* 34 Pa. St. 418, and that so much of *Burlingame v. Burlingame, supra,* as gave support to the doctrine of *Frost v. Tarr, supra,* had been disapproved by the court of appeals in New York in *Erben v. Lorillard,* 19 N. Y. 299. We think it unnecessary at this time to decide the question as to which of these conflicting views we shall adopt, since the contract which the plaintiff counts upon is for a sum equal to one-half of the value of Bauer's estate. This means the net value, and not the gross value. The claims of creditors, if any, and the expense and costs of administration, including funeral expenses, etc., must be deducted. *Graham v. Graham's Ex'r,* 34 Pa. St. 475. No proof was offered to show what the net value of the estate is. The estate is still unsettled. A jury is not competent to determine such a question in this action, and the proper tribunal to take an accounting of the debts and liabilities of the estates of deceased persons and to determine the net amount of an estate for distribution is the probate court. *Grant v. Grant,* 63 Conn. 530, 38 Am. St. Rep. 379.

The conclusions of the former opinion that such an action as this, to appropriate one-half of the net value of the estate, should be in chancery, where all persons interested may be made parties, are sound and are adhered to. While, as we have said, we do not take the same view of

the evidence as expressed in the former opinion, we think the propositions of law laid down in the syllabus, as herein explained, are sound.

FORMER JUDGMENT ADHERED TO.

WESTERN UNION TELEGRAPH COMPANY, APPELLEE, V. DOUGLAS COUNTY ET AL., APPELLANTS.

FILED MAY 17, 1906. No. 14,612.

1. A suit in equity will not lie when the plaintiff has a plain, adequate and speedy remedy at law.
2. Taxation: OVERVALUATION: REMEDY. The statute affords a plain adequate and speedy remedy to one whose property has been excessively valued for taxation and in cases in which the county board of equalization has committed prejudicial errors or irregularities in procedure.

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

W. W. Slabaugh and *A. H. Murdock*, for appellants.

W. W. Morsman and *F. A. Brogan, contra.*

AMES, C.

In May, 1904, the county assessor of Douglas county delivered to appellee a printed notice accompanied by a blank form requiring it to make and return a statement for the purposes of assessment and taxation showing in detail the description and amount or value of its tangible personal property situate in the county and also "gross receipts for the year, representing franchise valuation as per detailed statement on back." The president of the company made a return under oath showing the amount in value of such personal property to be $20,208.90, and of such gross receipts $27,092.29, and computing the two items as a "total personal" of $47,301.19. Substantially

this latter amount the assessor returned as his own valuation for the purposes of taxation of the personal property and franchises of the appellee. Subsequently the county clerk by direction of the county board served the appellee with a written notice to the effect that complaint had been made that its assessment of personalty was too low, and requiring it to appear before the board at the office of the latter on a day and hour named "and show cause, if any there be, why said assessment should not be raised." At the time and place named in the latter mentioned notice the company did appear by its manager, and such proceedings were had and done that the board caused to be entered upon its records in connection with the proceedings the words "Raised to $77,300." In due time the clerk extended the assessment, as thus raised, upon his tax list showing the "assessed value" of the personalty of the company to be $15,460 instead of $9,460 as returned by the assessor, and taxes were levied on the former sum in the amount of $477. But before the tax became due, this court had held in *Western Union T. Co. v. City of Omaha,* 73 Neb. 527, that so much of the revenue act of 1903 as requires the gross receipts of the company to be taken as a measure of the value of its franchises is unconstitutional and void, and the appellee thereupon tendered and offered to pay to the treasurer so much only of the tax as was founded upon its own estimate, made and returned as above stated, of the actual value of its tangible personal property, namely, $20,208.90. The tender was refused, whereupon this action was begun seeking a perpetual injunction against all of the tax in excess of the tender. There was an answer and a trial, but no dispute of facts, and a decree was rendered as prayed. The county appeals.

It seems to us that the appellee, plaintiff below, mistook its remedy. It cannot be disputed, and it is not attempted so to be, that the assessor and county board were acting within the limits of the powers conferred upon them respectively by the statute, nor can it be questioned that the plaintiff was subject to taxation upon its tangible person-

alty and franchises. Nor, we think, can it be doubted that gross receipts may be taken into account in estimating the value of franchises; in fact we are unable to understand how the latter can be based upon anything but the revenues they yield, although the legislature cannot prescribe such revenues as the measure of values. If the official mind was unduly influenced by a consideration of the plaintiff's income, and as a consequence placed an excessive estimate upon the value of its possessions, the statute affords it a speedy and effectual remedy by appeal; but the error, if any, did not deprive the board of equalization of jurisdiction or render its determination subject to collateral attack.

It is also urged that the action of the board could have been properly founded only upon a formal written complaint and that none was filed with it. The statute, unlike the preceding revenue law, does not require such a complaint. Comp. St. 1903, ch. 77, art. I, sec. 122. The plaintiff was served with the statutory notice and appeared in response thereto, and made no demand for a formal complaint and no objection because of its absence. If there was or had been any irregularity of procedure in this respect, it was or would have been insufficient to deprive the board of jurisdiction, which it acquired by service of notice and the appearance of the party. The error, if prejudicial, would have been subject to correction by petition in error in the district court, but would not have wholly avoided the proceeding so that it could have been held for naught in a collateral action. In short, if the plaintiff's property and franchises were excessively valued for taxation, or if prejudicial errors and irregularities intervened in the procedure of the county board, the statute afforded the plaintiff a plain, adequate and speedy remedy, and the plaintiff's petition in equity states no cause of action. It is recommended, therefore, that the judgment of the district court be reversed and the action dismissed.

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 the action dismissed.

REVERSED.

THADDEUS I. C. PEMBERTON V. HEIRS OF GEORGE C. PEMBERTON.

FILED MAY 17, 1906. No. 14,334.

1. **Contract of Adoption: ENFORCEMENT.** A contract in writing for the adoption of a child, although ineffective as a legal, statutory adoption, may upon a proper showing be enforced in equity.
2. ———: ———. A written contract of adoption which contains a condition binding the foster-parents to make the child "an equal heir to his part of our estate the same as one of our children" may upon a proper showing be specifically enforced against the estate of the deceased foster-parent, who has died intestate.
3. **Case Followed.** *Kofka v. Rosicky*, 41 Neb. 328, followed and approved.

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

F. Dolezal, for plaintiff in error.

Clark O'Hanlon, Herman Aye and *F. A. Brogan, contra.*

OLDHAM, C.

In 1893, George C. Pemberton died intestate in Washington county, Nebraska, and was at the time of his death the owner in fee of certain lands situated in that county. An administrator of the estate was appointed, all debts were paid, and the administration closed prior to the institution of the suit at bar. At the time of Pemberton's death, he left surviving him his wife, Margaret A. Pemberton, but no children born of his marriage. In 1863,

and while the plaintiff herein, whose natural name is Griffith, was in the custody of his mother, Kate A. Griffith, under a decree of the district court for Douglas county in an action for divorce instituted by the mother against the father, the mother entered into a written contract with Samuel A. Whittier and Deborah Whittier, his wife, in the nature of a deed of adoption, in which she relinquished all right, claim, and demand to the plaintiff, and authorized the Whittiers to adopt said child as their own and give it their name, and to direct, manage, educate, and control said child as their own. The Whittiers on their part specifically agreed that they would immediately take the child into their control and custody, adopt him as their own, and thereafter provide for, educate, and rear him according to their pecuniary and social standing. The contract further recites: "We do further agree that at our death the said child shall be an equal heir to his portion of our estate the same as one of our children, it being the express understanding that we are to treat, control, and in every way provide for said child as our own, we having hereby adopted it as such, and it is mutually agreed that from this date said child shall be known and called by name 'Charles Whittier.'" This instrument was signed by Kate A. Griffith, Samuel Whittier, and Deborah Whittier, and acknowledged before a justice of the peace in Douglas county, on the 27th day of April, 1863. After the execution of this instrument the Whittiers took the child to their home in Washington county and kept him for a couple of months, when by agreement with the deceased, George Pemberton, and wife they delivered the child and the written contract in the form of a deed of adoption to the Pembertons. It appears from the testimony that, when the deed and child were delivered to the Pembertons, the deceased took the deed or contract and went to Omaha to see an attorney, Honorable John I. Redick, to find out if it was necessary to have new papers made to secure the adoption of the child. From some source of information he concluded that it was not, and then scratched out the

names of the Whittiers from the deed and had inserted the names of the Pembertons in their stead. The paper, so changed, appears to have been signed and acknowledged on the 27th day of June, 1863, by George Pemberton and wife, although it is shown by the testimony of the wife that, while she signed the contract, she was not present when it was acknowledged. Thereupon the Pembertons took the charge, control, and custody of the child, then an infant between two and three years of age, gave him their name, sent him to school, and treated him in every particular as their son, referred to him always as their son, and he in turn addressed them as his father and mother. He remained with them, according to the testimony, and conducted himself as a dutiful and industrious son until past the age of 21 years, when, with the knowledge and consent of his foster-parents, he engaged in business for himself in the state of Oregon. After he left the homestead he communicated with his foster-parents, addressing them as "Pa" and "Ma," and received letters from them, written by the mother, however, in which he was addressed as their son. Five or six years before the death of Mr. Pemberton he was stricken with paralysis, and the wife telegraphed to the boy, who returned at once and remained with his foster-parents for over a month. The written contract, above set out, had been kept by Mr. Pemberton among his papers for over 30 years, when, at one time on a visit of the plaintiff to his home, Mrs. Pemberton delivered the contract to him, and he had it in his possession at the time this suit was instituted. It appears from the testimony of the neighbors, as well as the surviving wife, that Mr. Pemberton in his lifetime had always referred to plaintiff as his son, and had frequently stated to his neighbors that plaintiff was his adopted son and that "some day all his property would go to him." It also appears from testimony of one of the neighbors, Mr. Whitford, that shortly before the death of the intestate, when his paralysis had progressed until he was unable to articulate any words, but while he was still in possession of his mental faculties and responded to

questions asked him by nodding or shaking his head, the witness asked Pemberton if he did not want to make a will. To this question deceased shook his head, meaning no. He then asked him if he wanted the law to take its course, and the deceased nodded his head, meaning that he did. The witness then asked him if he wanted Thad (plaintiff) to have two-thirds and his wife one-third of the property, and again he nodded his head in assent. After the administration of the personal effects of the deceased, plaintiff instituted the suit at bar in the district court for Washington county for the specific performance of the contract of heirship above set out. Two collateral heirs, a brother and a sister of the deceased, answered in the proceeding, denying plaintiff's claim, and alleging that they were each entitled to an undivided one-fifth of the land. At the close of plaintiff's testimony the court dismissed his bill, and entered judgment for the answering defendants. To reverse this judgment plaintiff brings error to this court.

The contest is simply between the plaintiff and the collateral heirs of the deceased, the rights of the surviving wife being recognized in all the pleadings. The wife, however, testified, as far as the court would permit, in support of plaintiff's claim. At the time the contract in issue was entered into there was no statute in the state, or rather territory, of Nebraska, providing for the adoption of children by deed or otherwise, so that plaintiff's right to recover must stand or fall on an interpretation of the written contract, admitted to have been signed by the deceased and his wife at the time above set forth. The question of acknowledgment of this contract is immaterial, as it would be ineffective as a deed of adoption, even if it had been regularly acknowledged by both husband and wife. The question as to whether the delivery of this paper was made to plaintiff by direction of the deceased is also immaterial, because the right of action, if any, on the paper does not depend upon its delivery. The writing offered in evidence was and is admissible for the

purpose of showing a written contract between the plaintiff's natural mother, legally entitled to his care and custody, and the deceased and wife for plaintiff's benefit. Oral testimony, showing a full compliance with the terms of the contract by the plaintiff, was properly admitted for the purpose of showing that the contract was fully executed on the part of all parties thereto. The fact that there is no testimony in the record, other than the instrument itself, that the mother, Mrs. Griffith, ever consented to the change of names in the contract is immaterial, in view of the fact that such change was made by deceased and wife, and that the natural mother never repudiated the change, but on the contrary permitted the Pembertons at all times to assume and exercise full charge and control of the plaintiff under the terms of the written agreement. It does not lie in the mouths of the collateral heirs of Pemberton, who are claiming under him, to say that he changed the written instrument without the consent of the plaintiff's mother.

That specific performance of a contract of this nature will be enforced in equity, when properly established, is beyond dispute in this jurisdiction since the decision in *Kofka v. Rosicky,* 41 Neb. 328. In the case just cited, an infant child, named Josephine Kofka, was delivered by her parents to John Spilinek and wife, under a verbal agreement that Spilinek and wife, who were respectively aunt and uncle of the child, would adopt her as their own and make her their heir, so that at the death of the Spilineks she would inherit all the property of which they died possessed. The child took the name of Spilinek, and lived with her foster-parents as their child until about 15 years of age, when the foster-father committed suicide, while insane, and also mortally wounded his wife, who died three or four days later. The wife made a will before her death in favor of the child, who was still a minor, and who, with her father as next friend, filed a bill in equity praying for a specific performance of this oral contract; and, notwithstanding the fact that there was a

statute of adoption in force in this state at the time the oral contract was entered into between the natural and foster-parents of the claimant, it was held that a specific performance of the contract should be granted, and a judgment granting such relief was entered in this court. In the discussion of this case by the writer of the opinion, authorities bearing on the question at issue from other jurisdictions were examined at considerable length. This might properly excuse us from a reexamination of the authorities commented upon in the opinion, were it not for the fact that it is contended by counsel for the collateral heirs that this decision was chiefly influenced by the holding of the supreme court of Michigan in the case of *Wright v. Wright,* 99 Mich. 170, 58 N. W. 54, and that this decision has been overruled by the subsequent holdings of the Michigan court in *Albring v. Ward,* 137 Mich. 352, 100 N. W. 609, and *Bowins v. English;* 138 Mich. 178, 101 N. W. 204.

In suits of this character the relief granted necessarily depends on the facts and circumstances surrounding each particular case. While certain general principles are applied, yet the application of these principles to a particular case depends on its special environment. While we do not concede, because of different conditions surrounding the cases, that the conclusion reached in *Kofka v. Rosicky, supra,* was necessarily influenced by the decision in *Wright v. Wright, supra,* yet, because this contention is strongly urged by defendants, we have reexamined the latter case, as well as the cases in which it is said to have been overruled. As a result of our investigation, we find that in the case of *Wright v. Wright, supra,* the plaintiff, when about two years old, was indentured or bound to his foster-parents until he was 21 years of age, and it appears from the statement made in the dissenting opinion that there was no contract in this indenture that the child should inherit as an heir of the persons to whom he was bound. It further appears that afterwards the foster-parents under an unconstitutional

statute attempted to legally adopt the child as their heir. It also appears that the child lived with the parents, and after his attempted adoption took their name and conducted himself as a dutiful son toward them until the death of the adoptive father; that from the time of the adoption the father regarded him as his son, spoke of him as such, and desired that he should inherit his estate. The majority opinion of the the court was written by Long, J., and directed a specific performance of the contract. Grant, J., concurred in the decision in a separate opinion. Hooker, J., dissented, placing his dissent on the proposition that no contract was proved in which the deceased had agreed to make plaintiff his heir, that the right of heirship depended on the legality of the adoption, and that, as the statute providing for the adoption was unconstitutional, the pretended adoption was a mere nullity, that the contract of indenture made no provision for the heirship of plaintiff and was the only contract that was proved, and that the subsequent oral promises of the foster-father to make plaintiff his heir were without consideration and constituted a mere *nudum pactum*. This dissenting opinion was concurred in by Montgomery, J. It will be noticed that in this decision there is nothing, even in the dissenting opinion, that makes against the conclusion reached in *Kofka v. Rosicky, supra*. In *Albring v. Ward, supra,* the only contract attempted to be proved was an abortive attempt on the part of the foster-parents to adopt a child under an unconstitutional statute of Michigan. Grant, J., rendered the opinion in the case and distinguished the facts from the facts commented upon in his concurring opinion in *Wright v. Wright, supra*. He did say, however, that, if it was understood by the profession from the language of Judge Long in *Wright v. Wright* that void articles of adoption can afford the basis of a contract of heirship, it should, in his judgment, be overruled. In other words, he simply holds that something more must be established than mere void articles of adoption to entitle a foster-child to recover as

an heir. The opinion in *Bowins v. English, supra,* was also written by Grant, J., and depended on the construction of a written contract made between the father of the claimant and her foster-parents. It was determined that by the terms of this contract the deceased never agreed to either adopt the child or to make her his heir. While the natural father of the child agreed that she might be adopted and have her name changed by the legislature, if the foster-parents so desired, there was no agreement on the part of the deceased that he would do so. And while the child lived with the foster-parents, her name was never changed nor was she ever adopted, although she was provided for by the will of the foster-mother, and was also provided for by gifts from the foster-father. Under these circumstances, the court held that there was no equity in her bill for specific performance of a contract that deceased had never entered into.

We are also cited by the defendants to the holding of the supreme court of the state of Missouri in *Davis v. Hendricks,* 99 Mo. 478, 12 S. W. 887, as tending to support the judgment of the trial court in the instant suit. In this case the facts were that the child was taken by the foster-parents under an agreement with the natural father that they would make her their heir. There was some written agreement to this effect that appears to have been entered into, but was not produced at the trial. The foster-parents subsequently completed the adoption of the child by act of the legislature of the state of Missouri, and had her name legally changed to that of the foster-parents. She was raised, educated, and cared for as a child of the foster-parents. She was also provided for, with other legatees, in the will of the foster-father. She brought her suit asking for a specific performance of the contract of adoption, by which she claimed she was entitled to inherit the entire estate of the deceased. The contest was between the claimant and the legatees of the will of the deceased, and the court, in disposing of the case, said:

"The strongest case made by the evidence for the

plaintiffs is that McCormick agreed to adopt the child and make her his heir. Such an agreement falls far short of the one alleged, namely, that he agreed to grant and devise to her all his property at his death. The proved agreement only places the adopted child in the position of a natural child."

We think this decision, in so far as it holds that the agreement proved gave the plaintiff the rights of heirship as a natural child, makes against rather than for the decision rendered by the learned trial judge in the case at bar. For if, under that decision, the deceased and his wife had died intestate, plaintiff, under her contract of adoption, would have taken the entire estate.

In this connection, our attention is called by plaintiff to a later decision of the supreme court of the state of Missouri in the case of *Healey v. Simpson,* 113 Mo. 340, 20 S. W. 881, in which the facts and circumstances surrounding the contract of adoption are very similar to those of the instant suit. In this later case the foster-parents entered into a contract with the parents of the child in the state of Ohio, by which they agreed to adopt the child, and in which it was further agreed, "that said Evangeline Brewster shall have and inherit from the estate of said parties of the second part in the same manner and to the same extent that a child born of their union would inherit." After entering into this contract, the foster-parents removed to the state of Missouri, took the child with them, gave her their name, and treated her in all respects as their own child. The child, after coming to maturity, married, and later, in 1883, died, leaving three children of the marriage surviving her. The foster-father procured a divorce from his wife and remarried, and died intestate in 1886, leaving his second wife surviving him. The children of Evangeline Brewster brought an action, in which they prayed for a decree establishing their rights under the contract of adoption entered into for the benefit of their mother, and declaring them to be the heirs at law, and as such entitled to the estate. The lower court

sustained a demurrer to plaintiff's evidence, which judgment, on review, was reversed in the supreme court in an opinion wherein it was said: "The instrument of writing in question cannot operate as an adoption, as it did not come up to legal requirements, but it can operate as a contract for adoption, which may, upon a proper showing, be specifically enforced in equity." The agreement in this case was the same in substance as that contained in the contract now alleged upon.

As against these authorities it is of no avail to suggest that, notwithstanding the existence of the contract sued upon, the deceased could have disposed of his property as he pleased during his lifetime, by deed, devise, or otherwise. It is true that he might have done so, and also true that he did not. The deceased plainly lived up to both the letter and spirit of the contract in every particular, and died in the belief that its conditions would be carried out as he desired they should be. And we think there is no reason in equity and conscience why a decree of specific performance of this contract should not be granted.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to enter a decree as prayed for in the petition.

AMES and EPPERSON, 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 enter a decree as prayed for in the petition.

REVERSED.

M. G. ROHRBOUGH ET AL., APPELLEES, V. DOUGLAS COUNTY, APPELLANT.

FILED MAY 17, 1906. No. 14,583.

1. **Taxation:** EXEMPTIONS. A commercial college, teaching such branches as arithmetic, reading, penmanship, spelling, bookkeeping, geography, history, etc., is a school within the meaning of section 13, art. I, ch. 77, Comp. St. 1905.

2. **School Property:** ASSESSMENT. In assessing property for taxation, which is used partly for school purposes and partly for purposes not exempt from taxation, the value of the part of the property used exclusively for school purposes should be deducted from the total value of the entire property.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JR., JUDGE. *Affirmed.*

W. W. Slabaugh, F. W. Fitch and *F. A. Shotwell,* for appellant.

Benjamin S. Baker, contra.

OLDHAM, C.

This was an appeal from the board of equalization of Douglas county in the matter of the assessment of certain property situated in Omaha, and used by the owners thereof mainly as a commercial college, known as the "Rohrbough Commercial College." The appeal was tried in the district court on the following stipulation of facts: "It is hereby stipulated by and between the parties in the above entitled action that lot 5, in block 115, in the city of Omaha, Nebraska, and the building thereon, is the property of M. G. and G. A. Rohrbough. It is further stipulated that all of said real estate is used exclusively for commercial college purposes, as shown by exhibit A of the petition, except the east room in the basement and the third story in said building, which said basement room and said third story are rented by the said Rohrboughs for

commercial purposes. It is further stipulated and agreed by and between the parties in the above entitled action that said basement room and the said third story constituted 17½ per cent. of the whole value of said real estate, and that the remaining 82½ per cent. in value of said real estate represented by the balance of the basement story, the first, second and fourth stories of said building are used by the plaintiffs exclusively for commercial college purposes, as shown by exhibit A of the petition. It is further stipulated by and between the parties that plaintiffs own the said property, and that it was used exclusively for commercial college purposes as shown by exhibit A of the petition to the extent of 82½ per cent. of its value at and prior to the time of the assessment made by said county, of which assessment the plaintiffs bring complaint. Assessor's valuation $14,000; assessed valuation $2,800." Exhibit A, referred to in the stipulation, is the course of study taught in the institution, consisting of such branches as arithmetic, penmanship, reading, grammar, history, bookkeeping, shorthand, typewriting, French, Spanish, and German language, etc. This exhibit also shows the tuition charged for instruction in the various branches of study. On this stipulation of facts the court found that at the time of the assessment all of the premises, except the east room in the basement and the third story of the building, was and is used exclusively for school purposes, and is exempt from taxation; that the value of the premises exclusively used for school purposes is 82½ per cent. of the whole of the lot in dispute; and that the school conducted in the premises produces an income from tuition fees and is conducted in part for private gain. On these findings the court reduced the amount of the assessment 82½ per cent., the agreed proportionate value used exclusively for school purposes. To reverse this judgment the county appeals to this court.

Section 2 of article 9 of the constitution of Nebraska empowers the legislature to exempt from taxation the property of the state, counties, and municipal corpora-

tions, both real and personal, and such other property as may be exclusively used for agricultural and horticultural societies, for schools, religious, cemetery, and charitable purposes. Under the authority so conferred, the legislature enacted section 13, art. I, ch. 77, Comp. St., which exempted from taxation—First, all property of the state, counties, and municipal corporations. Second, such other property as may be used exclusively for agricultural and horticultural societies, for schools, religious, cemetery, and other charitable purposes.

It will be noticed that neither the constitution, nor the statute passed in furtherance of its provisions, makes any reference to schools conducted for gain, or to public as distinguished from private schools. Consequently, cases cited in the brief of the county attorney from states whose constitutions or statutes contain this limitation on the exemption lend little assistance in determining the question at issue, and it seems to us unnecessary to go beyond the construction of our own statute by this court to determine whether or not a commercial college, teaching the branches enumerated in exhibit A of the petition, is a school within the meaning of the exemption. In *Omaha Medical College v. Rush,* 22 Neb. 449, it was said that "the word 'school' in section 2, art. I, ch. 77, Comp. St. means an institution of learning, and is not limited to the lower grades of schools." In this case it was determined that a medical college was a school within the meaning of the statute. In *Academy of the Sacred Heart v. Irey,* 51 Neb. 572, the entire property was used for educational purposes, and it was held to be all exempt from taxation. In *Scott v. Society of Russian Israelites,* 59 Neb. 572, it was determined that it was the use and not the ownership of the property that exempted it from taxation. In *Watson v. Cowles,* 61 Neb. 216, the property was used as a commercial college, and it was held that during the years in which it was exclusively used for commercial college purposes it was not subject to taxation. In these several decisions it has been determined that a medical college,

the Academy of the Sacred Heart, and a commercial college are all schools within the meaning of the exemption of our statute, and that where buildings and grounds are used exclusively for these purposes they are exempt from taxation.

The question not covered by these decisions is as to the right to a proportionate exemption in property used partly for exempt and partly for other purposes. This question was before this court in the case of *Young Men's Christian Ass'n v. Douglas County,* 60 Neb. 642. Here a part of the building was used for charitable, educational and religious purposes and a part for commercial purposes, and it was held that the part of the building used for commercial purposes was subject to taxation; and in reaching this conclusion, it was said: "We do not desire to be understood as holding that all of the property mentioned in the petition of appellant is subject to taxation, but only that part which was used for other than the purposes contemplated by the organization maintained by appellant."

We think these decisions fully support the judgment of the trial court, and we recommend that it 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.

GEORGE A. ADAMS, ADMINISTRATOR, ET AL., APPELLEES, V. SAMUEL J. DENNIS, SPECIAL ADMINISTRATOR, ET AL., APPELLANTS.

FILED MAY 17, 1906. No. 14,287.

1. **Trusts: JURISDICTION.** The district courts of this state have jurisdiction in cases involving the ownership of property held in trust, though in the possession of and claimed by the administrator of the estate of a deceased person.

2. **Deeds:** VALIDITY. "A deed to real estate, executed, acknowledged, and delivered by the grantor, is valid as between the parties thereto and those having knowledge of its existence, although the conveyance be not witnessed." *Pearson v. Davis*, 41 Neb. 608.

3. **Witness:** COMPETENCY. A husband is a competent witness in behalf of his wife in an action brought by her in equity to establish the ownership to property claimed by her and held in trust by the administrator of his mother's estate, he having no direct interest adverse to the administrator.

4. **Evidence** examined, and *held* to sustain the allegations of the plaintiff's petition by a preponderance of the evidence.

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

A. J. Sawyer, Claude S. Wilson and *L. C. Burr*, for appellants.

George A. Adams, Stewart & Munger and *John B. Raper, contra.*

EPPERSON, C.

This is an appeal from the district court for Pawnee county. The record discloses that in an early day one Mary A. Bentley and her husband located on a farm in that county, the title to the land being in the name of the said Mary A. Bentley. These parties had no children of their own, but in 1868 legally adopted a boy, then six weeks old, and gave him the name of William A. Bentley. The adopted son lived with his parents for more than 18 years. On the 9th day of September, 1900, he was married to the plaintiff in this case, Gertrude Bentley. Plaintiff claimed to be the owner of the land above mentioned through a conveyance from Mary A. Bentley and brought this action against the defendant Jun, and others, to have declared fraudulent as to her a conveyance of the land by Mary A. Bentley to Jun, and to have a note and mortgage taken in part payment of the land declared to be the property of the plaintiff, and also for a foreclosure of the mortgage.

On the day of the son's marriage to plaintiff, they visited the mother at her home in Lincoln. The evidence discloses that the mother was well pleased with the son's marriage to plaintiff, and that she was on friendly and intimate terms with them until they departed from Nebraska eight months later. About two weeks after their marriage the son again visited his mother. He testified that at this time she handed him a warranty deed to her farm in Pawnee county, naming plaintiff as grantee therein, and told him to give it to his wife, the plaintiff herein, as a wedding present, but not to record it until after the mother's death. The deed, at this time, was signed by Mary A. Bentley and acknowledged, but not witnessed. When the son examined the instrument, he observed that it was not attested and called his mother's attention to that fact, and thereupon she requested him to sign it as a witness. After witnessing the deed he took it to Omaha and gave it to his wife, who retained possession of it until the trial in the court below. The notary before whom the deed appears to have been acknowledged testified that he was acquainted with Mary A. Bentley, that he signed the acknowledgment, that Mrs. Bentley was in his office to transact some business, and to the best of his recollection it must have been the acknowledgment of this deed. Two disinterested witnesses corroborated the notary as to the acknowledgment of the deed by Mrs. Bentley. About a month after the marriage Mary A. Bentley visited her son and daughter-in-law in Omaha and remained in their home for about a week. While there she made statements to several witnesses to the effect that she had given the farm to Gertrude Bentley as a wedding present. Soon after the mother's visit to Omaha the plaintiff and her husband came to Lincoln and lived with her until April 9, 1901, when they moved to Oklahoma. When Bentley and his wife were thus living with his mother, she went to Pawnee City, and, while there, without the knowledge or consent of plaintiff, sold her farm to the defendant Jun, receiving $1,000 in cash and two notes,

one for $1,100 and the other for $3,000, the latter secured by a mortgage on the land. The son testified that, when his mother returned to Lincoln with the proceeds from the sale of the farm, she promised to and did turn over to his wife the notes, money and mortgage. His testimony is corroborated to some extent by other facts appearing in the record. Mary A. Bentley died May 28, 1901, and Dennis, the special administrator of her estate, appears as a party defendant herein. The district court found for the plaintiff, and decreed that she was the owner of the note and mortgage in controversy, and that the defendants had no right, title or interest therein. Since the decree was entered in the court below, plaintiff departed this life, and the action was revived in the name of her administrator, George A. Adams. Appellants advance several reasons for a reversal of the judgment

1. The first point argued is that the district court for Pawnee county was without jurisdiction to try and determine this cause. Mary A. Bentley's home at the time of her death was in Lancaster county; and at the time this suit was instituted proceedings for the administration of her estate were pending in the probate court of that county. It is argued by defendants that, as the county court has original jurisdiction of all matters of probate and the settlement of the estates of deceased persons, this matter was exclusively within the jurisdiction of that court. This is not an action upon debt, nor an obligation of the deceased, nor otherwise involving the settlement of the estate of Mary A. Bentley, but is an action to determine the ownership of securities and a trust fund, and to foreclose a mortgage of which plaintiff claims to be the equitable owner. The mere fact that the special administrator of Mary A. Bentley contends that her estate is the owner thereof does not bring the matter within the exclusive jurisdiction of the county court. The special administrator, made defendant herein, was in possession of the notes and mortgage in controversy, which it is claimed belonged to the plaintiff, and not to the deceased.

Plaintiff's cause of action would have existed against anyone in possession. In *Coleman v. McGrew*, 71 Neb. 801, the court had under consideration a question involving the disposition of trust funds in the hands of an administrator, which funds were claimed by a party to the suit and also by the administrator. OLDHAM, C., in the opinion says:

"If these funds are assets of the estate, and liable for the debts of the deceased, then plaintiffs could not maintain this cause of action, for want of a present interest in the funds; but, if these funds are held in trust by the executor for the plaintiffs, their interest is immediate and the capacity to sue clearly exists. * * * This (defendant's) objection is based upon the proposition that the county court has sole and exclusive jurisdiction of probate matters; but, if we are correct in the conclusion already reached, the question involved has no connection with the proceedings connected with the probate of the will of the deceased. It is simply an application by the *cestui que trust* to a court of equity for an order restraining the trustee from misappropriation of his trust funds, and the jurisdiction of a court of equity to grant this relief is grounded on the fundamental principles of equity jurisprudence."

We cannot present a better reason for overruling this contention of the defendants.

Another suggestion made by defendants on this point is that the district court for Pawnee county had no jurisdiction because, when this suit was instituted, there was pending in the county court of Lancaster county against the estate of Mary A. Bentley the petition and claim of the plaintiff herein, in which she alleged substantially the above facts and asked that the special administrator be required by the court to deliver to her the trust property. Such proceedings were admitted by the plaintiff, but it appears that the claim in the county court was withdrawn before the trial of this cause and that action dismissed without prejudice. Defendants in their brief refer to the

facts, but do not claim that the proceedings in the county court constituted a bar to this action; and we are of opinion that such proceedings did not deprive the district court of jurisdiction.

2. It is next urged that the deed from Mary A. Bentley to the plaintiff was void because not attested by a competent witness. As hereinbefore stated, the deed, when handed to Bentley, was not attested, but, on the suggestion of the grantor, he affixed his name thereto as a witness. The title of the defendant Jun under his subsequent deed is not assailed in this action, and it is unnecessary to discuss the competency of the grantee's husband to attest the execution of the deed. The rule that as between the parties a deed is valid although not witnessed has been followed in many decisions of this court. *Missouri Valley Land Co. v. Bushnell,* 11 Neb. 192; *Pearson v. Davis,* 41 Neb. 608; *Holmes v. Hull,* 50 Neb. 656; *Prout v. Burke,* 51 Neb. 24. We shall not digress for the benefit of the defendants in this case. Defendants cite *Child v. Baker,* 24 Neb. 188, which, however, is not in point. The deed there considered was acknowledged before a notary public who was the purchaser and the only attesting witness.

3. The testimony of the plaintiff's husband was necessary to enable the plaintiff to recover. Defendants contend that under section 329 of the code he was an incompetent witness, for the reason that the special administrator was an adverse party within the meaning of the law. Section 329 of the code provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness," etc. Plaintiff's husband was his foster-mother's sole heir, and, as such, possessed an interest contingent upon the probate of a will which had been offered, but not yet admitted to probate. Under the proposed will the plaintiff's husband would have a small interest as legatee —$25. This amounted practically to a disinheritance.

But, whether his interest be that of legatee or heir, it is not adverse to the special administrator. Such an interest would be furthered by the special administrator's success and dependent thereon. In *Parker v. Wells,* 68 Neb. 647, it is said: "A wife may testify in favor of her husband in relation to conversations and transactions * * * except where the result of the suit, if favorable to the husband, would invest her with some direct legal interest in the subject of the controversy." See also *Hagaman v. Estate of Powell, ante,* p. 514. The plaintiff's success in this action would vest in her certain personal property or money in which her husband would have no direct legal interest, and the evidence admitted, under the circumstances existing at the time of the trial, was competent, and the trial court properly so held.

4. It is earnestly contended by defendants that the evidence fails to establish the alleged gift of the notes and mortgage by Mary A. Bentley to the plaintiff. The testimony of the plaintiff and her husband is to the effect that the notes and mortgage were given to the plaintiff, who took charge of the same and deposited them in a safety deposit vault or drawer in a local bank. This depository was procured for the use of the plaintiff, her husband, and his mother. Each had a key to the same. There the papers remained until a short time before the plaintiff and her husband moved to Oklahoma, when they were taken by the plaintiff and given into the possession of Mary A. Bentley, with the understanding that she was to collect a payment which was expected soon to be made, and, when so paid, she was to bring it to Oklahoma and join the plaintiff and her husband. Defendant's evidence discloses that on April 13, 1901, the notes and mortgage were deposited by Mary A. Bentley with a friend from whom the special administrator obtained them after the death of the said Mary A. Bentley. No written indorsements or assignment of the notes and mortgage were made. Such conduct between strangers would be of great weight in support of the theory that no gift of the securities had

been made and no transfer of title effected, but such conduct is not unusual between members of the same family on friendly terms. If the gift of the land to the plaintiff was made as alleged we need not hold her to the same degree of proof as to the delivery of the notes and mortgage as otherwise we would be compelled to do. In such case she would be entitled to the securities as equitable owner in the absence of proof of an independent gift thereof to her by the donor.

Defendants further argue that there is inconsistency in the allegations of the petition that there was a gift of the farm, and, later, a gift of the notes and mortgage. We cannot see wherein there is inconsistency in these allegations. It is true that proof of one without proof of the other would be sufficient to entitle the plaintiff to recover, but both pertain to the same matter, and evidence of one would not disprove or discredit the other.

Defendants strongly contend that the evidence indicates that the plaintiff's deed was a forgery, and that the evidence is insufficient to prove a gift of the notes and mortgage. Had the plaintiff's case rested upon the testimony of the Bentleys there would be more reason for this contention. Even though we cannot find any inconsistency in their testimony and have no reason for discrediting their statements, still they testified concerning matters, many of which rest alone within their knowledge. The execution of plaintiff's deed, however, was acknowledged before a notary public, and if the plaintiff and her husband perpetrated a crime the notary was a party to it. This notary was a witness on the trial and related the transaction, not as it would probably be stated by a party to a crime, but as an ordinary honest business man would relate the facts of an every day occurrence. We would be convinced of the truthfulness of his testimony, even though it had not been corroborated, as it was, by two other disinterested witnesses. The deed having been acknowledged, delivery thereof was a natural sequence. Opposing the plaintiff's evidence on this point, we find

the testimony of many expert witnesses who testify that, in their opinion, the signature to the plaintiff's deed was not the handwriting of Mary A. Bentley. Their evidence is conflicting in many details and is opposed by the opinions of two experts called by the plaintiff. Such evidence is not very satisfactory, and we cannot accept the opinions of these experts as against the evidence of the notary, the witnesses corroborating him, and the other facts appearing in the record sustaining the allegations of the plaintiff's petition.

Upon the trial plaintiff called several witnesses who testified to statements made by Mary A. Bentley to the effect that she had given her land to the plaintiff as a wedding present. Such evidence it is claimed by the defendants, was hearsay and incompetent. This opinion is already of considerable length, and a full discussion of this question is unnecessary. Such evidence was proof of admissions by deceased against interest and was competent.

A careful review of the record convinces us that the conclusion of the trial court was right, and we recommend that its 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.

JOHN M. SENNETT, APPELLEE, V. JAMES M. MELVILLE ET AL., APPELLANTS.

FILED MAY 17, 1906. No. 14,309.

Contracts: EVIDENCE. To establish as a contract a proposition made by letter, proof of its acceptance is necessary.

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

J. S. Kirkpatrick and *G. E. Hager,* for appellants.

H. M. Sullivan, contra.

EPPERSON, C.

Plaintiff instituted this suit in the district court for Custer county to require the specific performance of an alleged contract for the sale to him of 80 acres of land. The contract relied upon was made by correspondence transmitted through the mail between defendant and plaintiff. The first letter admitted in evidence bears date March 13, 1902, was written to plaintiff's agent and had defendant Melville's name signed thereto. The body of the letter is as follows: "Your favor of Mch. 11th received, contents noted. Will send deed and abstract as soon as I can get abstract from Broken Bow, Nebr." There is no evidence as to the contents of the letter to Melville of date March 11, to which the above purports to be an answer. The initial letter of this correspondence was written by plaintiff to Melville, and is shown by secondary evidence to have contained a proposal to pay $500 for the land in controversy, a part in cash, and a part at some future time secured by mortgage. The proposition therein made was not accepted, nor did the plaintiff rely upon the same as the basis of this action. In answer to this first letter defendant refused the proposition therein made, and submitted another proposition or made some answer as to the nature of which no evidence was given. Following the letter quoted, we find the following letter by defendant to plaintiff's agent, F. D. Brown:

"Sterling, Neb., Mch. 25, 1902. F. D. Brown, cashier, Miller, Neb. Dear sir: I inclose you herewith deed and abstract for the N. half, S. W. ¼ sec. 22-13-18. * * * When Mr. Sennett pays you $500, plus exchange, kindly deliver these papers to him, and send me draft for $500 at Sterling, Neb. Yours very truly, J. H. Melville."

Secondary evidence was given showing that plaintiff

returned the abstract, with a letter calling defendant's attention to what he supposed was a cloud upon the title and requested him to procure a quitclaim deed from one Popple to cure the defect. On April 2, 1902, defendant wrote the following to plaintiff's agent:

"Sterling, Neb., Apr. 2, 1902. S. D. Brown, Esq. Miller, Neb. Dear sir: Replying to your favor of Mch. 31, I have given the matter to my attorney, who will have everything fixed up as soon as possible. Yours very truly, J. H. Melville."

August 29, 1902, defendant wrote again to the agent saying that Popple would not give a quitclaim deed, and contended that the same was unnecessary, concluding his letter as follows: "If Mr Sennett thinks the title not good you had better return the deed to me, but if he wants to take it as it is we will return you the abstract so the deal can be closed at once."

Defendant contends that the secondary evidence above referred to was erroneously admitted. We cannot see that it is prejudicial, and therefore refrain from discussing that question. Such evidence as to plaintiff's answer to the letter of March 25, 1902, was sufficient proof that the proposition therein contained was not then accepted. This was not prejudicial to him.

It is also contended that the letters above quoted or referred to were not sufficiently identified to permit their admission in evidence. The proof showed that defendant resided at Sterling when the correspondence began; that the letters admitted were received in answer to letters written to him by plaintiff's agent. The letters purport to have been written at Sterling, but the evidence does not show that they were posted in Sterling, nor that the letters they purport to answer were addressed to Sterling. There was no testimony given that the letters were in the handwriting of defendant, nor that he either wrote, dictated or authorized the same. The admission of such evidence was objected to by the defendant, and it may be questioned under the rule in *Gartrell v. Stafford*, 12 Neb. 545, whether

it was competent, but, even if considered as competent evidence, still there is a failure of proof. The proof fails to show that plaintiff ever accepted the proposition made in the letter of March 25, 1902, or in the letter of August 29, 1902. No tender of the purchase price was made, but the agent to whom the deed was forwarded retained it, even though the defendant several times demanded its return. Plaintiff did have a fund on deposit, subject to his check, in the First Bank of Miller, of which his agent Brown was cashier. The bank had agreed to loan him the amount needed to consummate the purchase of the land, but he never complied with the conditions necessary to entitle him to the possession of the deed, nor is there proof that he ever indicated his intention to purchase under the proposition made in defendant's letters.

In his petition plaintiff alleged that he accepted the proposition made in the letter of August 29. No evidence was offered in support of this allegation, which was denied by the answer. On account of the absence of evidence as to the contents of the letters written by plaintiff, these allegations of the petition and the judgment of the trial court are not supported by sufficient evidence to show the acceptance of defendant's offer to sell. It is a well-established rule that a proposition to sell real estate made by letter may be enforced, if accepted. Proof of the acceptance is as essential as proof of the proposition. *Melick v. Kelley,* 53 Neb. 509. And at any time before its acceptance, no time being fixed, the proposition may be withdrawn.

Plaintiff contends that by delivery of the deed to his agent Brown the title vested in plaintiff. This is somewhat inconsistent with the petition, wherein plaintiff prays for specific performance of the contract, which by this contention he claims has been fully performed. It is true that Brown was plaintiff's agent for the purpose of corresponding with the defendant, but the defendant, by entrusting to Brown the deed in controversy with the request that he deliver the same to the plaintiff upon the payment of the purchase price, thereby made Brown his agent for that

purpose, and Brown had no authority to deliver the deed to the plaintiff until the proposition was accepted and the purchase price in his hands with authority to pay the same to the defendant.

The judgment of the trial court in favor of the plaintiff is not supported by the evidence, and we recommend that it be reversed and the cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

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

REVERSED.

PULLMAN PALACE CAR COMPANY V. CLARKE P. WOODS.

FILED MAY 17, 1906. No. 14,236.

1. **Evidence of Value: HARMLESS ERROR.** Where both competent and incompetent evidence is received as to the value of property, the latter placing the valuation no higher than the former, and neither is contradicted, and the value as found by the jury is less than that warranted by the competent testimony, the admission of the incompetent evidence is harmless error.
2. **Harmless Error.** Where a litigant relies upon the common law of a sister state, he is not prejudiced by the rejection of evidence to prove such law, where the court embodies such law in an instruction to the jury as a part of the law of the case.
3. **Evidence** examined, and *held* sufficient to sustain the verdict.

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

F. T. Ransom and *Robert Ryan,* for plaintiff in error.

S. B. Pound, contra.

ALBERT, C.

The plaintiff brought this action against the Pullman Palace Car Company to recover for the loss of certain

jewelry and money, which she alleges were stolen from her person while asleep in a berth on one of the defendant's cars in which she was traveling as a passenger in the state of Pennsylvania. She alleges that the loss was due to the negligent omission of the defendant to take due precautions to protect the property of its passengers from theft. The loss of the property and the amount of damages, if any loss occurred, are put in issue by the answer, which also contains the following allegations: "Defendant further alleges that the contract between the plaintiff and the defendant, whereby defendant was to furnish the plaintiff with a berth and accommodations in the car mentioned in the petition, was made in the state of Pennsylvania, and is to be construed according to the laws of that state, and the rights, duties and liabilities of the parties to each other under such contract are to be governed and determined by the laws of the state of Pennsylvania, and that under the laws of the state of Pennsylvania the defendant's liability to the plaintiff for the alleged loss of her jewelry depends upon whether the defendant used due care and caution to guard against said property of plaintiff being stolen or lost while she occupied the said berth, and defendant alleges that it used due care and caution, and therefore is not liable to plaintiff in this action." The jury found for the plaintiff and awarded $507.15 damages. The defendant brings error.

The principal question now presented is whether the verdict is sustained by sufficient evidence; the defendant contending that the evidence is wholly insufficient to sustain the finding that the jewelry and money were stolen from the plaintiff as alleged in her petition. The testimony of the plaintiff as to the alleged loss is to the effect that she and her husband were passengers on one of the defendant's cars on the night of the alleged loss, and occupied the same berth. Among other articles of personal adornment she carried with her two solitaire diamond rings, the stone in one weighing $1\frac{3}{4}$ carats, in the other 1 carat; a turquoise ring, with a circle of diamonds; a ring

set with an emerald, surrounded by a circle consisting of ten small diamonds, and a ring containing three large opals. Before retiring she placed the five rings and a $5 bill in a small bag at the end of a long strip of chamois skin, which was wound around it and securely tied, and pinned the bag to the inside of her undervest, next to her person, by means of two belt pins about 2½ inches in length. The undervest was low-cut, and the chamois-skin bag was pinned near the top of the vest. Over this vest she wore a nightgown, which was also low-cut in front like the undervest. She retired about 10 o'clock. Her husband retired about midnight. He was ill and feverish, and after he had been in the berth about an hour wanted some water, and rang the bell repeatedly for the porter, but could get no response. The conductor, who was produced as a witness on behalf of the defendant, testified that all the bells were in good working order, and, if rung, would have been heard by himself or the porter, if in the car. The plaintiff further testified that as her husband was unable to raise the conductor or porter by ringing the bell, she got up, went to the end of the car, procured water for him there, and returned with it to the berth. She also testified, that, upon leaving the berth, she looked up and down the aisle, that there was no person in sight, and that she saw no one in the aisle or in the car, either coming or going. When she had returned with the water, and again retired, the chamois-skin bag with the jewelry was still on her person, and the curtains of the berth were fastened. Her husband testified that when he retired, which was about midnight, there was none of the employees of the company in sight. He got up in the morning sometime before his wife, but did not touch the curtains at the head of the berth. The wife testified that when she got up, shortly afterwards, the curtains at the head of the bed were unbuttoned, and that the chamois-skin bag containing the rings and money had been removed from her person. She immediately reported her loss to the defendant's employees, but the property was never

recovered. That the plaintiff had the property in her possession when she retired, that she had secured it in the manner stated by her in her testimony, that it was still on her person after procuring the water for her husband, that afterwards, and before she arose in the morning, it was removed from her person and was never recovered, are facts which stand uncontradicted by any direct evidence. Taking into account the way the property was carried and secured, that it was designedly removed by some human agency, and not lost by mere accident, is, to say the least, a reasonable inference.

But the defendant contends that the plaintiff's story of the loss is so improbable as to be unworthy of credit. It is true the plaintiff had secured her property in such a way as to render its removal without her knowledge extremely difficult, and that the thief attempting it would take great risk of being detected in the act. But we are not prepared to say that her story is so inherently improbable as to warrant this court in holding, as a matter of law, that it should be utterly disregarded. She had slept none when her husband retired about midnight. Owing to his illness she was awake for some time afterwards. The evidence shows that she was accustomed to travel and to sleeping in sleeping cars. Hence we should expect that when she did get to sleep on the night in question she slept soundly. She was a married woman, sleeping by the side of her husband. Consequently it is not surprising that the slight touch necessary to remove the property from her person failed to arouse her from her sleep. Besides, instances are not wanting of larceny from the person of property as safely secured and guarded as was this. In *Pullman Palace Car Co. v. Hunter,* 107 Ky. 519, 47 L. R. A. 286, the plaintiff's claim that three rings were stolen from her finger while she slept was credited. In *Lewis v. New York Sleeping Car Co.,* 143 Mass. 267, money sewed up in the pocket of a vest, which had been rolled up and placed under the sleeper's head, was stolen by cutting a slit in the vest and drawing out the purse, leaving the vest in its place. In

Pullman Palace Car Co. v. Martin, 95 Ga. 314, 29 L. R. A. 498, jewelry was stolen from a satchel which had been placed on the inside of the berth, while the owner slept on the outside. In the light of everyday experience, it would be rash to attempt to set a limit upon the dexterity of the professional thief. Counsel urge upon our attention the risk a thief would incur in attempting to extract the bag of jewelry from where the plaintiff in this case had placed it, but, as their opponents justly observe, if thefts were confined merely to cases where no risk is involved larceny would be a thing of the past. It is true there are some circumstances shown in evidence that might be held to discredit to some extent the testimony of the plaintiff and her husband. But both of them testified in open court. The jury had an opportunity to observe their conduct and demeanor on the stand, their apparent candor and fairness or the lack of these qualities, and in many ways were in a far better position than we to judge of the weight to be given to their account of the occurrence. With these advantages for weighing the evidence, they found the plaintiff's account of her loss to be true, and we do not think their finding in that regard should be disturbed.

It is also contended that the evidence is insufficient to sustain a finding that plaintiff's loss was occasioned by any negligent act on the part of the defendant. The measure of defendant's duty to the plaintiff as one of its passengers is to be found in the instruction hereinafter set out which stands as the law of this case. Tested by that instruction we think the evidence is sufficient to sustain a finding of negligence on the part of the defendant. In the first place, if the defendant had exercised the degree of care required by that instruction it is hardly possible that the loss could have occurred. In the next place, the evidence of the plaintiff's husband is to the effect that none of the employees of the defendant was in sight when he went to his berth at midnight. The evidence of both the plaintiff and her husband is that he repeatedly rang the bell, but obtained no response. According to the conductor's testi-

mony, if the porter or himself had been in the car at the time they would have heard the bell. This would indicate that the conductor and porter were absent from the car when the bell was rung. The testimony of the plaintiff further shows that, when she got up from the berth about 1 o'clock in the night to get water for her husband, she saw no one. Taking into account the testimony which we have just recounted, we think the jury were warranted in drawing the inference that the defendant failed to maintain a careful and continual watch over the interior of the cars while the berths were occupied by sleepers. To that extent, under the instruction referred to, it failed of its duty and was negligent, and the inference that plaintiff's loss was occasioned by such negligence is by no means unreasonable.

Complaint is made that a considerable amount of the testimony adduced on behalf of the plaintiff as to the value of the stolen property was incompetent. We are disposed to think there is some foundation for this complaint. But along with the incompetent evidence upon this point is a considerable amount that is competent, and which does not appear to have been contradicted. The incompetent evidence, if anything, places a little lower valuation on the property than the competent, and both place it higher than found by the jury. That being true, had all the incompetent evidence been excluded, the uncontradicted evidence would still have entitled the plaintiff to a verdict for a larger amount than the jury awarded. We are able therefore to see no way in which the defendant was prejudiced by the reception of the incompetent evidence.

The defendant offered in evidence a case decided by the supreme court of Pennsylvania, entitled *Pullman Car Co. v. Gardner,* 3 Penny. (Pa.) 78, and now complains that its offer was rejected. This evidence was offered in support of those allegations of the answer in regard to the laws of Pennsylvania, and as showing the degree of care required by sleeping car companies for the safety of their passengers

in that state. It was offered upon the theory that, as the loss occurred in the state of Pennsylvania, the law of that state, rather than of this, would govern as to the defendant's liability. In the case offered in evidence the court, among other things, said: Conceding that the company is not liable in this action as an inn-keeper or common carrier, yet a reasonable and proper degree of care is imposed on the company. Whether it did exercise that degree of care under the circumstances was for the jury. The main object of taking passage in such a car is to permit the passenger to sleep. While in that helpless condition, a duty rests on the company to provide reasonable care and precaution against the valuables of a passenger being stolen from his bed or from the clothes on his person. This is not the case of a robbery by force and violence, but by stealthy larceny. Unless a watchman be kept constantly in view of the center aisle of the car, larceny from a sleeping passenger may be committed without the thief being detected in the act."

But in the case at bar the court instructed the jury as to the degree of care which the defendant owed to the plaintiff as one of its passengers, as follows: "It is the duty of a sleeping car company to use reasonable care to guard the baggage and personal effects which passengers have taken with them and retained in their custody in defendant's sleeping cars, and if, through a failure of defendant company to use such care, the baggage or property of such passenger is stolen, without any fault or negligence upon such passenger's part, then the company is liable therefor; and you are instructed that such reasonable care involves the duty on the part of the defendant company to maintain a careful and continual watch by a competent and efficient person for the safety of the baggage or property of its passengers while they are asleep in its cars at night." No complaint is made of this instruction by either party, and we must therefore accept it as the law of this case, and are not required to express any opinion as to its accuracy. A comparison of this instruction with

the rule announced in the Pennsylvania case shows, we think, that quite as high a degree of care is exacted in that state as by the instruction which stands as the law of this case, and that what the defendant sought to prove by this evidence was given to the jury as a matter of law by the court. It is quite clear therefore that the defendant was not prejudiced by the exclusion of the evidence, and equally clear, we think, that, in view of the theory upon which the cause was submitted, the evidence was properly excluded.

The defendant also complains of the refusal of the court to give certain instructions tendered by it. The ground covered by the instructions tendered is adequately covered by the instructions given by the court on its own motion; consequently, the refusal to give those tendered was not error.

We find nothing in the record that would warrant a reversal of the judgment in this case, and we therefore recommend that it be affirmed.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

JAMES E. BARNEY V. GEORGE B. LASBURY ET AL.

FILED MAY 17, 1906. No. 14,262.

Sale of Realty: CONTRACT. Where a contract for the sale of real estate between the owner thereof and a broker employed to sell the same is void because not in writing, as required by section 74, ch. 73, Comp. St. 1905, the broker cannot recover on a *quantum meruit* for services rendered in accordance with such contract, nor for the value of his time expended in that behalf. *Blair v. Austin*, 71 Neb. 401, distinguished.

ERROR to the district court for Sarpy county: ALEXANDER C. TROUP, JUDGE. *Reversed.*

O. C. Redick, for plaintiff in error.

John F. Stout and *W. R. Patrick, contra.*

ALBERT, C.

This is an action on a *quantum meruit* to recover for time expended by the plaintiffs in procuring a purchaser for certain lands belonging to the defendant. After the allegations that the plaintiffs are engaged in the business of buying and selling lands and conductors of a general real estate business, and that the defendant is the owner of certain real estate in Sarpy county, the petition contains the following: "(3) That said defendant employed these plaintiffs to find and secure for her a purchaser for said land at a price fixed by said defendant. That said plaintiffs expended considerable time in finding a buyer for said land and on or about the 8th day of September, 1904, secured for said defendant a purchaser for said land at the price named and agreed by said defendant and these plaintiffs; and said defendant entered into an agreement with said purchaser to sell to him the said land at the price named, and said purchaser paid to said defendant a part of said purchase price. That said purchaser was able, ready and willing to pay the balance of said purchase money upon the delivery to him of a deed conveying the title to said real estate as promised and agreed by said defendant, but, notwithstanding the fact that said purchaser so found and secured by these plaintiffs was ready, able and willing to carry out his part of the contract to and pay to said defendant the agreed price for said land, said defendant has refused to carry out her part of the contract to convey to said purchaser the title to said above described real estate. (4) Said plaintiffs say that the time expended by them in securing for said defendant a purchaser for her said land, and in aiding and assisting the closing up of said deal was and is reasonably worth the sum of $350. That said defendant has refused and now refuses to pay

said plaintiffs for said time so expended by them in securing for her a purchaser for said land and there is now due said plaintiffs from said defendant the sum of $350." A demurrer to the petition was interposed, which was overruled by the court, whereupon the defendant answered, denying that she ever employed the plaintiff to find a purchaser for the land. The jury returned a verdict for the plaintiff, and judgment went accordingly. The defendant prosecutes error.

We are satisfied that the demurrer should have been sustained. The alleged agreement was oral. Section 74, ch. 73, Comp. St. 1905, is as follows: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." The foregoing section has been before this court several times, and the uniform holding has been that there can be no recovery by a real estate agent or broker on a verbal contract for the sale of real estate. *Allen v. Hall,* 64 Neb. 256; *Spence v. Apley,* 4 Neb. (Unof.) 358; *Baker v. Gillan,* 68 Neb. 368; *Covey v. Henry,* 71 Neb. 118; *Danielson v. Goebel,* 71 Neb. 300. In *Blair v. Austin,* 71 Neb. 401, and *Rodenbrock v. Gress,* 74 Neb. 409, a recovery in each case was sought on a *quantum meruit* for services rendered by a broker to the owner of real estate in procuring a purchaser therefor, and the rule applicable thereto is thus stated in the head-note: "Services as a real estate broker, rendered for the owner of the land without a written contract, cannot be recovered for as such upon a *quantum meruit.*" The present action, however, is grounded on the following, taken from the body of the opinion in the *Blair* case:

"In this case it does not seem possible that plaintiffs can have any recovery of commissions for making a sale. If they have incurred expenses in the transaction at

defendant's request, and which have redounded to his benefit, they could doubtless recover for it as money laid out and expended for his benefit and at his request. If they have shown an absolute loss of time which could and would have been valuably employed, except for its use at defendant's request upon his employment, they could probably recover for that as time devoted to defendant's profit at his request, but for services as a broker in selling land, reckoned in percentage as commission, a written contract seems to be necessary under this statute."

The plaintiffs contend that, while the rule embodied in the head-note to that case would prevent a recovery for the reasonable value of their services as real estate brokers, the language taken from the body of the opinion authorizes a recovery for time expended for the defendant in their efforts to bring about a sale. In other words, that, while the express contract between themselves and the defendant is void under the statute, she is liable on an implied undertaking to pay them the reasonable value of the time they expended in her behalf in their efforts to find a purchaser for the land. This contention, we think, cannot be sustained. The object of the statute in question is well known, and is thus set forth in *Covey v. Henry, supra:*

"The reasons which impelled the legislature to pass that act are well known to the courts and the profession generally. Innumerable suits were being instituted, from time to time by agents and brokers, after the owners of land had sold the same, claiming a commission, on the ground that they had been instrumental in securing the purchaser; and, in many cases, owners of land were compelled to pay double commission on account of such claims. In order to prevent such disputes and protect property owners under just such cases as the one we are now considering, the legislature passed the act."

The fact that the statute requires the compensation to be set forth in the written contract is significant, and shows that the legislature had no intention of allowing a recovery on an implied contract. Nor do the plaintiffs escape the

statute by seeking to recover for the reasonable value of the time expended instead of the reasonable value of their services as real estate brokers. The value of their time, of necessity, would be measured by the value of the services that could be rendered within that time by an ordinary person engaged in the same business. Hence, in whatever language the cause of action may be couched, for all practical purposes it is an action for compensation for services rendered as real estate brokers, and comes within the rule announced in the head-note to *Blair v. Ausin, supra.*

This conclusion in nowise conflicts with the quotation hereinbefore taken from the body of the opinion in that case. What is there meant is not that there could be a recovery for the loss of time expended in attempting to carry out the verbal contract by the broker, but that there might be a recovery for the time or money expended in accordance with specific directions of the owner of the land, as, for example, where the owner of the land specifically requests the broker to procure an abstract, advertise the land for sale, show it to a prospective purchaser, or the like. There is no doubt a recovery could be had for the time and money expended in carrying out such specific directions. But to hold that there could be a recovery for the time expended by the broker, generally, in attempting to bring about a sale of real estate in pursuance of a verbal contract between himself and the owner, would be to open the door to the very abuses the statute was enacted to prevent, and defeat its manifest purpose. Besides, in this case it is not claimed that the plaintiffs ever made any contract with the defendant in person. Their claim is that they were employed by a relative of the defendant, who appears to have had charge of the land, collecting the rents and so forth, and who was authorized to procure a purchaser and negotiate for a sale thereof on behalf of the defendant. His authority in the premises was in writing in the form of letters which he received from the defendant, and which the plaintiffs themselves introduced in evidence.

There is nothing in the entire correspondence which could be construed into authority to this person to employ sub-agents to procure a purchaser for the land. On the contrary, in one letter the defendant expressly states that she wants nothing to do with real estate agents. This phase of the case is slighted in the brief, and a reference to it is made here only because of the recommendation which we intend to make. The petition fails to state a cause of action. The evidence wholly fails to show that the plaintiffs were ever employed by the defendant, or by any one authorized to act for her in the premises.

For these reasons, it is recommended that the judgment of the district court be reversed and the cause remanded.

DUFFIE and JACKSON, CC., concur.

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

REVERSED.

JOSEPH HAUBER v. WILLIAM LEIBOLD.

FILED MAY 17, 1906. No. 14,352.

1. **Instructions.** A party is entitled to have the jury instructed with reference to his theory of the case, when such theory is presented and supported by competent evidence

2. **Contracts: COMPETENCY.** In order to make a valid contract the minds of the parties must meet; and if one mind is so weak, unsound or diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to make a valid contract, whether such state of his mind be the result of sickness, accident or voluntary intoxication. *Johnson v. Harmon*, 94 U. S. 371.

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

W. F. Moran and *A. P. Moran,* for plaintiff in error.

John C. Watson and *L. F. Jackson, contra.*

ALBERT, C.

This action was brought to recover damages for breach of an alleged contract not to engage in business as a baker or confectioner in Nebraska City. The petition upon which the cause was tried alleges, in substance, that the plaintiff and defendant for a number of years had been associated together as partners under the firm name of Hauber & Leibold, and engaged in the bakery and confectionery business in that city, owning the stock in trade, fixtures and certain real estate; that on or about the 5th day of October, 1901, they entered into a contract in writing, whereby the defendant, for and in consideration of the sum of $5,000 to be paid to him by the plaintiff, agreed to sell and convey his entire undivided interest in the firm and firm property, including the good-will belonging to the said business, to the plaintiff, and as a further consideration for the $5,000 undertook and agreed that he would not, at any time, either as owner or employee, "set up, exercise or carry on the said trade or business of baker or confectioner within the said city of Nebraska City, or engage in opposition to the trade or business hereafter to be carried on by William Leibold, nor do anything to the prejudice thereof, so long as the said William Leibold is engaged in the bakery business for himself," and that for any violation of the stipulation against engaging in said business the defendant by the terms of said contract undertook to pay the sum of $2,000 as liquidated damages. The petition also charges certain acts on the part of the defendant constituting a breach of said stipulation and consequent damage to the plaintiff.

The trial court in its charge to the jury, after stating the material allegations of the petition, instructed the jury with reference to the subsequent pleadings, giving the

substance thereof, as follows: "Instruction No. 1. Paragraph 2. "To this petition the defendant answers, in substance, by first denying each and every allegation contained in said petition. Defendant, further answering, says that the pretended agreement set out in plaintiff's petition was not the real dissolution agreement between him and the plaintiff, but that the contract set out in plaintiff's petition was made and executed several days after the real dissolution took place, and the $5,000 mentioned in said agreement was the agreed consideration for the actual property transferred by the defendant to the plaintiff, and no part thereof was received by this defendant in consideration of his not engaging in the bakery business, nor did he in the original dissolution agreement ever agree or promise not to reengage in said bakery business.

Defendant, further answering, says that, in order to cheat, wrong and defraud this defendant, the plaintiff wrongfully destroyed or secreted the original agreement of dissolution, and several days thereafter, and while this defendant was so intoxicated as not to be able to comprehend the nature of the business he was transacting, and through and by force of reason, threats and duress practiced upon this defendant, this defendant was forced to and did sign the alleged agreement set out in plaintiff's petition, and that there was no consideration whatever received by this defendant or paid by the plaintiff for the contract or agreement set out in plaintiff's petition. Defendant, further answering, says that the plaintiff's business has not in any manner been injured by reason of his engaging in the bakery business, and that the plaintiff has not been in any manner damaged thereby, and defendant prays that he may be dismissed from this action and recover his costs herein expended.

"Paragraph 3. To this answer the plaintiff has filed a general denial for reply."

Evidence was adduced on the part of the defendant tending to establish both affirmative defenses, namely: (1) That the contract in suit was made after the parties had

entered into a contract in writing in substantially the same terms, save that the original contract contained no stipulation against the defendant engaging in said business, and that there was no consideration for the second contract containing such provision; and (2) that at the time the contract in suit was made the defendant, owing to intoxication, lacked capacity to make a binding contract.

The following taken from the charge to the jury shows the theory upon which the trial court submitted the case:

"Instruction No. 3. The burden of proof is on the plaintiff in this case, and before he can recover he must prove by a preponderance of the evidence the following propositions: (1) That the alleged contract set up in his petition was signed at or about the time therein mentioned. (2) That a part of the $5,000 given by plaintiff to the defendant was in consideration of defendant not again engaging in the bakery business in Nebraska City while the plaintiff was engaged in that business. (3) That defendant has engaged in the bakery business again in competition with plaintiff. (4) That plaintiff has been damaged in his business by reason of defendant engaging in the bakery business. (5) The amount of damages that plaintiff has sustained, if any.

"Instruction No. 4. If you believe the plaintiff has established each and all of the issues mentioned in the preceding instruction by a preponderance of the evidence, then before the defendant can avoid a judgment against him he must show by a preponderance of the evidence that said contract was signed by the defendant at a time when he was so intoxicated that he did not have sufficient mental ability to understand the nature of the contract he was entering into."

The defendant tendered, but the court refused to give, the following instruction: "You are instructed that one of the issues in this case is the consideration of the contract sued on in this case. You are instructed in this connection that if you find from the evidence that $5,000 was the purchase price of defendant's interest in the partnership

property, and that such sale was actual, agreed on and reduced to writing, and that said contract contained no inhibition against the defendant engaging in business in Nebraska City, Nebraska, and that there was no further consideration for the contract sued on in this case, and in case you so find from the evidence, you will return a verdict for the defendant." There was a verdict for the plaintiff and judgment went accordingly. The defendant brings error.

It is now contended that the court erred in refusing to give the instruction hereinbefore set out tendered by the defendant. We are of the opinion that this contention is well founded. The instruction tendered covers one theory of the defense, namely, that the contract in suit was made after the parties had already bound themselves by a valid contract in writing, and in substantially the same terms, save the stipulation against engaging in the same business in Nebraska City, and without any new or additional consideration for such stipulation. If this theory be established, and as before stated there is evidence tending to support it, the stipulation is without consideration and the defendant is not bound by it. It is well settled that a party to an action is entitled to have the jury instructed with reference to his theory of the case, when such theory is presented and supported by competent evidence. *Boice v. Palmer,* 55 Neb. 389, and authorities cited. It is the duty of the trial court to instruct the jury as to the issues. *Sanford v. Craig,* 52 Neb. 483; *Kyd v. Cook,* 56 Neb. 71, 71 Am. St. Rep. 661, and cases cited. The instructions hereinbefore set out are the only ones whereby the court undertook to state the issues and cover the theories of the respective parties, and it does not seem that they cover the defendant's theory of a want of consideration for the stipulation in question. We do not overlook the second paragraph of instruction No. 3, requiring the plaintiff to show by a preponderance of the evidence "that a part of the $5,000 given by plaintiff to defendant was in consideration of defendant not again engaging in the bakery business,"

but that, in our opinion, does not cover the ground. In the first place, it is not clear whether it refers to the contract in suit, or to what the defendant claims was the original and only valid contract between himself and the plaintiff. But in either case, the language could easily be construed by the jury as a license to interpret the contract, to place their own construction upon it, or to look beyond the writing and determine from facts and circumstances *aliunde* whether the defendant was bound to refrain from engaging in business in competition with the plaintiff. But, however this language of the court may have been construed by the jury, or for whatever purpose it was used by the court, it cannot be said to be a clear presentation of the defendant's theory of a want of consideration, and the instruction tendered covering that theory should have been given.

Complaint is made that the instruction as to the degree of drunkenness the defendant was required to prove to establish the defense of intoxication is too favorable to the plaintiff. We are inclined to think there is some ground for this complaint. The word "idiotic" used in this instruction is very elastic. According to Webster an idiot is a natural fool, or fool from his birth; a human being in form, but destitute of reason or the ordinary intellectual powers of man; a foolish person; one unwise. Bouvier says that idiocy is that condition of mind in which the reflective, or all, or a part, of the affected powers are either wanting or are manifested to the least possible extent. In *Owings' Case,* 1 Bland (Md.), 370, 17 Am. Dec. 311, it is defined as that condition in which a human creature has never had from birth any, or the least glimmering of reason, and is utterly destitute of all intellectual faculties in which man in general is so eminently and peculiarly distinguished. In *Clark v. Robinson,* 88 Ill. 498, the court, citing 1 Blackstone, Commentaries (Chitty's ed), *302, *304, said: "An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to obtain any. * * * A man

is not an idiot if he have any glimmering of reason, so that he can tell his parents, his age, or the like common matters." In *Bicknell v. Spear,* 77 N. Y. Supp. 920, the court defined an idiot as one having no power of mind whatever. Taking into account the connection in which the word idiotic is used in the instruction, and the various definitions thereof by eminent authorities, there is danger that the jury construed the instruction as imposing a greater burden upon the defendant than is warranted.

The courts are not quite in accord as to the degree of drunkenness that will incapacitate a person to bind himself by contract. The authorities are reviewed at some length in *Wright v. Walker,* 127 Ala. 557, 54 L. R. A. 440, the latter being copiously annotated. Of the numerous cases there cited *Johnson v. Harmon,* 94 U. S. 371, 24 L. ed. 271, states the rule which best commends itself to our judgment. It is as follows:

"Both minds must meet in such a transaction; and if one is so weak, unsound, and diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness, or from accident, or from debauchery, or from habitual and protracted intemperance."

Measured by the foregoing rule the instruction in question is too favorable to the party seeking to enforce the contract. Whether the defendant is in a position to avail himself of the defense of intoxication as an independent defense is not raised, and for that reason is not considered.

For the reasons hereinbefore pointed out, 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.

VAN DORN IRON WORKS COMPANY, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED MAY 17, 1906. No. 14,609.

Contracts: VALIDITY. An appropriation by the legislature of $80,000 for "240 steel cells and sewerage" for the penitentiary does not necessarily require that sewerage must be put in all cells contracted for, but leaves a discretion in the board of public lands and buildings so that a contract to construct the 240 cells will not be held void because it provides that six of such cells may be without sewerage.

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

Norris Brown, Attorney General, and *W. T. Thompson,* for appellant.

O. B. Polk, contra.

ALBERT, C.

The petition filed by the plaintiff below (the appellee) is based on the following state of facts: By an act making appropriations for the current expenses of the state for the years ending March 31, 1904, and March 31, 1905, approved April 11, 1903, there were included certain items for the penitentiary, among which are the following: "For 240 steel cells and sewerage $80,000." Laws 1903, ch. 160, p. 718. In pursuance of this appropriation, the board of public lands and buildings decided to construct 156 cells in the state penitentiary, and, after due notice to bidders, awarded the contract for the construction of such cells

to the plaintiff. The cells were constructed and accepted by the board of public lands and buildings, but the auditor rejected the claim for final payment under the contracts on the ground that the appropriation called for 240 cells, while the contract had been awarded for but 156. Thereupon the board decided to construct the remaining 84 cells, and, after due notice to bidders, awarded the contract therefor to the plaintiff, who undertook to construct the 84 cells for $9,982. It appears from the argument that his bid was placed at that figure because that was all that remained of the appropriation, and he felt compelled to make some sacrifice in order to obtain payment of the balance due on his original contract. The 156 cells were placed in two tiers of 78 cells each. Of the 84 cells contemplated by the contract, 78 were to constitute a third tier. The remaining six were not really required and no precise location was provided for them. They were designated as "female and juvenile cells."

The second contract contains the following provision: "Each of the cells in the third story to have one standard improved cast iron enameled flush rim prison closet placed underneath the nitch in utility corridor and connected with heavy cast iron enamel trap. The trap is to be connected with a section of 4 inch soil pipe stack extending from the floor to the ceiling of the cell, all connections to be made with sanitary tees, all traps to be vented from the crown with 2 inch vents." The foregoing provision, it will be observed, relates to the third story, that is, the third tier of cells, and does not include the six "female and juvenile cells." With respect to the latter, the contract contains this provision: "The six additional cells for juveniles or females will be of the same size as the other cells and constructed in the same manner, except with the entire fronts to be grating, the doors to be swung on 6 inch steel hinges and locked with four tumbler spring lock attached to swing bar, which will cover the entire front door and lock with spring lock." The contract also contains this provision: "The contractor will give his

personal superintendence to the work or have a representative to receive instructions, shall furnish all materials and labor, including heating, transportation, scaffolding, apparatus and utensils necessary to complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the architect shall be the sole interpreter, and his ruling shall be final and binding upon the parties to the contract."

The plaintiff constructed the 84 cells, which were approved by the state architect, as shown by the following communication addressed by him to the board of public lands and buildings: "Lincoln, Neb., Dec. 17, 1904. To the Hon. Board of Public Lands and Buildings. Gentlemen: I have examined the third tier of steel cells also the six juvenile cells at the state penitentiary and find the material and labor in accordance to the plans and specifications. Under head of 'Note Particulars' (see specifications) the plumbing is noted to apply to the third tier only. Yours respectfully, Jas. Tyler, Jr., State Architect."

In addition to the foregoing facts, the petition also contains the following allegations: "(7) That the plaintiff herein constructed said cells (the 84 cells) in conformity with the specifications of said state architect in all things. That plaintiff did not place any plumbing in the six juvenile or female cells contained in said specifications nor did plaintiff connect said cells with the sewerage system, but it was not contemplated by the parties to said contract that plumbing should be placed in such cells. (8) That after the completion of said contract as herein alleged, to wit, on the 17th day of December, 1904, the said state architect, James Tyler, Jr., who by said contract was made the sole judge of said work, duly approved the same, a copy of said approval is hereto attached marked exhibit 'D' and made a part hereof. (9) That the state of Nebraska, on said last named contract, has paid the sum of $6,654, leaving a balance due on said contract of $3,328. (10) That on or about the —— day of February, 1905, the plaintiff herein filed with the secretary of state its claim

in triplicate vouchers as required by said secretary of state, and the same was submitted to the auditor of public accounts for the allowance thereof and for a warrant of said sum of $3,328. (11) That upon the 4th day of September, 1905, the board of public lands and buildings approved said voucher, and ordered the auditor of public accounts to draw his warrant for said sum of $3,328 in payment of said claim. (12) That on the 26th day of September, 1905, the said auditor of public accounts refused to draw a warrant for said claim, and indorsed his reasons for said refusal upon said voucher as follows: 'Warrant not drawn for reason it appears that work was not completed within the terms of the appropriation.' "

A general demurrer to the petition was interposed and overruled. The state elected to stand on its demurrer, and judgment went accordingly. The state appeals.

The contention of the state is thus epitomized in its brief filed in this court: "The auditor of public accounts cannot be compelled to issue to a contractor a warrant to pay a claim for a public improvement constructed in a manner at variance with the statute making the appropriation against which claimant's voucher is drawn. * * * The appropriation was made for steel cells and sewerage. These two matters were not left to the discretion of the officers. If the board had authority or discretion in other matters, this power did not extend to the sewerage settled by the legislative enactment." This contention is based on the fact that the six "female or juvenile" cells were not connected with the sewerage system, which fact affirmatively appears from the seventh paragraph of the petition included in the quotation therefrom, *supra*. Running through the entire argument is the assumption that the legislative language, "For 240 steel cells and sewerage," should be interpreted as though it read "For 240 steel cells, and sewerage for each of such cells." We know of no good reason for placing that interpretation on the language of the appropriation. On the contrary we think it is fair to presume that the legislature intended to allow

the board of public lands and buildings a reasonable discretion in the expenditure of the fund, and not to bind it down by unnecessary and vexatious details. The general terms in which the appropriation was made justifies this presumption, and the facts disclosed by the record show the wisdom of avoiding unnecessary details. The six cells were not actually needed, and may not be needed for some time. No location was provided for them. To hold that the board of public lands and buildings was bound to provide sewerage that was not required in order to get cells and sewerage that were required would impute a lack of foresight and sound judgment to the legislature, which is by no means warranted by the language employed in making the appropriation. So far as the contract itself is concerned, we have set out that portion which relates to sewerage and the six cells in question. Standing alone it might admit of some doubt whether it contemplates that the six cells shall be connected with a system of sewerage. But the agents of the state who executed the contract on its behalf, and the state architect who, by the terms of the contract, is made the final arbiter as to the interpretation to be placed on the plans and specifications, held that sewerage for such cells was not contemplated by the contract. Since the contract admits of that construction, we feel bound by it in view of all the circumstances.

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.

CITY OF SOUTH OMAHA V. OMAHA BRIDGE & TERMINAL RAILWAY COMPANY.

FILED MAY 17, 1906. No. 14,064.

Eminent Domain. Under the provisions of the charter of South Omaha in force in 1901, that city was entitled to at least nominal damages in an action by a railway corporation to condemn a right of way over portions of its streets and alleys.

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

W. C. Lambert, for plaintiff in error.

William Baird & Sons, contra.

JACKSON, C.

The defendant, a railway corporation, being unable to agree with the city council of the plaintiff as to terms and conditions upon which it might construct its roadbed across certain streets and through an alley in the city, proceeded under the provisions of section 83, ch. 16, Comp. St. 1901, to condemn a right of way. This section provides: "If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation, or public officer or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms, and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same

terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter." The real estate of private persons is acquired for right of way purposes by condemnation in this state in a proceeding before the judge of the county court, who appoints a jury to assess damages sustained by landowners. Upon the application of the defendant a jury was appointed, who viewed the premises and awarded damages to the plaintiff to the amount of $3. The city appealed to the district court, where issues were joined and the trial resulted in a directed verdict for the defendant. The city prosecutes error.

The plaintiff claims substantial damages, while the defendant insists that the judgment of the trial court should be affirmed, on the theory that the city could not sustain damages by reason of the location of its right of way across streets and alleys. The authorities are quite uniform that the appropriation of a street by a railway company for the purpose of laying its track is not a perversion from its original purpose, so long as it does not interfere with the use of the street or alley by the public as a highway. This rule, however, is not to be taken as authority for a railway corporation to appropriate streets and alleys for the purpose of laying its tracks. The right to authorize such appropriation is vested in the legislature, and legislative authority is necessary to warrant such use and occupation. *Atchison Street R. Co. v. Missouri P. R. Co.*, 31 Kan. 660, 6 Am. & Eng. Ency. Law (1st ed.), 534. The power to authorize such use may be delegated to municipal authority, and, as will be seen by the provisions of the statute quoted, has been expressly delegated in this state. The statute contemplates that a railroad seeking to occupy a street or alley for right of way purposes, should first apply to the proper municipal officers and if possible agree upon the terms and conditions upon which the streets may be occupied, and if they are unable to agree the company may proceed by condemnation, in the same manner and upon the same terms as is provided for the

appropriation of the property of individuals. The property of individuals may not be taken by a railway corporation without compensation for the impairment of property rights.

The contention of the defendant is necessarily based upon the conclusion that the plaintiff has no property right in its streets and alleys, and therefore is not entitled to compensation; that a municipality holds the title to streets and alleys in trust for the purpose for which they were dedicated, and such was the holding of this court in *Jaynes v. Omaha Street R. Co.*, 53 Neb. 631. Our holding in that case was in accord with the great weight of authority, but we do not regard it as conclusive of the question here involved, because, notwithstanding that rule, it is competent for the legislature to fix, by the charter of a city, the status of its streets and alleys. Section 104, art. I, ch. 14, Comp. St. 1905, provides the method of platting cities and villages. By section 106 of that chapter it is provided that the acknowledgment and recording of the plat is equivalent to a deed in fee simple of such portions of the premises platted as are in such plat set apart for streets and other public use. In *Lindsay v. City of Omaha*, 30 Neb. 512, it was held, under the provisions of the charter of that city, that upon the vacation of any street the title to the portion so vacated remained in the city, and might be sold and conveyed and the proceeds of the sale converted into the city treasury. One of the provisions of the charter of South Omaha, in force at the time the condemnation proceedings were instituted, was: "That no street or part thereof shall be ordered vacated by the mayor and council except upon the following conditions, to wit: First, that the value of the ground so vacated shall be first determined by the valuation of three disinterested freeholders, who shall be appointed by the mayor and confirmed by a majority vote of all the members elected to the council and they, after being duly sworn to perform the duties of their appointment with fidelity and impartiality, shall value the property so to be vacated by taking into consideration the

fair market value of the lot or lots abutting on that part of the street to be vacated. Second, the owner or owners of the lot or lots abutting such portion of the street to be vacated shall, before the order of vacation is passed, pay into the city treasury the amount so determined by said appraisers, as the value of said property, and thereupon the mayor of said city shall be authorized to make a deed to the purchaser for that portion of the street so vacated." That the legislature might vest this right in a municipality of the state is without question. The plaintiff's right, under its charter, to vacate its streets, and upon such vacation to receive payment for any portion of the street vacated, was a valuable right and was involved in the condemnation proceedings. We are convinced, therefore, in view of the provisions of the charter of the plaintiff, that it was entitled to at least nominal damages, and that the judgment of the district court, withdrawing from the jury all question of damages, was erroneous.

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

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY v. JOHN H. SLATTERY.

FILED MAY 17, 1906. No. 14,325.

1. **Carriers: CARE OF STOCK.** The provisions of sections 4386 and 4387, Revised Statutes of the United States, do not relieve a railway company engaged in conveying animals from one state to another from liability for damages arising through the failure to properly

care for, feed and water animals in their charge, the transportation of which is delayed through an act of God.

2. ———: LIABILITY. A common carrier of live stock is generally an insurer of their safe delivery to the consignee against loss or damage.

3. ———: EVIDENCE. The delivery of animals to a carrier in good order and their arrival at the place of destination in bad order makes a *prima facie* case against the carrier, and it devolves upon the carrier to show that the loss or damage resulted from some cause which would exempt it from liability.

4. ———: DUTIES. A cause for unavoidable delay in shipment affords no excuse for a failure to exercise that degree of care required of a common carrier in the transportation of stock.

5. Shipping Contract. A common carrier is not relieved from its responsibility to care for animals entrusted to it for transportation by reason of the express terms of a written contract, whereby the shipper agreed to accompany the stock, where the company, with knowledge of the failure on the part of the shipper to accompany the stock, proceeds under the shipping contract.

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

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

Ashton & Mayer, contra.

JACKSON, C.

The plaintiff charges in his petition that on May 29, 1903, he delivered to the defendant 20 horses to be conveyed from South Omaha, Nebraska, to East St. Louis, Illinois; that the horses were not delivered to him at the destination until June 3, 1903, but were delayed in course of shipment almost four days longer than the time regularly required for transportation between those points; that they were not properly handled and cared for during any part of the time within which they were under the care of the defendant, and were for a period of over 56 hours without food and water, and exposed continuously to the sun and rain,

and when they were delivered they were sick, gaunt and bruised, as a result of the ill treatment complained of, and that from the effects of such treatment two of the horses died, and that the plaintiff sustained damages. The defendant admits the shipment, and avers it was by virtue of a written contract entered into at the time the shipment was agreed upon; that the stock was shipped and delivered to the consignee at the destination named, without any failure or neglect on its part; that, as a part of the consideration, the plaintiff agreed to accompany the same in order to look after and care for the comfort and necessities of the stock while *en route,* and that he would give the stock proper and reasonable attention while in transit for the purpose of feeding and unloading, when necessary; that, in violation of the contract, the plaintiff did not accompany the shipment, although free transportation was provided and he was furnished with every facility for so doing. As a further defense, it was answered that, by reason of an unprecedented flood that was then prevailing along its line of road, it was unable to transport the stock by the usual route of travel, but was obliged to divert the shipment to another route, and that there was no unnecessary delay or neglect of duty on the part of the defendant; that if the stock sustained any injury by reason of improper attention it was due to the neglect of the plaintiff, who failed to accompany the shipment. In reply, the plaintiff denied that the horses were injured through any fault or negligence on his part, and alleged that the consignment was accepted and forwarded by the defendant with knowledge on its part that no one would accompany the stock. The plaintiff had judgment in the trial court, and the defendant seeks a reversal.

The testimony on behalf of the plaintiff tends to prove that on the 28th day of May, 1903, he came into the city of South Omaha over the Union Pacific Railroad, with this car-load of horses, and that they were there delivered to the Union Stock Yards Company. He applied to the live stock agent of the defendant company to have the horses shipped

out over the defendant's line to East St. Louis, and informed the defendant's agent that he was going out that evening on the passenger train to St. Louis; that he signed a contract in blank, and also a shipping order to the Union Stock Yards Company, and thereupon left for St. Louis; that the horses were delivered to him in St. Louis on the afternoon of June 3 in a gaunt and damaged condition, some of them suffering from pneumonia, from the effects of which one died in two or three days, and another some weeks thereafter; that on the route covered by the shipment there were facilities for unloading and feeding stock at Creston, Iowa, St. Joseph, Missouri, and other points. On behalf of the defendant the evidence discloses a condition arising from an unusual storm and flood, sufficient, without question, to excuse the delay; that the shipment arrived at Monroe, Missouri, on the morning of June 1, where the horses were unloaded, fed, watered and cared for until the next day at 9 o'clock P. M., when they were reloaded and forwarded to St. Louis. The contract set out in the company's answer was put in evidence and contains this condition: "In consideration for free transportation for one person, designated by the first party (plaintiff), hereby given by said railway company, such person to accompany the stock, it is agreed that the said cars, and the said animals contained therein, are and shall be in the sole charge of such person, for the purpose of attention to and care of said animals, and that the said railway company shall not be responsible for such attention and care. * * * It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge." The evidence also discloses that the shipping contract was delivered to the conductor in charge of the train at the city of South Omaha, and when he discovered that no person was aboard in charge of the stock he returned the contract to the company's agent, who forwarded it by mail, addressed to the plaintiff at East St. Louis, Illinois, where it was received by him. There is no evidence as to whether the

stock was at any time unloaded, fed and watered, between the time it left South Omaha on May 29 and the time it was unloaded at Monroe, Missouri.

On behalf of the railroad company it is claimed that the transaction was an interstate shipment and governed by federal statute. Section 4386 of the Revised Statutes of the United States provides: "No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine or other animals are conveyed from one state to another, * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes." By section 4387 it is provided: "Animals so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company * * * transporting the same at the expense of the owner or person in custody thereof; and such company, owners, or masters shall in such case have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals." The statute also provides a penalty for the violation of these provisions. We do not understand how the defendant is aided by the provisions of the federal statute. It is true that the obligation in the first instance rests upon the owner or his agent in charge, but it attaches with equal force to the public carrier in case of default by the owner. Nor is the carrier released from its responsibility by reason of the express terms of the written contract, whereby the shipper agreed to accompany the stock, but failed to do so. Where the company, with knowledge of such failure, proceeded under the shipping contract, it would still be liable for any loss resulting from its failure to provide the stock with proper care and protection. *Chicago, B. & Q. R. Co. v. Williams,* 61 Neb. 609. The case does not fall within the rule of *Chicago, St.*

P., M. & O. R. Co. v. Schuldt, 66 Neb. 43, where not only was there an agreement that the shipper should accompany the stock and be responsible for its care, but he was provided with transportation for that purpose and personally accompanied the shipment, and it was held that the carrier was only required to provide proper facilities, and, when doing so, was not liable for injury arising from lack of care through the fault of the shipper himself.

Again, liability on the part of the company is denied because of the failure of the plaintiff to prove that the railroad company did not stop the shipment for feed and rest at such places as were possible; that if he claims damages on account of the failure to perform that duty the burden was upon him to show that the company failed to perform it. A carrier of live stock is an insurer of the safety of the property while in its charge for transportation. *Kinnick Bros. v. Chicago, R. I. & P. R. Co.,* 69 Ia. 665. There are, of course, exceptions to this rule,, but the delivery of live stock to a carrier in good order, and their arrival at the place of destination in bad order, makes a *prima facie* case against the carrier, and it devolves upon the carrier to show that the loss or damage resulted from some cause which would exempt it from liability. *Wabash R. Co. v. Sharp, ante,* p. 424.

But it is said that the damage was the direct result of an act of God. This conclusion, however, is not justified by the evidence. The evidence in that respect, as already stated, was sufficient to show a just cause for delay, but there is an entire absence of evidence to show that the flood in any manner interfered with the unloading of the stock, providing it with food and water, and giving it such care as would insure its delivery at the destination in good condition. A cause for unavoidable delay in shipment affords no excuse for a failure to exercise that degree of care required of a common carrier in the transportation of stock. *Kinnick Bros. v. Chicago, R. I. & P. R. Co., supra.*

The assignments of error are all covered by the general discussion of the case and will not be noticed separately.

There is no prejudicial error in the record, and we recommend that the judgment be affirmed.

ALBERT, C., concurs.

DUFFIE, C., not sitting.

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

AFFIRMED.

MAY SWIHART ET AL. V. H. C. HANSEN.

FILED MAY 17, 1906. No. 14,335.

1. **Possession** of real estate is some evidence of title, but evidence of possession is not sufficient of itself to establish a freehold estate.
2. **Intoxicating Liquors: LICENSE: EVIDENCE.** In a hearing upon a remonstrance against granting a license for the sale of liquor, a witness who testifies that the petitioners told him they were freeholders, and that he examined a list of freeholders of a village prepared by the county clerk, does not thereby qualify himself to testify who the freeholders of the village are.

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

Kirkpatrick & Hazen, for plaintiffs in error.

F. Dolezal, contra.

JACKSON, C.

The defendant in error applied to the village board of Kennard, Nebraska, for a license to sell liquor at retail. The plaintiffs are remonstrators who objected to the granting of the license. The remonstrance was overruled, and the remonstrators appealed to the district court, where the findings of the village board were approved and the license issued. From the judgment of the district court the remonstrators prosecute error.

Several questions are discussed, both in the briefs and

upon oral argument, only one of which we deem it important to notice. One of the grounds of remonstrance was that the persons who signed the petition for license were not freeholders. The only evidence on that branch of the case is found in the testimony of the applicant. In substance it is that one of the petitioners exhibited a deed to the property that he was in possession of; that all the petitioners informed him they were freeholders; that he procured from the county clerk a list of the freeholders in the village so that he knew who the freeholders were; and his testimony, based upon that information, was to the effect that all of the signers were freeholders. There is evidence that some of the persons signing the petition were in the possession of real estate in the village. The list provided by the county clerk, from which the applicant testified, was not exhibited at the hearing or put in evidence. The admission of this evidence was met with an objection, and attacked by motion to strike it out, after the testimony of the applicant was closed, and is now assailed for the reason that it is entirely incompetent to establish the qualifications of those signing the petition.

The statute requires the petition in such cases to be signed by resident freeholders, and where the qualifications of the signers to a petition for the sale of liquor are put in issue by a remonstrance, the burden is upon the applicant to show by competent evidence that the petitioners do possess the qualifications required. A hearing upon an application for a liquor license, from the nature of things, is somewhat informal, but this condition does not obviate the necessity of competent proof. The testimony of the applicant, based upon the list provided by the county clerk and statements made to him by petitioners, was hearsay and incompetent. Evidence of the possession of real estate is some evidence of title, but of the lowest degree. It falls short of being sufficient to establish a freehold estate. In our judgment the objection of the plaintiffs in error is well taken, and the judgment of the district court is erroneous.

It is recommended that the judgment of the district court be reversed and the cause remanded, with instructions to reverse the findings of the village board.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to reverse the findings of the village board.

REVERSED.

CHARLES HARGADINE, APPELLANT, V. OMAHA BRIDGE & TERMINAL RAILWAY COMPANY, APPELLEE.

FILED MAY 17, 1906. No. 14,546.

1. **Second Appeal: LAW OF CASE.** The determination of questions presented to this court in its review of the proceedings of an inferior tribunal become the law of the case, and ordinarily will not be reexamined in a subsequent review of the proceedings of the inferior tribunal on a second trial or hearing of the cause. *Omaha Life Ass'n v. Kettenbach*, 55 Neb. 330.
2. **Directing Verdict.** The evidence examined, and *held* to justify the trial court in directing a verdict for the defendant.

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

Nelson C. Pratt, for appellant.

W. C. Kenyon, William Baird & Sons and *J. M. Dickinson, contra.*

JACKSON, C.

The defendant is a railway corporation owning terminals and facilities used by the Illinois Central Railroad Company in entering the city of Omaha. It entered into a contract with Gilbert H. Scribner, Jr., of Chicago, Illinois,

for the erection of a trestle across Cut-Off lake, according to plans and specifications agreed upon between the defendant and the Illinois Central Railroad Company. The work had been sub-let by Scribner to Edward W. Raymond, who employed and paid the workmen, provided the tools, and was engaged in the work of construction. The plaintiff, a bridge carpenter, was in the employ of Raymond. He was at work adjusting heavy timbers on top of the trestle, 30 feet above water. This service was performed by means of a steel bar, wedge shaped at one end. In moving one of the timbers the bar slipped, plaintiff lost his balance, and fell to the water below. In the course of the descent he struck against a heavy plank, and sustained an injury. The action is for damages, and is founded upon an allegation that the plaintiff was in the employ of the defendant; that the accident occurred by reason of a defect in the bar, on account of which it slipped; that he complained to the defendant and objected to using the bar, but was requested to continue in its use until a new bar could be procured to replace it. There is in evidence no dispute about the fact that Scribner was under contract to construct the trestle; that the work was sublet to Raymond, by whom the plaintiff was employed and paid; that the tool used by him was owned by Raymond, and was provided for his use on the morning of the day when the accident occurred by Raymond's foreman. In the trial court, at the close of the evidence, a verdict was directed for the defendant, and the plaintiff appeals. He seeks to hold the defendant liable by an application of the doctrine of *respondeat superior*.

One clause of the contract between the defendant and Scribner provided that the work should be executed in strict conformity to the specifications and plans, and such explanatory instructions as might from time to time be given by the chief engineer of the defendant. A civil engineer in the employ of the defendant was in daily attendance at the work for the purpose of inspection, his only authority being to see that the work was constructed

according to the plans and specifications stipulated in the contract. During a portion of the time a like engineer in the employ of the Illinois Central Railroad Company was present and inspected the work as it progressed. There is some evidence that on two or three occasions one of these engineers gave specific instructions to the workmen. It is not clear whether these directions came from the engineer in the employ of the defendant or the one employed by the Illinois Central Railroad Company, and it is perhaps not important, because the evidence fails to disclose any interference on the part of the engineers, or anything done by them, except along the line of instructions required and permitted by the terms of the contract itself. The engineer in the employ of the defendant, however, testified that at no time did he give the workmen any instructions, and that such suggestions as he made were either to the contractor, the superintendent or foreman in charge of the work, both of whom were in the employ of Raymond.

This is the second time the case has been before us for consideration. Our former opinion is reported in 5 Neb. (Unof.) 418, where we reversed a judgment in favor of the plaintiff. The contract in question is sufficiently set out in that opinion. Our holding there was that the plaintiff was in the employ of an independent contractor; that the relation of master and servant did not exist between the plaintiff and defendant, and under the terms of the contract the defendant had no authority or control over the contractor or his workmen as to the manner of performing the work; that it had power to direct as to results only, and that the fact that the company reserved the right to inspect the work and see that it conformed to the contract in result did not make the contractor the agent of the defendant to the extent that it rendered the defendant liable for a neglect of duty growing out of the contract of employment between the contractor and his employees, and that no obligation rested upon the defendant to provide tools, safe or otherwise, to the workmen. These questions are

involved in the present record. They were fully discussed and determined in our former opinion, and our holdings there have become the law of the case.

We are asked to review and overrule the conclusions reached at the former hearing, and in addition it is urged that the pleadings have been amended so as to present an entirely different issue, and that the evidence is different from that taken at the former trial. If the issues have been changed, that fact does not appear in the record, and the evidence taken at the former trial is not before us. The evidence of the contractor is that he had a superintendent overseeing the work, and a foreman in charge of the workmen; that no one else had authority to employ or discharge the men, or direct their labor. This evidence is undisputed.

A careful examination of the evidence and a review of the authorities have convinced us that the rule announced in the former opinion should be adhered to; that no course was open to the trial court except the one pursued, and we recommend that the judgment be affirmed.

ALBERT, C., concurs.

DUFFIE, C., took no part in the decision.

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

AFFIRMED.

STATE OF NEBRASKA V. GEORGE W. MCCRIGHT ET AL.; CHARLES S. MCDONALD, INTERVENER.*

FILED JUNE 8, 1906. Nos. 14,210, 14,211, 14,212, 14,213, 14,214, 14,215, 14,216, 14,217.

1. **Indemnity School Lands: RIGHTS OF OCCUPANTS.** By the act of 1875, entitled "An act authorizing parties living on school lands selected in lieu of sections 16 and 36 to purchase the same when the state acquires title" (Comp. St. 1897, ch. 80, art. IV, sec. 4),

* Rehearing denied. See opinion, p. 738, *post.*

persons who complied with the act had a preference right of purchase or lease of land known as indemnity school land, and had title to the improvements made by them thereon.

2. ———: ———. Occupants of indemnity school lands who had complied with the act of 1875 before the repeal thereof were entitled to have the land appraised separately from the improvements, and to be given an opportunity to lease the land upon such appraisement before being ejected therefrom.

3. ———: ESTOPPEL. The fact that the occupant of indemnity school land has attempted to make entry thereof under the homestead laws of the United States, and has, in good faith, contested the right of the state to the same as indemnity school lands, will not estop him to assert his right under the act of 1875 relating to the improvements of actual settlers upon lands so obtained by the state.

ORIGINAL action by the state in the nature of ejectment. *Dismissed.*

Norris Brown, Attorney General, and *W. T. Thompson,* for the state.

Flickinger Brothers and *H. F. Rose,* for intervener.

M. F. Harrington, Sanford Parker and *W. T. Wills, contra.*

SEDGWICK, C. J.

These eight cases were by agreement consolidated and presented together. They involve the right of possession of lands within the abandoned Fort Randall military reservation. The defendants do not claim the title to the lands themselves. In *State v. Tanner,* 73 Neb. 104, which also involved lands within the abandoned reservation, the defendants asserted title in the lands, but that claim was denied. In these cases the right of the defendants to possession of the land is asserted on the ground that they have made valuable improvements thereon, and that the state cannot oust them from the lands without first having their improvements appraised. The origin of the state's title

and rights in the land, as a part of the school lands, is set out at large in the opinion in *State v. Tanner, supra.* The state officials refused to appraise the lands separately from the improvements which these defendants had made thereon; the defendants refused to lease them without such appraisement, and the lands were leased to other persons who have intervened herein and demand possession of the lands under their leases.

In 1893 these defendants settled upon the lands in controversy and began improving them. By the act of July 5, 1884 (23 St. at Large, p.103, ch. 214), congress provided for the surveying, appraisement and sale of the lands constituting the reservation. The act contained no express provisions subjecting these lands to homestead or preemption entry. By the act of August 23, 1894 (28 St. at Large, p. 491, ch. 314), congress provided that all lands of abandoned military reservations placed under the control of the secretary of the interior which had not already been disposed of, and the disposal of which had not been provided for by a subsequent act of congress, should be open for settlement under the public land laws, and the act gave a preference right of entry for six months from the date of the act to *bona fide* settlers who were qualified to enter under the homestead law, had made homes and were residing upon any agricultural lands in said reservation. The state by the enabling act was granted sections 16 and 36 in each township in the state as school lands. Some of these lands so granted, the state for various reasons was unable to obtain. Congress by the act of 1893 (27 St. at Large, p. 555, ch. 200) provided that the state might select lands in this abandoned reservation in lieu of the lands to which it was entitled and which it had failed to receive under the enabling act. In making selection of indemnity lands the state officers, apparently not knowing that the lands in controversy here were occupied by settlers, selected these tracts of land among others. Afterwards, when these settlers applied to the land department of the government to enter these lands under the homestead act pursuant to

the provisions of the act of congress of 1894 above referred to, there was no doubt that they came within the terms of that act, and would have been entitled to so enter the lands, but for the fact that the disposal of these lands had been provided for by the act of congress which allowed the state to take the lands as indemnity lands as above mentioned. It seems to have been a mere chance that the state selected these lands instead of others in the abandoned reservation. But for the unfortunate fact that these lands were selected by the state when others might as well have been selected, the defendants would have been recognizd by the land department of the government, and would have been allowed to take these lands under the homestead law; and so it seems manifest that, although when they went upon the lands they did so without any assurance from the general government that they would or could acquire title to the lands, still the government did not regard them as wrongdoers, but on the other hand enacted legislation which would have protected them and would have given them the lands which they had occupied and improved, but for the accident that the state mistakenly selected these lands instead of other lands equally available which it might have selected. The state seems to have anticipated that such conditions might exist. As early as 1875 the legislature enacted: "Any person or persons who shall have resided continuously for a term of five years on lands selected in lieu of sections sixteen and thirty-six for common school purposes, shall, unless the state acquires title thereto, have the privilege of purchasing the same, on the same terms as other school lands are purchased from the state: *Provided,* That such land shall be appraised under direction of the county commissioners, at not less than seven dollars per acre: *Provided further,* That such appraisal shall not include any improvements placed on said lands by the person so purchasing the same." Laws 1875, p. 123. This law was in force when these defendants went upon the lands in question, and made the most of their improvements thereon, and also when they made their

application to the general government to enter the lands under the homestead law and were denied the right to so enter them because of the fact that the land had been disposed of by the general government by allowing the state to take the land as indemnity school lands. If this statute had remained in force until this action was begun there could be no doubt of the rights of these defendants. Under this statute it would clearly have been the duty of the state to have appraised all of the improvements that the defendants had placed upon these lands separately from the lands themselves before attempting to lease the lands to these defendants or to any other person. No such appraisement was made by the state, and without such appraisement the leases were made under which these interveners claim. The statute in question was repealed by the act of 1899 (laws 1899, ch. 69), and the question is as to the effect of this repeal upon the rights of these defendants. The act of 1897 (laws 1897, ch. 71) repealed prior acts governing the entry and leasing of school lands, and provided general laws governing the educational lands of the state. By section 5 of said act provision is made "for paying for movable improvements" to the person owning the same, and giving to any person having made such movable improvements the option for six months of removing them from the land or accepting the appraised value thereof. Although these provisions are expressed in general terms, and might in the absence of any other legislation upon the subject be construed to apply to the case at bar, yet in view of the act of 1875 above referred to, which was continued in force and must be construed with the new act, this section cannot be applied to these defendants. From the time that this act of 1875 was enacted until its repeal in 1899 the laws governing the educational lands of the state were repeatedly changed, amended, repealed and reenacted. But the legislature at each session recognized this act of 1875. It constitutes a special provision governing the rights of settlers upon government lands that afterwards may become a part

of the school lands of the state by their selection as indemnity lands "in lieu of sections 16 and 36 for common school purposes," and must, of course, govern any general provisions of the statute enacted with it. Section 17 of the act of 1899 provides for the forfeiture of leases for the nonpayment of rent, and contains the only reference in the act to improvements on the school lands in the following words: "Persons owning movable improvements on lands reverting to the state may remove the same within six months after such land is released and all improvements not so removed shall inure to the benefit of the new lessee." This section, of course, could not apply to these defendants. Section 4 provides for the appraisement of school lands and its language is so general as to include the lands in question. Nothing is said in this section in regard to improvements upon the lands. Under the law as it existed at the time this section was adopted, the improvements upon these lands belonged to the settlers thereon who had placed them there; and we think that, rather than to conclude that the legislature intended to confiscate these improvements, the section should be construed to require the state's rights and interest in the land to be appraised, which would not include the improvements made by *bona fide* settlers upon lands that had been selected by the state as "indemnity school lands," which improvements, by the act of 1875, would belong to such settlers. The lands then should have been appraised separately from the improvements, and these settlers should have been given the opportunity to lease the lands upon such appraisement. Without such appraisement and opportunity to the settlers, the state would not be entitled to the possession of the land, and could not make a valid lease thereof to other persons, and this action therefore cannot be maintained. The fact that further legislation may be necessary to enable these settlers to purchase the lands upon such appraisement, or otherwise avail themselves of the value of their improvements, does

not relieve the state officials of the duty to cause the lands to be appraised separately from the improvements as above indicated, and to allow these settlers to lease the lands upon such appraisement.

2. These defendants at first resisted the claims of the state upon the ground that the law had not been complied with by the state, and that for other reasons the state was not entitled to these lands as indemnity school lands. Upon that theory the defendants applied to the land department, as before stated, to enter these lands under the homestead act, but this contention was decided against them both by the general land office and by this court in *State v. Tanner, supra.* It is now insisted that, by making this contention, the defendants have estopped themselves to claim that they are entitled to the improvements which they had made upon the land under the statutes of this state regulating the entry and leasing of school lands, but we do not see any merit in this objection. It does not appear that the right of the state to the lands themselves, as against these defendants, was so clear and free from all doubt as to justify a charge of bad faith against the defendants in attempting to homestead the lands; and, when it was decided that they were not entitled to the land, no good reason appears why they should not be allowed, after it had been established that these lands are a part of the school lands of the state, and came within the provisions of the act of 1875, to ask the state to comply with the provisions of that act.

We conclude that neither the state nor the interveners were entitled to the possession of these lands when this action was begun. The action therefore is dismissed at the cost of the state.

DISMISSED.

The following opinion on motion for new trial and motion for rehearing was filed May 10, 1907. *Motions overruled:*

BY THE COURT.

In 1903 the state claimed that the lands known as the "Boyd County School Lands" belonged to the state, and that the settlers on the various tracts of land that have been in controversy since were trespassers thereon. It then had the lands involved in this suit appraised for leasing under the statute then in force, and these defendants, who were settlers on the land and had been occupying and improving the land for ten years prior to that time, challenged the title of the state and claimed that they had the right to the lands under the homestead laws of the United States. A suit was begun then against several defendants, situated similarly with the defendants in this case, and upon trial in this court it was determined in March, 1905, that the state owned the lands, and that the settlers must surrender the lands to the state. *State v. Tanner,* 73 Neb. 104. The lands of these defendants, as before stated, were appraised in 1903, and these defendants then refused to lease them from the state because they were making claim to the lands, and did not desire to waive those claims and acknowledge that the lands belonged to the state. Therefore the state at once leased the lands to intervener McDonald and other parties, and the other parties have assigned their leases to McDonald, and he claims under a lease executed in 1903 when the right in the land itself was in controversy. After it had been decided as before stated, in *State v. Tanner, supra,* that the state was entitled to the lands, which decision was in March, 1905, the state began this action in April of that year against these defendants. No new appraisement of the land was made, the state insisting and this intervener insisting, that the appraisement made two years before and the lease made to this intervener and his assignors under that appraisement were valid and binding. These defendants from the time of the appraisement two years before to the time of commencement of this action had been occupying the lands

and making improvements thereon, believing that they were the owners of the land; but when that claim was decided adversely in *State v. Tanner, supra,* and after this action was begun, the defendants conceded that they were not the owners of the land, and made application to the state to have the land appraised. They made this demand as settlers upon the land, claiming that they had then been settlers upon the land for twelve years and making improvements thereon. Under this application some proceedings were had before the county board, but the matter appears to have been referred to the state board, and it adopted a resolution to take no action thereon because the matter was pending in the supreme court. It will be seen that the statement in the opinion that the state refused to appraise the land separately from the improvements is inaccurate because it is not limited. The state, when it demanded the land, had the land appraised separately from the improvements, but after its claim of ownership of the lands was settled in its favor no opportunity was given these defendants to lease the lands. In the former opinion herein it was said:

"When it was decided that they (these defendants) were not entitled to the land, no good reason appears why they should not be allowed, after it had been established that these lands are a part of the school lands of the state, and came within the provisions of the act of 1875, to ask the state to comply with the provisions of that act."

The defendants appear to have acted in good faith throughout, as shown in the former opinion. They presented their case upon the theory that, after their right to the land had been determined adversely, they were entitled to have their improvements appraised, which would include the improvements made during the two years (now four years) since the appraisement. The former opinion was written upon the supposition, mistakenly as it now appears, that the appraisement made in 1903 was not relied upon by either party. If that appraisement is now regarded as sufficient for the purposes of this action,

these defendants will forfeit their improvements because they insisted upon their right to the land itself. It seems more reasonable to hold that the appraisement of 1903 was abandoned on the part of the state by its delay in bringing this action. During that delay the situation of the parties and the condition of the land were so changed as to require a new appraisement. In this view of the case the judgment is right. The motion for new trial and the motion for rehearing are therefore

OVERRULED.

STATE, EX REL. ELMER E. THOMAS, APPELLEE, V. BOARD OF FIRE AND POLICE COMMISSIONERS OF CITY OF OMAHA, APPELLANT.

FILED JUNE 8, 1906. No. 14,627.

1. **Liquor License: EVIDENCE: TRANSCRIPT.** Upon contests of applications for liquor license, the board hearing the contest is not bound by the stipulations of the parties providing a method of taking and transcribing the evidence not prescribed by statute, and involving greater expense in reducing the evidence to writing than is necessarily incurred in the manner of trial contemplated by statute. If the evidence is taken pursuant to such stipulations, the board will not be compelled by mandamus to reduce the evidence to writing in the manner provided for by such stipulation of the parties without payment of the extra expense of so doing made necessary by the unusual manner of taking the evidence.

2. ———: **APPEAL: TRANSCRIPT.** An appeal from the decision of the board in granting a liquor license is taken by giving notice of the intended appeal, and procuring a transcript of the record of the proceedings before the board, and filing the same in the appellate court. When such appeal has been taken, the court may compel the board to furnish a duly certified transcript of the evidence taken before the board upon the hearing. A peremptory mandamus to compel the board to reduce the evidence to writing and file the same in the office of the board is not necessary.

3. ———: ———: ———. A party desiring to appeal from the decision of the board of fire and police commissioners of Omaha

granting a liquor license is entitled to a certified transcript of the record of the proceedings before such board, upon demand and the payment of reasonable fees for making such transcript. The board is not required to furnish such transcript without the payment of fees therefor.

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

John P. Breen, W. H. Herdman, Harry E. Burnam and *I. J. Dunn,* for appellant.

Elmer E. Thomas, contra.

SEDGWICK, C. J.

The relator filed with the board of fire and police commissioners of the city of Omaha remonstrances against the applications for licenses of 170 saloon-keepers of that city. The remonstrances were overruled, and, upon application to the district court for Douglas county and a hearing thereon, a peremptory writ of mandamus was granted against the board of fire and police commissioners commanding them to reduce the evidence to writing in each of 170 cases, and have the same filed in their office, and to make transcripts of the records also in each of the 170 cases, and to deliver the same to the relator to enable him to prosecute appeals in all of the cases, notice of which appeals had been duly given. From the order granting the peremptory writ the board of fire and police commissioners have appealed to this court.

1. One of the objections to the granting of the peremptory writ now insisted upon is that, upon the hearing before the board of fire and police commissioners, stipulations were entered into by this relator, who was remonstrator there, on the one part, and the attorneys representing the applicants for license on the other part, by which it was agreed: "That about 30 cases should be heard together for the purpose of saving time, and that, when the official stenographer of the board should write up the

testimony, he should separate it and write the record of testimony in each case separately"; that the stenographer was unable to separate the evidence of the witnesses so as to determine what evidence pertained to each case respectively, and so it would become necessary for the stenographer to write out all the evidence taken for each and every one of the cases; that the evidence taken before the board was very voluminous, and to procure the whole thereof to be written out in each of the 170 cases would require an outlay of something over $5,000. It is conceded that, when a hearing is had before the board upon a remonstrance against the granting of a saloon license, it is the duty of the board to cause the evidence taken to be reduced to writing and filed in the office of the board for the use of any party desiring to appeal, and that anyone interested may insist upon the board so doing without any payment therefor. But it is contended that, when the parties interested in the contest make agreements among themselves in regard to the manner of taking of the testimony by which the expense of writing out the testimony taken would be greatly increased, without making any provision in their agreement by which the expenses may be restricted in amount to the ordinary expenses in such cases, the board is not obliged to incur the great expense so made necessary without being compensated therefor. It would seem reasonable that the board should not be bound by the stipulations entered into by the parties contesting before them. The board might consider that both parties contemplated resting their case upon the decision of the board and without availing themselves of the right of appeal, or that the parties contemplated themselves bearing the extra expense caused by their unusual manner of taking the testimony. It is not doubted that it would be the duty of the board, upon request for that purpose and after notice of appeal, to cause the evidence taken in the respective cases to be reduced to writing so far as the same was made necessary by the hearing before them in the manner pointed out by the statute, when such evidence was neces-

sary to enable the defeated party to diligently prosecute his appeal. Whether more than this could be required of the board it is not necessary for us now to further discuss, because of the conclusion that we have reached upon other matters presented.

2. In *State v. McGuire,* 74 Neb. 769, it was held that the evidence taken before the board "is not essential to give the district court jurisdiction of an appeal from an order granting a license; the filing of a certified transcript of the proceedings containing such order being sufficient for that purpose," and it was also held in that case that, "where the district court has acquired jurisdiction of such appeal by the filing of a certified transcript of the proceedings, and the license board fails to transmit the evidence taken before it at the hearing, the district court may enter a rule requiring the board to supply the omission." This we think is the regular and orderly practice, and, this being the law, no writ of mandamus is necessary to compel the board to reduce the evidence to writing in aid of one who desires to appeal to the district court from the decision of the board. When the district court has acquired jurisdiction of the case, it may make such orders as are necessary for completing the appeal, and is in a better position so to do than upon the extraordinary proceedings in mandamus. If the board has complied with the law and caused the evidence taken in the case to be reduced to writing and filed in the office of the board, it can readily transmit such evidence properly certified to the district court. If it has neglected to reduce the evidence to writing, the court can compel the board so to do as far as it is possible, and the remedy provided by the statute is therefore complete.

3. The controversy in regard to making of the transcripts of the record of the board appears to turn upon the question of fees. Is the board entitled to fees for making these transcripts, or is it compelled to furnish them without payment therefor? The statute provides: "The testimony on said hearing shall be reduced to writing and filed in the office of application, and if any party feels

himself aggrieved by the decision in said case he may appeal therefrom to the district court, and said testimony shall be transmitted to said district court and such appeal shall be decided by the judge of such court upon said evidence alone." Comp. St. 1903, ch. 50, sec. 4. The statute does not point out the steps necessary in order to appeal from a decision of the board. It does not provide in terms for any transcript of the record of the proceedings before the board, and, of course, contains no express provision as to payment of fees therefor. In the earlier cases construing this statute it was frequently said that the purpose of the legislature was to facilitate the taking of appeals, and that the public was interested in preventing licenses to irresponsible and improper parties. If the law provided that an appeal might be taken by filing a written notice thereof with the board, it would not be unreasonable to conclude that after such notice had been given it would be the duty of the board to transmit to the court such records of the proceedings as would be necessary to enable the court to pass upon the appeal. Although the point has not been expressly adjudicated, it has been in several cases assumed that the appeal is taken by procuring a transcript of the record and lodging the same in the appellate court. *Lydick v. Korner,* 13 Neb. 10; *State v. Trustees of Village of Elwood,* 37 Neb. 473. This construction of the statute has generally been accepted and acted upon, and we feel constrained to follow it now. In order therefore to take an appeal, it was necessary for the remonstrator in this case to give notice of his intention to appeal, and to procure a transcript of the proceedings of the board. This seems to be conceded. But the trial court seems to have held that the relator would be entitled to these transcripts upon demand of the board and without payment therefor. In *State v. Trustees of Village of Elwood, supra,* it is assumed that the village clerk would be entitled to demand his fees for such transcripts in advance, but the court said that it was not a material question in that case, and so it was not decided. And in *State v.*

Bonsfield, 24 Neb. 517, it was said: "There is no doubt of the right of the appellants to a transcript of all the proceedings, upon the payment of legal fees therefor, and that part of the case will not be further noticed." And it has generally been assumed that, when the hearing has been before the county board, or city or village authorities, whose clerks are by statute allowed a fee for transcripts of the records, the party demanding a transcript for appeal must pay the ordinary fees therefor. An attempt is made to make a distinction in this case because the statute makes no specific provision for making transcripts of records of the board of fire and police commissioners. The principle is invoked that, when the law imposes a duty upon a salaried officer and provides no specific fees therefor, he must look to his salary for the compensation for such duties. We think that the principle is not applicable to a case like this. The statute contemplates contests of this kind before county commissioners, and boards of supervisors, and before city councils and trustees of villages, and in all these cases parties desiring transcripts of proceedings must pay for transcribing the same. It seems unreasonable to suppose that the legislature intended to vary from this rule when the services that are ordinarily performed by clerks entitled to fees therefor are demanded of public officials of this character; that in most cases of contest of applications for license to sell liquors the party desiring transcripts should be required to pay for the same, and exception should be made in other cases where there is no apparent reason for such exception. The relator should have tendered reasonable fees for these transcripts. His failure to do so appears to be the sole reason for refusing the transcripts, and the peremptory writ therefore should not be issued.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON, J., concurring separately.

While I concur in the result, on account of the failure of the relator to tender reasonable fees for the transcripts, I dissent from the views expressed as to the board not being compelled to furnish a transcript of the evidence on account of the manner in which it was taken. The control of the manner in which the evidence is produced is with the board. It is not compelled to recognize any stipulations or agreements of the parties with reference to how it shall be taken. If they see fit to stipulate to a manner of taking it which will involve greater expense than usual in reducing the evidence to writing, the board need not be bound by it; but if it consents to the agreement and allows the evidence to be taken in accordance therewith, the fact that this method will entail greater expense than the usual and ordinary method will not excuse the board from a failure to perform its legal duty in furnishing a transcript of it upon demand. While in one sense the applicant and remonstrators are parties to the proceedings, the public also has an interest, and it would be against public policy to allow the board to plead the acts and agreements of the contending parties as an excuse for its failure to perform a duty enjoined upon it by law.

STATE, EX REL. JOHN H. MICKEY ET AL., RELATORS, V. W. A. SELLECK ET AL., RESPONDENTS.

FILED JUNE 8, 1906. No. 14,664.

1. **Schools: CHILDREN OF STATE OFFICERS.** Under section 2, subd. 14, ch. 78, laws 1881, as amended by section 6, ch. 62, laws 1899, state officers, living in Lincoln during their terms of office, may send their children of school age to the public schools of the Lincoln district without paying tuition, even though they retain their legal residence elsewhere.

2. ———: TEMPORARY RESIDENTS. If a family, or the person or persons having the legal custody and control of children of school age, remove to and live in a school district other than the district of their legal residence, and such removal is not for the purpose of obtaining school privileges, but is principally from other motives, such children are entitled to free school privileges while so living in the district.

ORIGINAL application for a writ of mandamus to compel respondents to admit children of relators to the public schools. *Writ allowed.*

Norris Brown, Attorney General, W. T. Thompson and *W. B. Rose,* for relators.

Clark & Allen, contra.

SEDGWICK, C. J.

The relators filed their petition in this court to obtain a peremptory writ of mandamus against the defendants, who are members of the board of education of the school district of Lincoln, to admit the children of relators in the public schools free of tuition. The relators are respectively the governor of the state and the superintendent of public instruction. A general demurrer was filed to the petition. The constitution requires the governor and other specified state officers to "reside at the seat of government during their terms of office." Const. sec. 1, art. V. The state superintendent of public instruction is not included in this requirement, but the duties of his office are such as to make it more convenient and suitable for him to reside at the capital of the state, and he has during the incumbency of the office resided in the city of Lincoln with his family, and continues so to do. Both of these state officers have maintained their legal residences respectively at their former homes, not within the city of Lincoln. They have children of school age and desire that they attend the public schools. Section 2, subd. 14, ch. 78, laws 1881, provided: "That all schools organized within the limits of

said cities shall be under the direction and control of the boards of education authorized by this subdivision. Such schools shall be free to all children between the ages of five and twenty-one years, whose parents or guardians reside within the limits of said district." An act of the legislature in 1899 was entitled: "An act to provide free attendance at public high schools of nonresident pupils; to provide for the expense thereof, and to amend section 3 of subdivision 6, sections 2 and 7 of subdivision 14, and 2 of subdivision 17, chapter 79 Compiled Statutes of Nebraska for 1897, and to repeal said original sections as now existing." Laws 1899, ch. 62. The main purpose of the act was to establish free public high schools, and to allow nonresidents to attend them. By this act the section above quoted was amended to read as follows: "That all schools organized within the limits of said cities shall be under the direction and control of the boards of education authorized by this subdivision. Such schools shall be free to all children between the ages of five and twenty-one years, whose parents or guardians live within the limits of said district, and all children of school age nonresidents of said district who are or may be by law allowed to attend said schools without charge." Laws 1899, ch. 62, sec. 6. It will be noticed that the amendment consists in inserting the word "live" in place of the word "reside" in the second sentence of the section, and adding to the section the words "and all children of school age nonresidents of said district who are or may be by law allowed to attend said schools without charge." This last clause was clearly added to the section in view of the other provisions contained in the act of 1899. No such reason existed for substituting the word "live" in place of the word "reside" in the body of the section. A reason can be given for this change, if we suppose that the legislature intended that *bona fide* inhabitants of a school district might have the benefit of free public schools for their children, and desired to remove all doubt upon that question, considering that the word "reside" might be construed to apply only to those who

were domiciled in the district, and were maintaining a legal residence therein for all purposes. This change must have been made out of an abundance of caution. The word "reside" in the section as it was originally would not necessarily be construed to mean a legal residence as distinguished from actual inhabitancy. The exact meaning to be given to the words "reside" and "residence" depends oftentimes upon the connection in which they are used, and upon the general purposes of the legislation in which they may be employed. The policy of our state is to furnish free schools for all children of school age, and to compel unwilling parents to give their children the benefit of these schools. We are satisfied with the language used upon this point in *McNish v. State,* 74 Neb. 261. Our school law does not contemplate that families will be broken up for the purpose of sending children to the common schools. It was necessary for these officers to be at the state capital, and the allegations of the petition show that they live in Lincoln within the meaning of the school law.

2. In *State v. School District of City of Superior,* 55 Neb. 317, the relator "owned a farm in Kansas and had resided thereon with his family as a home for many years." Every fall, for several years, he had moved his family and a portion of his household goods to the city of Superior in this state "to permit his children to attend the public schools of that city, and at the close of the school year they moved back to their farm in Kansas, where they remained until the beginning of another school year." The main fact, then, upon which the decision depended was that the relator had taken his children to the city of Superior solely for the purpose of sending them to school; and it has been held that such action would be a fraud upon the school district, and that the children of the relator under such circumstances might be required to pay tuition. Opinion of state superintendent of Wisconsin, quoted in *State v. Thayer,* 74 Wis. 48. This case is cited and other portions of the opinion of the superintendent quoted from

with approval in *McNish v. State, supra.* This appears to be a just distinction. If the family is removed temporarily to the school district for the principal purpose of obtaining the advantages of the school without expense to the family, the school authorities may protect the district from such imposition. If the family, or the person or persons having the legal custody and control of children of school age, remove to and lived in the school district principally from other motives than obtaining the privilege of the schools for their children, even though their stay in the school district is not expected to be permanent, such children should not be deprived of the benefits of school privileges while so living in the district. If the removal to the district is solely for the purpose of obtaining school privileges, still if the legal residence of the family is actually changed to the school district, whatever the motive may be for so doing, there can be no doubt of the right of the children to school privileges. It was upon this ground that the relator in *State v. School District of City of Superior, supra,* claimed school privileges for his children. He presented to the court the issue as to whether he had actually changed his legal residence to Superior, and it was that question that was discussed by the court.

The respondents should have admitted these children into the public schools without charge for tuition. The facts are fully stated in the petition for the writ, and upon the argument it was understood that the respondents had no further defense to make. The relators therefore are entitled to a peremptory writ upon this application.

WRIT ALLOWED.

IN RE EUGENE BURTON.

FILED JUNE 8, 1906. No. 943.

Attorneys: ADMISSION TO PRACTICE. Section 9, ch. 3, Rev. St. 1866, was not repealed as a whole by ch. 6, laws 1895, but the power of the district court to admit attorneys of other states to practice in this state was taken away by that act. *In re Admission to the Bar*, 61 Neb. 58, distinguished.

APPLICATION of Eugene Burton for admission to the bar. *Motion for admission sustained.*

SEDGWICK, C. J.

On the application of Eugene Burton for admission to the bar, the bar commission reported specially asking the opinion of the court upon a question of law. Section 9, ch. 3, Rev. St. 1866, provided for the admission to the bar of practicing attorneys of other states. This court said that this section, which was also section 9, ch. 7, Comp. St. 1893, was repealed by chapter 6, laws 1895. *In re Admission to the Bar*, 61 Neb. 58. Of course, if this section was repealed it could not afterwards be amended, but in 1903 the legislature attempted to amend it, and enacted that it should thereafter read as follows: "Any person producing a license, or other satisfactory voucher, proving either that he has been regularly admitted an attorney at law in the courts of record of any state where the requirements for admission when he was admitted were equal to those prescribed in this state, or so proving that he has practiced law five full years in courts of record under license in any state, and proving also that he is a person of good moral character, may be admitted by the supreme court to the bar in this state without examination." Laws 1903, ch. 5, sec. 3. The question then is whether the original section was repealed by the act of 1895. The point decided in the opinion above referred to was that the provision of the original section that attorneys might be

admitted by the district court was necessarily repealed by implication, and not that the whole section was repealed. It was recited in the opinion that "it appears that some of the district courts are still assuming the power to admit to practice generally persons who present certificates of admission from the courts of other states and of territories," and it was determined that the district courts have no such power since the enactment of the law of 1895. That law expressly gives the sole power of admission to the supreme court, and thereby so far repeals section 9 of the former act as to take away the jurisdiction of the district court in such matters. The expression in the opinion, "The act is complete in itself and results in repealing sections 3 and 9 above referred to," was perhaps unfortunate. If it repeals sections 3 and 9 it must repeal the whole chapter, which at that time embraced 14 sections containing many important provisions not included in the act of 1895. There was nothing then to prevent the legislature from amending section 9 as it did in the act of 1903, and the section, as so amended, is valid.

The motion for admission is therefore

SUSTAINED.

LANCASTER COUNTY ET AL. V. CHARLES O. WHEDON.

FILED JUNE 8, 1906. No. 14,195.

1. **Taxation: APPEAL: BURDEN OF PROOF.** Where a taxpayer appeals from the action of the board of equalization in the matter of the assessment of property for taxation, the burden is on the appellant to show that the decision of the board is erroneous.

2. **———: JUDGMENT: EVIDENCE.** The statement of a witness that he would not have increased the assessed valuation of the real estate of a certain precinct or ward, and that such increase did not tend to equalize the values of real estate throughout the city, without stating any facts as a basis for his opinion, is not sufficient to overthrow the judgment of the board of equalization.

3. ———: EQUALIZATION: NOTICE. Where the value of property, as returned by the assessor, as to an entire precinct is relatively too low, it may be raised by the board of equalization without notice previously given to property owners.

4. **Board of Equalization: FINDINGS.** The statute requires no formal finding by the board of equalization as a basis for its action in equalizing assessments between precincts, and a finding that it is necessary to a just and proper equalization of the assessments of the various precincts and wards of a county that the aggregate assessment of certain precincts and wards be raised, and that others be lowered, is sufficient to sustain an order equalizing such assessments.

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

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

Charles O. Whedon, pro se.

BARNES, J.

The facts underlying this controversy, as disclosed by the record, are as follows: On the 7th day of July, 1904, the last day of the session of the county board of equalization of Lancaster county, an order was entered by said board equalizing the assessments in said county, as follows: "Whereas, it is necessary to a just and proper equalization of the assessment of the various precincts and wards of Lancaster county that the aggregate assessment of certain precincts and wards be raised and lowered; therefore, be it resolved by the board of equalization of Lancaster county, Nebraska, that the following precincts and wards be lowered, viz. (then follows the names of 22 precincts): and the aggregate assessment of the following precincts and wards be raised, viz.: Fifth ward—lots 10 per cent.; sixth ward—lots 10 per cent.; first ward —lots 10 per cent.; third ward—lots 10 per cent. The amount of such additions or reductions shall be added to or subtracted from each individual assessment in

said precincts or wards *pro rata,* except where valuations have been fixed by the board of equalization." Some two weeks later Charles O. Whedon, a resident taxpayer of the fifth ward in the city of Lincoln, filed a notice with the county clerk certifying his intention of appealing from the order increasing the assessed valuation of the real estate in said ward. His appeal bond was later approved and, together with a transcript of the proceedings of the board, was filed with the clerk of the district court, thus perfecting his appeal in accordance with the practice governing appeals from the allowance or disallowance of claims by the county board. Later on the appellant filed his petition in said court, alleging, among other things, that he prosecuted the appeal on his own behalf and on behalf of all other owners of real estate subject to taxation in said Fifth ward precinct. The county attorney demurred to the appellant's petition, and when the cause came on for trial withdrew the demurrer, and objected to the introduction of any evidence on the part of the appellant on the grounds that the court had no jurisdiction over the subject matter, and no jurisdiction over the person of any taxpayer of the Fifth ward other than Mr. Whedon. The objection was overruled; the case was tried upon the evidence introduced by the appellant alone, and the court thereupon made the following findings: "That the plaintiff was the owner of certain real estate in the Fifth ward of the city of Lincoln, said ward being one of the precincts of Lancaster county; * * * that appellant prosecutes the appeal, not only on his own behalf, but on behalf of all other owners of real estate subject to taxation in said precinct; that on the last day of the sitting of the board of equalization of said county, to wit, on the 7th day of July, 1904, said board made its order as set out in appellant's petition, and that the county clerk in making up the tax list of said county added to each lot or tract of real estate in said precinct 10 per cent. above the valuation placed thereon by the county assessor or his deputy; that such increase of 10 per cent. was not necessary or

proper to be made for the purpose of equalizing the valuations of property in said county for the purpose of producing a just relation between all the valuations of property in said county, or for any purpose whatever, and that such increase was unauthorized, and was arbitrarily made, without ascertainment being made or had by said county board as to whether the valuation of the property in said precinct bore a just relation to the property in other precincts of said county." And thereupon the court reversed the order of the board of equalization, annulled the same, set it aside, directed the county treasurer to correct his tax record to conform to the judgment of the court, and taxed the costs of the proceeding to the county. From said judgment the county attorney has brought the case to this court by a petition in error.

The plaintiffs contend that, no complaint having been filed before the board of equalization, neither the appellant Whedon, nor any other real estate owner in the Fifth ward, can be heard to complain that his assessment was too high, or, in other words, that the court was without jurisdiction of the subject matter of the appeal. Section 124, art. I, ch. 77, Comp. St. 1903, provides: "Appeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county." It is further provided by said section that "the court shall 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." So, it would seem that a taxpayer, or the taxpayers collectively, of any precinct or ward may appeal from the action of the board of equalization in such a case by proceeding in the manner pointed out by the statutes. Whether it is necessary for the appellant to file a complaint and have a hearing before the board, as a foundation for his right to appeal, we are not required to determine in this

case, because the judgment of the district court must be reversed on other grounds, and we therefore leave that question for future consideration.

It is next contended that the evidence is insufficient to sustain the judgment of the trial court. As before stated, the appellant introduced his testimony, and no evidence was produced on behalf of the appellees. But one witness, Mr. J. R. C. Miller, was produced, who testified as follows: "Q. Mr. Miller, in regard to the raise of 10 per cent. on real estate in the Fifth ward precinct, in view of the assessed valuation placed on the property of the city and the investigation that you have made since the adjournment of the board of equalization, would you say that that raise of 10 per cent. on the real estate of the Fifth ward was unnecessary and excessive in comparison with the valuation on other property in the city? A. Yes, I think that is true. But I would like also to say that it don't make the assessment any more uniform by the 10 per cent. raise than if it had been left off. Q. How is that? A. I would say that it don't make the assessment any more uniform by putting the 10 per cent. on than if it had been left off. Q. (By Mr. Caldwell.) You mean uniform throughout the ward? A. Yes. Q. (By Mr. Whedon.) You would say, then, that that raise was unnecessary, and did not tend to equalize the values of the real estate throughout the city? A. No, sir. Q. And you would not make that increase now just upon that ward alone, in view of the valuation that has been placed upon the other property throughout the city—real estate throughout the city? A. No, not in that way. No, sir. (By the Court.) This raise was made by the board of equalization without notice? A. Yes, sir; just a flat raise by the board of equalization. Q. (By Mr. Caldwell.) That equalized the values of the several wards in the city? A. Yes, sir. (By the Court.) Wasn't raised at your instance? A. No, sir." It also appears that the witness was the county assessor and a member of the board of equalization, and this was all of the evidence offered or received at the trial.

When the jurisdiction of a *quasi* judicial tribunal is once established, its subsequent proceedings are presumed to be regular. And so the rule is that, where a taxpayer appeals to the district court from the action of the board of equalization in the matter of the assessment of property for taxation, the burden is on the appellant to show that the decision of the board is erroneous. A contrary holding would impose on the district court the duty of making an original assessment of the property of the county. *Frost v. Board of Review,* 113 Ia. 547. It will be observed that the witness stated no facts on which to base an opinion that the action of the board was incorrect. The substance of his testimony is that he would not have made the raise of 10 per cent. on the assessed valuation of the real estate in the Fifth ward, but he gives no reason for his statement. He gives no facts as to the assessed value of property in any other precinct of the city or county, but merely states that the raise did not make the assessed valuation of the city precincts or wards any more uniform than it was before such increase was made. There is nothing in the testimony by which a comparison of values between the different wards of the city and the different precincts of the county can be made, and the court was not justified in allowing the individual opinion of the witness to prevail over the collective judgment of the members of the board of equalization, of which he was a constituent part, and whose conclusion he had, without objection, officially agreed to. Again, an examination of the petition satisfies us that it is insufficient to sustain the judgment of the trial court. To be sure, it contains an allegation that the increase complained of was needlessly, unjustly and arbitrarily made, but such allegations are the conclusions of the pleader, and not statements of facts. So, we are satisfied that neither the appellant's petition nor the evidence adduced by him was sufficient to sustain the judgment of the district court.

Complaint is also made of the finding that notice of the meeting or action of the board of equalization in ordering

the increase should have been given to the real estate owners of the Fifth ward. We are satisfied from an examination of the authorities that no such notice was necessary. Section 121, art. I, ch. 77, Comp. St. 1903, provides, among other things, that "the county board shall hold a session of not less than three nor more than twenty days for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year." This is a sufficient notice to all taxpayers of the board's meetings. If the appellant, or any other taxpayer in the county, feared that the board would make any order detrimental to his interest, it was his duty to be there to protest. In the recent case of *Hacker v. Howe,* 72 Neb. 385, it was said:

"No notice is required, other than that given by statute, of the time and place of meeting or of action taken by the state board in the equalization of the assessments of property of the different counties." In the body of the opinion Chief Justice HOLCOMB says: "With reference to the alleged want of notice of the meeting of the state board of equalization, none is required. The section under which the board acted fixes the time and place of the meeting, and this of itself is sufficient notice, even though one were required, to the different counties and all persons interested, of the time and place of such meeting. By this statute all are warned as to when the meeting will occur, and the nature of the action which may be taken in pursuance of the power therein conferred upon the board. This section meets all legal requirements as to public notice, and no additional duty devolves upon the board to notify any of the time and place of its meeting, or of its contemplated action when convened for the purposes contemplated by the statute."

Hallo v. Helmer, 12 Neb. 87, is a case directly in point. It is there held that, where the valuation of property, as returned by the assessor, as to the entire precinct or tax district is relatively too low or too high, it may be raised or lowered by the board of equalization without notice pre-

viously given to property owners. So, it seems that no notice of the action of the board was required, and the holding of the trial court to the contrary constitutes reversible error. It is contended, however, by the defendant in error that the allegations of his petition were confessed for want of answer, and therefore the plaintiff cannot be heard to complain of the judgment of the trial court. This contention is not well founded: First, because, as we have heretofore stated, his petition did not state sufficient facts to entitle him to the relief prayed for; and, second, the cause was tried in the district court as though an answer was unnecessary. Judgment was not taken *pro confesso* for want of an answer to the petition, but a trial was had in which the appellees objected to the introduction of any evidence, or, in effect, demurred to the petition *ore tenus;* the demurrer was overruled, and the appellant in order to make his case produced his witness, whose evidence was taken, and the judgment of the trial court was based alone on such evidence. So, the failure of the appellees to answer in the court below does not deprive them of the right to review the judgment of that tribunal.

It is further contended by the defendant in error that the finding of fact made by the board was not sufficient to sustain its order. An examination of the statute discloses that it makes no provision for a finding of any kind. It is made the duty of the board, among other things, to ascertain whether the valuation in one township, precinct or district bears just relation to all townships, precincts or districts in the county, and to increase or diminish the aggregate valuation of property in any township, precinct or district by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of the property in the county. The record recites, in effect, that the board ascertained the necessary facts, and such finding was sufficient to authorize the board to act.

So, we are of opinion that defendant's contention cannot be sustained, and, for the errors above mentioned, the judg-

ment of the district court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED.

CHARLES O. WHEDON, APPELLANT, V. LANCASTER COUNTY ET AL., APPELLEES.

FILED JUNE 8, 1906. No. 14,406.

Taxation: LEVY: APPEAL. The statutes of this state make no provision for an appeal from the order of the county board in making the tax levy provided for by section 136, art. I, ch. 77, Comp. St. 1903; and an attempt to prosecute such an appeal confers no jurisdiction on the district court to review such order.

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

Charles O. Whedon, pro se.

J. L. Caldwell, F. M. Tyrrell and *Charles E. Matson, contra.*

BARNES, J.

The facts presented by this appeal are substantially as follows: It appears that the board of equalization of Lancaster county completed its labors for the year 1904 within the time fixed by statute, and thereafter, on the 7th day of July, the county board levied taxes to the amount of 15 mills on the dollar of the assessed valuation of the property of said county. No objections were made to such levy, and no complaint in relation thereto was ever filed with or presented to said board by any one. On the 21st day of July, 1904, one Charles O. Whedon, a resident taxpayer of said county, gave notice of an appeal to the district court from the order constituting such levy of taxes, filed his bond, obtained a transcript of the proceeding in question, filed the same in the district court for said county,

and caused his appeal to be docketed by the clerk of said court. Thereafter, and in due time, he filed his petition, setting forth, in substance, the assessed valuation of the county for the year 1903, the amount of the taxes for that year, together with a statement of the sum of money necessary to properly conduct the business of the county, and alleged that the levy for 1903 was largely in excess of the amount necessary to properly conduct the county affairs. The petition also contained a statement of the assessed valuation of the property of the county for the year 1904, the amount of the levy complained of, the sum of money that such levy would produce in each of the several funds of the county, the amount necessary to conduct its governmental affairs, and alleged that the levy was excessive, extravagant, exorbitant and illegal, because there would be raised thereby a sum of money largely in excess of the needs of the county. Without quoting the petition, it is sufficient to say that it contained averments which were probably sufficient to constitute a cause of action to restrain the board from making a portion of the tax levy in question, or to recover taxes levied for an illegal purpose where paid under protest. The appellees, including the county board, demurred to the appellant's petition on the ground, among others, that the district court was without jurisdiction of the subject matter of the appeal. The demurrer was sustained for the reason, as stated in the judgment of the district court, "that the law does not authorize an appeal from the levy of taxes made by the board of county commissioners." The appellant excepted, elected to stand on his petition, declined to further plead, and judgment was rendered against him dismissing the appeal at his costs. From that judgment he brings the case to this court under our present statute regulating appeals.

The appellant contends that the statutes authorize an appeal from such levy, while the appellees insist that the law makes no such provision; and this is the principal question for our consideration. The right of appeal in this state is purely statutory, and, unless the statute provides

for an appeal from the decision of a *quasi* judicial tribunal, such right does not exist. With this rule in view, we come to examine the statutes defining the powers and duties of the county board in the matter of taxation, and the provisions contained in the present revenue law relating to appeals from the orders of that tribunal. Section 120, art. I, ch. 77, Comp. St. 1903, provides that "the county board, the county assessor, and county clerk, shall constitute the county board of equalization, and the county clerk shall be the clerk of said board." Section 121 provides for a session of the board, defines its powers and duties in regard to the equalization of the county assessments before the tax levy is made, and limits the duration of such session. It is provided by section 124 that "appeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county." And it is further provided that "the court shall 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, and any decision rendered therein shall be certified by the clerk of the court to the county clerk, who shall correct the assessment books in his office accordingly." This is the only provision authorizing an appeal from the orders of the county board of equalization. Section 136 provides that "on the last day of sitting as a board of equalization the county board (not the board of equalization) shall levy the necessary taxes for the current year, including all county, township, city, school district, precinct, village, road district, and other taxes required by law to be certified to the county clerk and levied by the county board." A careful examination of our present revenue law discloses that it contains no provision for an appeal from the order of the county board in making the tax levy. We therefore conclude that it was not the inten-

tion of the legislature to allow a taxpayer to appeal from such order. In *Keokuk & Hamilton Bridge Co. v. People,* 185 Ill. 276, construing a statute very much like our own, the court said:

"An appeal cannot be prosecuted as of right, but only when authorized or granted by the statute. The provision * * * (of the statute) which provides for an appeal to test the correctness of the decision of the board on one, only, of the contentions committed to it to decide, is a denial, by implication, of the right to appeal from any other of the decisions of the board."

The same rule, in substance, was announced in *Dutton v. Board of Review,* 188 Ill. 386, and *In re Appeal of Wilmerton,* 206 Ill. 15. The reason for our conclusion is made clear by what was said by Chief Justice HOLCOMB in *Hacker v. Howe,* 72 Neb. 385, where we find the following:

"An assessment means the determination of the value of a man's property for the purpose of levying a tax; an official listing of persons and property with an estimate of the value of the property of each for purposes of taxation. 3 Cyc. 1111."

This clearly distinguishes the act of assessment from the order constituting the tax levy. A proper and legal assessment must first be made, and the value of the taxable property of the county must be thus ascertained as a basis for the subsequent act of levying sufficient taxes to conduct the governmental affairs of the state, the county and its several municipalities. So, the statute providing for an appeal from the decision of the board of equalization in certain matters of assessment can have no application whatever to the subsequent action of the county board by which the tax is levied. This would seem to be the view entertained by the supreme court of Iowa in construing a statute very like our own. *City Council of City of Marion v. National Loan & Investment Co.,* 122 Ia. 629. Speaking of a case where the jurisdiction of the court depended on the right to appeal, the supreme court of Iowa said:

"No presumption can be entertained to the effect that

jurisdiction as to the subject-matter appealed from exists. The record must show it. As in the case of an appeal to this court, we can proceed only when it appears as an affirmative fact, established by matter of record, that a judgment has been rendered from which an appeal may be taken. And consent of parties—much less, mere silence on the part of the appellee—cannot be accepted as sufficient to take the place of a record showing the essential fact of jurisdiction." *Green v. Ronen,* 59 Ia. 83; *Groves v. Richmond,* 58 Ia. 54.

Again, it would seem clear that the legislature never intended to confer jurisdiction upon the courts by appeal to review or control the discretion of the county board in the matter of levying taxes. To grant the district court such powers would, in effect, substitute its discretion for that of the county board, the tribunal to which the statute has specifically committed that duty. So, we are of opinion that the right of appeal to the district court from an order of the county board in making the necessary tax levy under the provisions of section 137, art. I, ch. 77, Comp. St. 1903, does not exist, and therefore that court was without jurisdiction to hear and determine the matters set forth in the appellant's petition.

It follows that the judgment of the district court in sustaining the demurrer and dismissing the appeal herein was right, and it is therefore

AFFIRMED.

SAMUEL PARKER V. STATE OF NEBRASKA.

FILED JUNE 8, 1906. No. 14,592.

Instructions to the jury must be based upon and applicable to the evidence; and where in the trial of a criminal case an instruction is given without testimony to sustain it, and prejudice results thereby, a new trial will be granted.

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

W. S. Summers and *Thomas L. Sloan,* for plaintiff in error.

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

BARNES, J.

Samuel Parker was tried in the district court for Thurston county on an information charging him with murder in the first degree for the killing of one Andrew Johnson. He was found guilty of the crime of manslaughter, and sentenced to the state penitentiary for a term of five years. From that judgment and sentence he prosecutes error, and will be hereafter called the accused.

His first contention is that the trial court erred in overruling his motion to quash the jury panel. The grounds of such motion were: First, that a large number of the citizens, taxpayers and residents of Thurston county are Indians, and were objected to and excluded from the jury list from which the panel was drawn for that reason alone; that, he being an Indian, such action amounted to a denial of his rights under the laws and the constitution of this state and of the United States. Second, that one of the officers who participated in selecting the jury was a nonresident of Thurston county, and disqualified from acting in that capacity. It appears that his motion was supported by affidavit evidence, and an examination of the record discloses that such affidavits are not embraced in or made a part of the bill of exceptions, and whatever showing there was in support of the motion is contained in the transcript. The evidence not having been preserved in the manner provided by law, and according to our well-established rules of practice, it cannot be considered by this court, and therefore we are unable to determine this question. *Wright v. State,* 45 Neb. 44.

It is also contended that the court erred in receiving the evidence of the witness Maggie Martin, for the reason that she was wholly unacquainted with the nature and sanctity of an oath. Her preliminary examination leaves her competency doubtful, to say the least, but we are not required to determine this question for reasons which will hereafter appear.

It is further claimed that the court erred in instructing the jury, on his own motion, as follows: "9. You are instructed that a party charged in the unlawful killing of a human being cannot avail himself of the claim of necessary self-defense, or defense of family, if the necessity for such defense was brought on by his own deliberate, wrongful act. Therefore, if the jury believe from the evidence that the defendant sought, brought on, or voluntarily entered into a difficulty with the deceased, Andrew Johnson, for the purpose of wreaking vengeance upon him, or to accomplish some unlawful purpose, or if the jury should find and believe from the evidence, beyond a reasonable doubt, that he killed the deceased at a time when he had, because of the acts of the deceased or those with the deceased, no reasonable apprehension of immediate and impending injury to himself or family, and did so to accomplish some unlawful purpose, or did it from a spirit of retaliation and revenge, then the defendant cannot avail himself of the law of self-defense." The jury were further told in substance, by instruction No. 10: "If from all of the evidence they should find, beyond a reasonable doubt, that the defendant had no reason to believe that the deceased, Andrew Johnson, intended to take the life of his father or inflict upon him great bodily harm, and that the defendant struck the fatal blow in revenge, or in a reckless spirit, the defendant was not entitled to claim exemption from punishment on the ground of self-defense, or defense of his father."

Many of the witnesses in this case were Indians, and their evidence was delivered through an interpreter. Some of it is hardly intelligible; but it fairly establishes the

following: The deceased, together with his wife and his two daughters, was visiting the father of the accused at his place of residence during the afternoon of the day when the difficulty, which probably caused his death, occurred. The accused was absent from home during all that day until a short time before the affray in question took place. The father of the accused had two or three bottles of whiskey, and, when the deceased and his family arrived at his place, produced them. They all drank copiously of the liquor, and were more or less intoxicated when the accused came upon the scene. It is fairly inferable from the evidence that the two families had been friends for many years, and no difficulty of any kind had occurred between them until after the accused returned. About that time the deceased and his family prepared to leave for their home, but he was so intoxicated that he was hardly able to go from the house to the wagon, so the accused assisted him to where the team stood, and tried to lift him into the wagon. The deceased in attempting to climb into the vehicle fell to the ground, and one of its wheels ran over him. This apparently caused him to become angry, and he laid hold of the accused and commenced to bite him. In order to make him desist, the accused choked the deceased, and thereupon the wife laid hold of the accused, pulled his hair, choked him, and tore his shirt off. He thereupon turned his attention to the woman. The deceased, having by this time become partially sober and able to help himself, obtained the possession of a neck-yoke, and commenced an assault upon the father of the accused, chasing him, as the evidence shows, at least two or three times around a cultivator, which stood there, finally overtaking him; and the son, seeing the danger the father was in, came to his assistance. He succeeded in wresting the neck-yoke from the deceased, and struck him with it. Johnson thereupon fell to the ground, was afterwards taken home, and was found to be quite badly injured. He died some nine days afterwards, either from the effects of the blow or from blood poisoning caused by

his wounds. We find no testimony in the record which shows, or tends to show, that the accused brought on the difficulty, that he was actuated by any hatred of the deceased, or that he cherished any spirit of ill will or revenge toward him. On the contrary, the evidence seems to show that the parties were friends until the very moment when the affray commenced. So, the real question for the jury was whether the accused used more force than was necessary, or than would have appeared to be necessary under the circumstances to a careful, prudent and considerate man, in the defense of his father. This being true, the giving of the instruction above quoted was reversible error. The tendency of the instruction was to lead the jury to believe that there was some evidence from which the element of hatred, revenge or ill will could be attributed to the accused, and thus deprive him, as stated by the court, of the right of self-defense, or defense of his father. The instruction complained of is in almost the identical language which we disapproved in the case of *Blair v. State*, 72 Neb. 368, where it was said:

"It is a well-settled rule that the instructions must be based on the evidence, and where an instruction has been given without any testimony to support it, and prejudice results thereby, it is reversible error."

The record contains many other assignments of error, but as the judgment must be reversed for those which we have heretofore discussed, they will not be considered, and it may be presumed that upon a retrial of the case they will be avoided by the trial court.

For the foregoing reasons the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

STATE OF NEBRASKA V. HENRY F. DAILEY.

FILED JUNE 8, 1906. No. 14,613.

Penal Statute: CONSTRUCTION. The provisions of a penal statute will not be extended by construction so as to apply to persons not clearly within its terms.

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

Norris Brown, Attorney General, W. W. Slabaugh and *C. E. Foster,* for plaintiff in error.

Gurley, Crawford & Woodrough, contra.

LETTON, J.

Henry F. Dailey was charged, as agent of the owner, with refusing to erect and maintain certain fire escapes in the manner provided by law upon a certain building in the city of Omaha. He filed a special demurrer to the information. This demurrer was sustained by the district court and the defendant discharged. The county attorney excepted to this action, and brings the case to this court for review, alleging error on the part of the court below in sustaining the demurrer.

The information in substance charged that the defendant, being an agent of one Knox, the owner of the Winona building, having been duly notified by the deputy labor commissioner to erect and provide three single wrought iron or steel balcony stair fire escapes on the rear of said building, did unlawfully refuse to comply with such notice, and to place or cause to be placed on said building such fire escapes as provided by law. The defendant does not question the sufficiency of the statute as far as it purports to prescribe a rule of civil conduct for those in actual control of the kind of buildings mentioned in the act. The only question is as to the validity of that part of the act

which makes it a misdemeanor for the agent to fail to erect fire escapes after notice has been served upon him. The power given to the labor commissioner to serve a notice upon the "owner or owners, trustees, or lessees, their agents or the occupant of any building" is not a delegation of legislative power, as the defendant contends, but is merely a method prescribed for calling to the attention of the persons interested in the building the fact that the owners have failed to perform their legal duty. The power of supervision and inspection must be vested in some officer, and the labor commissioner has been clothed with it. The object of the notice is to allow grace to the persons interested before enforcement by prosecution. In contemplation of law, a building of the character described in the act, which is unprovided with proper and reasonable methods for the egress of its occupants in case of fire, is a nuisance, and the agencies which are customarily employed for the suppression and abatement of nuisances are proper to be used in such case. The police powers of the state are properly called into exercise for this purpose. These powers are not and need not be uniform in their operation or methods, the enforcement varying in method, and the penalty in character, as in the judgment of the legislature seems best adapted to accomplish the desired result; but the provisions of this act, at least so far as concern the agent, seem defective. That part of the act, the consideration of which is involved in this case, is as follows: "It shall be the duty of said commissioner of labor or his deputy to serve a written notice in behalf of the people of the state of Nebraska upon the owner or owners, trustees, or lessees, their agents or the occupant of any building within this state, not provided with fire escapes in accordance with the provisions of this act, commanding such owner, trustee, lessee or occupant, or either of them, to place or cause to be placed upon such building such fire escape or escapes as is provided for in section four (4) of this act, within thirty (30) days after the service of such notice." Comp. St. 1905, ch. 30, sec. 17

(Ann. St. 6361). And section 18: "Any such owner or owners, trustee, lessee or occupant or either of them, or their agents, so served with notice as aforesaid, who shall not, within sixty (60) days after the service of such notice upon him or them, place or cause to be placed such fire escape or escapes upon such building as required by this act and the terms of such notice, shall be subject to a fine of not less than twenty-five or more than two hundred dollars, and to a further fine of fifty dollars for each additional week of neglect to comply with such notice." The object of the law evidently is to compel the owner of the building to provide fire escapes. It is made the duty of the labor commissioner to serve a written notice upon the "owner or owners, trustees, or lessees, their agents, or the occupant" of the defective building. This notice, while it may be served upon the agent, commands "such owner, trustee, lessee or occupant, or either of them," to provide fire escapes within 30 days after the service of the notice. It will be observed that the notice does not command or require the *agent* to place the fire escape upon the building. By the next section it is provided that "any such owner or owners, trustee, lessee or occupant or either of them, or their agents, so served with notice as aforesaid," who shall not provide the fire escapes "as required by this act and the terms of such notice" shall be punished as therein provided. There is an evident inconsistency between these two sections. The notice required by the first section does not command the agent to furnish the fire escape, but by the second section the agent is to be punished for not erecting such a fire escape as is required by the terms of such notice. The intention of the legislature evidently was to permit the notice commanding the owner to provide the fire escapes to be served upon the agent, since he might be more readily accessible than the owner, but to require the owner to perform the duty of furnishing the fire escapes. In the case of *Arms v. Ayer*, 192 Ill. 601, the Illinois statute, of which the Nebraska statute is almost a verbatim copy, was considered by the

supreme court of Illinois as far as it provided for civil damages, and it was held that the reasonable intendment is that the owner or owners of the building shall perform the duty of furnishing the fire escapes.

It is argued by the state that the purpose of the act may be defeated by holding that the agent may not be held liable criminally for the default of his principal, but we must construe the law as we find it. The purpose of the act is a proper one, but whether its terms afford the most efficacious remedy for the evil which it is sought to right may be questioned. It might perhaps be competent for the legislature to provide that a building unequipped with fire escapes should be deemed a nuisance and that no persons should be permitted to occupy the same, whether as the owner, tenant, agent, or in any other capacity, until it had been placed in a condition of safety. Similar provisions have been adopted in other states to reach nonresident owners of defective buildings. Any reasonable means, not in conflict with the constitution, which the legislature may adopt to prevent such terrible calamities as have happened in the past from the failure of property owners to provide proper means of escape from fire, ought to receive the favorable consideration of the courts. We cannot, however, extend the provisions of a penal statute to persons to whom it is at least doubtful it was intended to apply.

The judgment of the district court is

AFFIRMED.

IN RE JOHN SCHWARTING.

FILED JUNE 8, 1906. No. 14,676.

1. **Dipsomaniac Law: CONSTRUCTION.** The provisions of chapter 82, laws 1905 (Comp. St. 1905, ch. 40, secs. 62-69), known as the "Dipsomaniac Law," are *in pari materia* with other laws providing for the detention, care and discharge of persons committed to the hospital for the insane, and must be construed in connection therewith.

2. **Discharged Patient.** A person who has been confined in the hospital for the insane under the provisions of said act until he has been cured may not be subjected to further restraint without new cause.

3. **Constitutional Law.** Section 7, ch. 82, laws 1905, *held* unconstitutional, as in violation of the right to personal liberty.

ORIGINAL application for writ of habeas corpus. *Writ denied.*

O. A. Williams, for applicant.

Norris Brown, Attorney General, and *W. T. Thompson,* for the state.

LETTON, J.

This is an application for a writ of habeas corpus, representing that John Schwarting is unlawfully deprived of his liberty by Dr. J. L. Greene, superintendent of the hospital for the insane at Lincoln, Nebraska, upon the charge of being an inebriate. It appears that the petitioner has been adjudged by the commissioners of insanity of Antelope county to be an inebriate, and to be a fit subject for custody and treatment in the hospital for the insane, and that he has been committed to such institution until he is cured, or for a period not exceeding three years. The petitioner contends that chapter 82, laws 1905, being "An act providing for the examination of dipsomaniacs, inebriates and persons addicted to the excessive use of morphine, cocaine or other narcotic drugs; for the detention, care and treatment of such persons and for their parole," is unconstitutional and void for the reasons that the law is contrary to the provisions of section 1 of the fourteenth amendment to the constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, and because it is a law denying to certain persons the equal protection of the law, and because it provides for imprisonment without due process of law and without trial by jury.

The act under which the petitioner was committed to the insane hospital is supplementary or additional to the statutes which provide for the treatment of the insane, and the establishment and maintenance of hospitals for the reception of that unfortunate class of individuals. It is an exercise of the paternal care of the state, designed for the benefit of those persons whose mental fibre has become so weakened by the excessive use of intoxicants and narcotics that they are unable to refrain from an undue indulgence in the same, and in whom the craving has become so intense as to be in the nature of a mental infirmity. From an early period the law has assumed the care and protection of the property of persons who have become unfit, on account of excessive drinking or debauchery, to control or manage the same, to their own detriment or that of the public. This jurisdiction is assumed as a part of the duty of the state to protect society from the burden which might be imposed upon it if, by the improvidence of the individual, he or his family should be so reduced in circumstances as to become a public charge. Comp. St. 1903, ch. 34, secs. 17, 21, 40 (Ann. St. 5387, 5391, 5410). This act extends this care to the person as well as to the property of the defective individual, and is designed to protect both the individual himself, and other persons who may be exposed to injury from his conduct, from the consequences which may reasonably be anticipated if he should be left at liberty to gratify his abnormal cravings. But this power should be exercised with great caution and only upon such a state of facts being shown as would justify the forcible intervention of the state for the protection of persons and property. "While the state should take compassionate charge of any who are dangerous to themselves or others, it is equally bound to protect the personal rights and liberties of every harmless and law-abiding citizen, capable of taking care of himself, his family, and his property, however weak and unfortunate he may be in other respects." *State v. Ryan,* 70 Wis. 676.

The power conferred in the first place upon the commis-

sioners of insanity is great, and the responsibility is great in proportion. The right to liberty is sacred, and should not be taken from any person under the provisions of this act without careful investigation and just and impartial consideration of the testimony, and unless the facts shown are serious enough in nature to warrant detention for treatment, he should not be committed. The act is for the dipsomaniac and inebriate, not for the occasional drinker, even though his drinking may result in intoxication. The first section of the act provides that these patients "shall be admitted, detained, cared for and treated in the Nebraska hospital for the insane," and by the second section it is provided that "the commissioners of insanity, in each organized county of the state, shall have cognizance of all applications for admission to the hospital on behalf of such persons and shall have the same powers and exercise the same jurisdiction as are conferred upon them in the case of an insane person." Further provisions of the act provide for applications for the admission of patients, and the examination and commitment to the hospital. These provisions are examined and set forth in the recent case of *In re Simmons, ante,* p. 639, in which case it was held that, when a citizen is charged with being a dipsomaniac or inebriate, there must be a trial and findings of fact, and a record of the trial and findings kept with sufficient formality to show the jurisdiction of the commissioners in the premises, and to show the action that was taken by the commissioners upon the complaint, and that the commissioners found the facts to exist that would require such commitment. The act further provides for the treatment of the patient in a separate ward at the hospital and for the nature of the treatment to be given. Section 7 of the act provides in substance that any patient whom the superintendent of said hospital believes to be cured may be paroled upon certain conditions, among which are that the patient sign a written pledge agreeing to refrain from the use of all intoxicating liquors as a beverage, and from the use of morphine, cocaine and narcotic drugs during the

period of his commitment, and shall avoid frequenting places and the association with people tending to lead him to the same, and requires him to make written reports on the first of each month to the fact that he has not during the past month in any respect violated any of the terms of his parol, which reports must be investigated and approved by the clerk of the commissioners of insanity of the county in which the patient resides, and if he fails at any time to make such report or to fulfil all of its conditions upon which the parol was granted, he may, without any further proceeding whatever, and on the written order of the superintendent of the hospital, be taken and returned to the hospital, there to be detained and treated as before.

The petitioner contends that the act is penal in its nature, because it provides for a commitment for a definite number of years and that, when cured, he can only be released upon the performance of the conditions above set forth; that he may arbitrarily be returned without process of law upon the whim of the superintendent, and that the act therefore violates the constitutional provisions safeguarding the liberty of the person. We are convinced that there is much merit in these strictures upon that portion of the law which provides for the partial restraint of the patient after he has been cured, and which provide that he may be returned to the hospital, without further procedure, on the written order of the superintendent. The law is not enacted to punish crime, and is by no means penal in its nature. While a period is fixed beyond which the detention may not go, this term is fixed with the idea that, if the patient cannot be cured within the space of three years, his case is not capable of remedy by such treatment and he should not be further detained. The time of detention is fixed in the interests of liberty, and not as a term of imprisonment or confinement as a punishment. But, while this is true, we know of no power residing in the legislature to impose restraint upon the personal liberty of an indi-

vidual after he has been restored to health and to the control of his appetites by the treatment afforded him under the provisions of the act. When he is cured he stands upon an equality with all other citizens. The legislature, however beneficent its motives may be, is restrained by the provisions of the constitution from interfering with his personal liberty, and, in so far as these provisions of section 7 provide for the restraint of persons who have been cured, they are in conflict with the constitution and must fall.

It is further contended that an inebriate has no right by statute for a retrial anywhere as to whether he is an inebriate, and that he has neither appeal, habeas corpus, nor error to protect his rights. We think, however, that counsel overlooks the fact that this act must be read in connection with the provisions of the act for the government of the hospital for the insane, which defines the legal relations of insane persons and provides for their care and protection. Comp. St. 1903, ch. 40, secs. 1-58 (Ann. St. 9590-9647). The act provides that all persons in the insane hospital shall be regarded as standing on an equal footing, and that upon a statement in writing, verified by affidavit, addressed to a judge of the district court for the county in which the hospital is situated or of the county in which any persons confined in the hospital has his or her legal settlement, alleging that such person is not insane and is unjustly deprived of his or her liberty, a commission shall be appointed by the judge, who shall proceed to the hospital and investigate the facts; that such commission may be repeated not oftener than once in six months. The act further provides that all persons confined as insane shall be entitled to the benefit of the writ of habeas corpus, and a later act provides that every inmate of the hospital shall be allowed to write letters when and whenever he or she desires, and to any person he or she may choose. While counsel contend that the act which is now assailed has none of these necessary and humane provisions, we are

of opinion that, since they are to be found in the general laws with reference to the government and management of the hospital for the insane, it was unnecessary to repeat them in a subsequent act which merely adds another class of unfortunates to that which was formerly entitled to treatment in the institution.

It is contended that the provisions with reference to the release of persons is inadequate, but if the unconstitutional restraints with reference to the liberty of the patient after he has been cured, which are imposed by section 7, are exercised from the act, the patient has the same remedy which is provided for all other persons unlawfully restrained of their liberty. The commitment provides for the detention in the hospital until the patient is cured. The general law relating to the control of the hospital provides that any person who is cured shall be immediately discharged by the superintendent. The detention therefore of a person who is cured would be an unlawful restraint, and the patient thus restrained can be released by the ordinary remedies provided by law for such purpose.

No law conceived by human minds can be said to be perfect in all details, and this act is no exception to the rule. Its purpose is a good one, and it is intended to benefit the unfortunate individuals described in the first section thereof, as well as to protect society in general from the evils flowing from the reckless conduct of inebriates. Whether or not in its operation it will attain the results desired is a question which the future alone can determine, and whether or not it shall continue in effect remains a matter for legislative discretion. In so far, however, as its provisions are not violative of constitutional provisions, it is our duty to uphold the law. We are of the opinion that section 7 of the act, imposing conditions upon the discharge of a patient when cured, is an unlawful and unconstitutional restraint upon the liberty of a person and is beyond the power of the legislature to enact. We think, however, that the remainder

of the act, when considered in connection with the general act for the government of the hospital for the insane, is not subject to the complaint made by the petitioner.

The demurrer of the respondent is therefore sustained, and the application

DENIED.

MIDA A. BRANSON, APPELLANT, V. ISAAC R. BRANSON, APPELLEE.

FILED JUNE 8, 1906. No. 14,167.

Divorce: COLLUSION. An agreement between the parties to a pending suit for a divorce for the collusive rendition of a decree therefor will defeat the action, and it is immaterial that one of the parties may have supposed such agreement to be free from legal or moral wrong.

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

J. A. Whitmore and *J. H. Edmondson,* for appellant.

R. D. Stearns, contra.

AMES, C.

Appellant was plaintiff in the court below in an action for a divorce. While the action was pending she entered into a written agreement with her husband to the effect that, "in consideration of the said defendant, Isaac R. Branson, not going personally upon the witness stand to testify against Mida A. Branson in her suit against him for divorce," she would make no application in said suit for either temporary or permanent alimony, and that, in case a divorce should be granted, the plaintiff should have set apart to her certain articles of personal property and certain moneys, which she claimed as her

separate estate, and she should execute to her husband a formal release and quitclaim of all dower estate, or other rights or interests in his lands and personal property by reason of the marriage or otherwise. This agreement was identified by the wife in the course of her cross-examination as a witness upon the trial and brought to the attention of the court, who thereupon dismissed the suit. The character of this document as an agreement for a collusive divorce is too evident to require comment, and that the existence of such an agreement will defeat the action is elementary. *Gentry v. Gentry,* 67 Mo. App. 550; *Adams v. Adams,* 25 Minn. 72; *Phillips v. Thorp,* 10 Ore. 494; *Thompson v. Thompson,* 70 Mich. 62; 1 Nelson, Divorce and Separation, secs. 502-506. Testimony by the plaintiff seeking to explain her motives in entering into the agreement, if competent at all, emphasizes rather than refutes the idea, expressed in the writing itself, that her sole object sought to be obtained thereby was the facilitating and expediting of the rendition of a decree of divorce. It is immaterial that the plaintiff may have supposed such an act free from legal or moral wrong. The evidence discloses that the agreement was entered into by the plaintiff voluntarily and deliberately in the presence of her counsel and of another person, who subscribed his name to the document as a witness. Her own explanation of her conduct is that her husband had repeatedly importuned herself and counsel to enter into such an agreement, and that she finally consented so to do in order to be rid of his annoyance, and because she had not prayed in her petition, and had not intended to apply for, either permanent or temporary alimony or suit money, attorney's fees or other.

Counsel for plaintiff concedes in his argument that the agreement by its terms and upon its face is collusive, and would be effectual to defeat the action but for the foregoing explanation. To our minds the testimony of the wife is wholly insufficient to purge the document of its vice. If such a transaction could be validated by the oath of one,

or even of both, of the parties that it was entered into without any real consideration and from morally pure or justifiable motives, means would be found to uphold it in every instance. We are of opinion that, when such an agreement has been executed deliberately and without trick or illusion as to its contents, its own recitals are conclusive to us to the purpose and intent of the parties thereto. As to the legal effect of such a document there can be no doubt. As is said in 2 Bishop, Marriage and Divorce, sec. 252: "However just a cause may be, if parties collude in its management, so that in real fact both are plaintiffs, while by the record the one appears as plaintiff and the other as defendant, it cannot go forward." And again in sec. 697: "Any agreement between the parties to withhold facts or evidence from the court, or to influence its decision by concealment or misrepresentation, is, as collusion, void." And in sec. 698: "So a wife's undertaking to accept $500 in full for all her claims as wife or widow in her husband's property, coupled with her promise not to resist his divorce suit, should he bring one, to put him to no additional costs, and to make no claim for alimony, was held to be a mere nugatory attempt to defraud the court in which afterwards he should bring his suit." In *Adams v. Adams, supra,* the supreme court of Minnesota say:

"The authorities are uniform in holding that any contract between the parties, having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce, to withdraw his or her opposition, and to make no defense, is void as *contra bonos mores.*"

The defendant observed the terms of his contract. He filed no answer in the action and did not appear therein as a witness. The only evidence in behalf of the plaintiff, except with respect to the execution of the agreement, was the testimony of the plaintiff herself. Section 38, ch. 25, Comp. St. 1905, enacts: "No decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions or admissions of the parties, but the

court shall in all cases require other satisfactory evidence of the facts alleged in the bill for that purpose." In view of this statute and of the collusive agreement to suppress the testimony of the defendant, the correctness of the judgment of the district court is not open to question, and we recommend that it 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.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. ELIZABETH A. HEALY.*

FILED JUNE 8, 1906. No. 14,252.

Election of Remedies. A suit by an administrator of a deceased employee of the Chicago, Burlington & Quincy Railroad Company, who was a member of the relief department of that company, to recover damages, under the statute, for wrongfully or negligently causing the death of such employee, is a bar to a subsequent action upon the membership certificate in said department, when the administrator is the same person named as beneficiary in the contract.

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

J. W. Deweese, W. S. Morlan and *F. E. Bishop,* for plaintiff in error.

T. J. Doyle, contra.

AMES, C.

This is an action upon a certificate of membership issued to one Cornelius R. Healy in the insurance organization known as the "Burlington Relief Department." The per-

*Rehearing allowed. See opinion, p. 786, *post.*

son named as beneficiary was his wife, Elizabeth A. Healy, now defendant in error herein. He lost his life by accident while in the service of the railroad company, leaving surviving him four minor children besides his widow, the plaintiff below. She was appointed administratrix, and begun and prosecuted an action against the company to recover damages, under the statute, for the alleged wrongful or negligent causing of the death of the insured. From the verdict and judgment in her favor, the company prosecuted error to this court, and secured a reversal on the ground that the evidence was insufficient to uphold the verdict. 5 Neb. (Unof.) 225. When the cause was remanded to the district court she voluntarily dismissed it without prejudice to a new action, and began the present suit in which she recovered a judgment sought to be reversed by this proceeding.

The contract of membership between the deceased and the plaintiff in error provides that all rights of recovery thereunder shall be forfeited and shall cease and determine "if any suit shall be brought against said (railroad) company, or any other company associated therewith as aforesaid, for damages arising out of injury or death occurring to me," the insured. There can be no doubt that the present case falls within the letter of the clause just quoted. But in *Chicago, B. & Q. R. Co. v. Olsen,* 70 Neb. 559, this court, in discussing a contract identical with this, say that it "provides for the application of the well-settled rules of law in regard to election of remedies," and counsel for the defendant in error herein contend that her unsuccessful action against the railroad company was not an irrevocable election within the meaning of those rules. We doubt if the language just quoted was intended to be taken in its wholly unqualified sense. It was, we presume, used with reference to the circumstances then under discussion. In that case the plaintiff had, after his injury, accepted relief department benefits, and it was held that by so doing he had made an irrevocable election which barred him of a remedy against the company to recover damages for a

negligent injury; but it was also held that his unsuccessful attempt to prosecute the action thus barred did not revoke his previous election to avail himself of his remedy upon his contract, or deprive him of the benefits accruing to him thereunder. Or, in other words, as the court say, his rights under the contract became, upon his receiving benefits thereunder, "absolutely fixed," and were not subject to subsequent forfeiture by the bringing of the ineffectual action in tort. There is no doubt in our minds of the soundness of this view. As the court say, the opposite rule would be "too unconscionable to be enforced by a court of justice." The applicability of this rule to those cases in which actions are brought by administrators, under the statute, for the recovery of damages for wrongfully or negligently causing the death of the deceased, appears to have been established by this court in those instances in which the administrator is the same person named as beneficiary in the contract of insurance. *Chicago, B. & Q. R. Co. v. Bigley,* 1 Neb. (Unof.) 225; *Walters v. Chicago, B. & Q. R. Co.,* 74 Neb. 551.

This conclusion is, as we understand, justified solely upon the ground, above stated, that the administrator and beneficiary are the same person, and that her official character does not deprive her of the discretion, reserved in the contract, of choosing to which of two several remedies she will resort for compensation in damages for the act complained of. Or, perhaps, more correctly speaking, the beneficiary, upon her appointment and qualification as administratrix, succeeds to and becomes vested with the right and power of election of remedies which the deceased would have enjoyed had he survived the injury. From this premise it follows, of course, that if she does not receive or accept of such appointment she never occupies a position in which her rights can be impaired or affected by such an election or in which she can be required or entitled to make one; and, conversely, her prosecution of the contract obligation of the company to herself cannot impair or

affect the right of the administrator to prosecute any claim to which he may deem himself entitled under the statute.

We conclude therefore that the case is substantially identical in principle with the former decisions of this court above cited, and recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

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 the cause remanded for further proceedings.

REVERSED.

The following opinion on rehearing was filed April 4, 1907. *Former judgment vacated and judgment of district court affirmed:*

1. Contracts: REMEDIES. Under a contract of membership in the relief department of the Chicago, Burlington & Quincy Railroad Company, which provided that the receipt of benefits by the beneficiary should bar all actions for damages arising from the death of the member, the beneficiary, after receiving the benefit provided for in the certificate of membership, cannot maintain an action to recover damage for herself caused by such death; but the receipt of such benefit will not bar her action as administratrix of the estate of the deceased for the benefit of her minor children.
2. ———: FORFEITURE: PUBLIC POLICY. The provision in a contract of membership in the relief department that, "if any suit at law shall be brought against said company for damages arising from or growing out of" the death of the member, the benefit otherwise payable shall thereby be forfeited, is against public policy and will not be enforced.

SEDGWICK, C. J.

The questions presented on this motion for rehearing have been thoroughly briefed and carefully presented. We have reexamined the decisions of this court construing contracts relating to membership in the defendant's relief department. In the former opinion in this case, *ante,*

p. 783, it was decided that the commencement of an action against the defendant for damages by this plaintiff as administratrix of the estate of her husband worked a forfeiture of her rights as beneficiary in the certificate herein sued upon. Questions arising upon the construction of these contracts have been before this court in several cases, but we have never been called upon to adjudicate the precise question involved in this case, unless it be in *Walters v. Chicago, B & Q. R. Co.*, 74 Neb. 551. In that case the plaintiff was the mother of the deceased. There were no widow and children. The plaintiff, therefore, although she prosecuted her action for damages as administratrix of the estate of the deceased, prosecuted it solely in her own interest. She did not voluntarily dismiss her action, but after final judgment had been rendered against her in her action for damages she attempted to recover as beneficiary of the relief fund. It was held that her former action was a bar to such recovery. In the opinion in that case the distinction between the principles there involved and ordinary cases of election of remedy was pointed out and clearly stated. The sense in which the doctrine of election of remedies was applicable in *Chicago, B. & Q. R. Co. v. Bigley*, 1 Neb. (Unof.) 225, and *Chicago, B. & Q. R. Co. v. Olsen*, 70 Neb. 559, was also correctly stated. In those cases it was held that, when the beneficiary elected to take the benefits under the relief certificate, and actually received a part of the amount due under the beneficiary certificate, a subsequent ineffectual attempt to recover damages arising out of the negligence of the company would not prevent the collection of the remainder of the benefits under the certificate. It has been several times held by this court that one who has received benefits from the relief departments under his relief certificate cannot himself maintain an action for damages for the negligence of the company in causing the same injury which was the basis of his claim for benefits. *Clinton v. Chicago, B. & Q. R. Co.*, 60 Neb. 692; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 44; *Chicago, B & Q. R. Co. v. Curtis*, 51 Neb. 442.

This was the situation in the *Olsen* case: When the defendant was sued for damages caused by its negligence, it answered that the plaintiff had elected to claim under his benefit certificate and had received a part of the benefits to which he was entitled, and so defeated his action for damages. After having defeated his action for damages upon that ground, it was not allowed to deny its liability under the benefit certificate.

In the case at bar the plaintiff as administratrix of the estate of the deceased represented her several minor children as well as herself. Her husband was killed while in the employ of the defendant company. She had good reason to believe, and she testified she did believe, that his death was caused by the negligence of the defendant. If it was so caused, it was her duty as administratrix to recover damages from the defendant in behalf of her minor children. This duty she attempted to perform. In an early case in this court it was determined that the widow, by accepting benefits from the relief department under a contract like the one in question, settled and barred her claim against the company for damages, but it was also held that such action on her part would not defeat the rights of her minor children. After having received benefits herself from the relief department, she might as administratrix prosecute an action for damages against the company in behalf of her minor children. *Chicago, B. & Q. R. Co. v. Wymore,* 40 Neb. 645. Speaking of that case, this court in *Chicago, B. & Q. R. Co. v. Bell,* 44 Neb. 44, said: "In that case Wymore was a member of the relief department, and was killed through the negligence of the railroad company. After his death his widow accepted from the funds of the relief department the death benefit to which she was entitled by virtue of being Wymore's widow and his membership in the relief department. She then brought a suit as administratrix against the railroad company for damages for negligently killing her husband. This suit was brought under chapter 21 of the Compiled Statutes, 1893; and we held that the right of action conferred by

the statute was for the benefit of the widow and next of kin of the deceased who had lost his life through the negligence of the railroad company, and that the acceptance by the widow of the death benefit from the funds of the relief department was a release and discharge of her cause of action against the railroad company given by that statute for her own benefit; but that neither Wymore's membership in the relief department, nor his contract with it, nor the acceptance of the death benefit by the widow, operated to bar or release her cause of action as administratrix against the railroad company in favor of Wymore's children. We adhere to that case."

In actions of this kind there is especial reason for adhering to the earlier decisions of the court. Contracts of employment and of membership in the relief department are being continually made, and it is of highest importance that the contracting parties shall so far as possible understand their respective rights and duties when entering upon such contracts. If the two cases last referred to are to be regarded as a correct exposition of the law, we suppose that from the language quoted it would follow that, if this plaintiff had prosecuted her action as administratrix for the benefit of the children alone, such action would not have been a bar to her claim upon the relief fund. She, however, made no such distinction in the action which she brought. She sought to recover damages for herself as well as for her children. If therefore she had collected and received such damages in that action it would, we suppose, under the principles announced in the cases referred to, have barred all her claims against the relief fund. She began her action for damages and recovered a substantial verdict against the defendant in the trial court. The judgment of the trial court was reversed upon proceedings in error in this court upon the ground that the evidence showed contributory negligence on the part of the deceased. The evidence showing such contributory negligence was the testimony of one of the employees of the defendant, who testified that the deceased was warned of

peculiar dangers which he was incurring and was told to take precautions, which he failed to do, and knowledge of these facts was wholly in the possession of the defendant's agents. The plaintiff makes it appear that she could not and did not forsee that she would be confronted with such evidence, and that when she commenced her action for damages all the circumstances were such as to not only warrant her in bringing such action, but to make it her duty as administratrix so to do.

When the judgment for damages had been reversed by this court, the plaintiff at once dismissed her case without prejudice, and brought this action to recover under the benefit certificate. The question presented is whether the terms of the benefit certificate and the rules of the company, which were made a part of the contract, will under these circumstances prevent her recovery from the relief fund. That part of the contract relied upon for this purpose is in these words: "If any suit shall be brought against said company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable, and all obligations of said relief department and of said company created by my membership in said relief fund, shall thereupon be forfeited without any declaration or other act by said relief department or said company." It is contended that the construction of this language is that, if any suit for damages is brought by any party, the benefits payable to the beneficiary in the relief department are forfeited, whether such beneficiary participates in the action for damages or not; but this is not the meaning of the language used. The provision is that the person who brings the suit for damages against the company shall forfeit the right to the relief fund. Can the forfeiture provided for in this contract be enforced? The benefit provided for in the relief certificate did not depend upon the negligence of the company in causing the accident, nor upon the question of contributory negligence of the deceased. Even his gross negligence or his criminal

conduct contributing to his death would not defeat the right of his widow to particpate in this fund. The amount to which she is entitled is fixed by the contract. It became due her upon the death of her husband. It partakes of the nature of life insurance. It is not measured by the amount of her loss. The jury estimated the damages to which she was entitled as administratrix at $3,500. When she began her action for damages she had reason to suppose that she ought to recover at least that amount from the defendant. She knew that she could obtain $500 from the relief fund without trouble. By the death of her husband she was confronted by the alternative to either waive her right to damages and her right to enforce that claim in the courts, or to forfeit the $500 which was hers and could be had for the asking. Her testimony shows that she realized the situation. Upon the advice of friends and her counsel she concluded that it was her duty to enforce her claim for damages. There can be no doubt that this was good advice as the claim then appeared. She attempted to enforce that claim, and, as soon as she ascertained that the facts were such that she could not enforce it, she dismissed her action and asked for her relief benefit. She is told that she has forfeited the $500. The contract itself calls this a forfeiture and there is no doubt that it is correctly named. The deceased during his lifetime paid for this benefit out of his earnings. It is therefore as though he had deposited $500 with the company upon the contract and agreement that he should go into the employment of the company, and that upon his death the $500 should be paid to his widow, with the further provision that, if the widow should sue the company for damages upon an allegation of negligence in causing his death, the $500 should be forfeited. She has a constitutional right that the courts shall be open to her to redress the grievance of negligently killing her husband and to litigate her claims predicated upon such negligence; but if she exercises that right she must under this contract suffer a forfeiture for so doing. If the company required its employees to deposit money with the

company upon contract that, if such employee should afterwards be injured in the service of the company, and should bring an action for damages predicated upon the negligence of the company, the money so deposited should be forfeited, would such a contract be enforced? Can a party contract beforehand under penalty and forfeiture that he will not litigate a claim that may thereafter arise? The policy of our law is to furnish every citizen with speedy redress for any injury that he may receive in person or property, and a contract which essentially imposes a penalty upon seeking such redress is contrary to that policy. The decision in *Walters v. Chicago, B. & Q. R. Co., supra,* so far as it conflicts with the views herein expressed, is wrong and is overruled.

The former judgment entered in this cause is vacated and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

RUTH BROWN ET AL. V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED JUNE 8, 1906. No. 14,289.

Principal and Surety: DISCHARGE. If a creditor to whom two persons are obligated, one as principal and the other as surety, release the former he also discharges the latter, and the same principle is applicable when the person released is, as to the creditor, a surety only, if he is known to be ultimately liable to the party not formally discharged. The creditor cannot intentionally deprive his debtor of his indemnity, and still hold him to his obligation.

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

Benjamin F. Johnson, for plaintiff in error.

Billingsley & Greene, contra.

AMES, C.

This case is now for a fifth time before this court, and for a history of it and of the circumstances out of which it arose reference is made to former opinions of the court in 64 Neb. 62, and 70 Neb. 696. In the last of these opinions it was held that the amended answer and supplemental answer of the railway company stated facts constituting a defense, especially the latter which pleaded a settlement, accord and satisfaction between the plaintiffs and one of the sureties of the defaulting county judge. A judgment for the plaintiffs upon a directed verdict was accordingly reversed and the cause remanded for a new trial. When the cause was reached in the district court, the plaintiffs withdrew their replies and demurred generally to the amended and supplemental answers, with the inevitable result that the demurrer was overruled and a judgment was rendered for the defendant. From that judgment this proceeding in error is prosecuted, which presents the identical controversy argued and decided in *Chicago, R. I. & P. R. Co. v. Brown,* 70 Neb. 696. We are entirely satisfied with the opinion of Mr. Commissioner ALBERT, filed at the last hearing, which has become the "law of the case," and to which we refer in preference to repeating it here. We will, however, note what appears to us to be an additional reason for the decision then made. As between the railway company and the county judge and his sureties, the latter were, under the circumstances of this case, the principal debtors. That is to say: If before, or in the absence of, the settlement the plaintiffs had recovered any sum from the company it would have been entitled to indemnification at the hands of the officer and his sureties, and it follows as a matter of course that a settlement with and discharge of the latter by the plaintiffs released also the party for whom they were sponsors; for it cannot be doubted that if a creditor to whom two persons are obligated, one as principal and the other as surety, releases the former he also discharges the

latter, and we think there is no difference in principle if the person released is, as to the creditor, a surety only, if he is known to be ultimately liable to the party not formally discharged. The creditor cannot intentionally deprive his debtor of his indemnity, and still hold him to his obligation.

We 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.

JOHN EMLEY, ADMINISTRATOR, APPELLEE, V. CITIZENS STATE BANK OF STANTON, APPELLANT.

FILED JUNE 8, 1906. No. 14,371.

1. **Trial**: REPLY. A trial judge does not commit prejudicial error by refusing to strike from a reply allegations of new matter already embraced in the issues raised by the petition and answer, and therefore admissible in evidence without further pleading.
2. **Issues**: VERDICT: INDEMNITY. Where the issue is as to whether a certificate of deposit was issued against a deposit in a bank, and the general verdict is for the plaintiff, based upon his denial that such instrument ever existed, the court need not require indemnity against such alleged outstanding instrument.
3. **A cross-examination should be confined to the subject matter of the examination in chief.**

APPEAL from the district court for Stanton county: GUY T. GRAVES, JUDGE. *Affirmed.*

G. A. Eberly, for appellant.

A. R. Oleson, John A. Ehrhardt, W. W. Young, W. P. Cowan and *A. A. Kearney, contra.*

AMES, C.

This case was formerly before this court and decided by an opinion prepared by Mr. Commissioner OLDHAM, *Sharp v. Citizens Bank of Stanton,* 70 Neb. 758. Reference is made to that opinion for a recital of such of the facts as are not stated below. After the cause had been remanded, Emley, the administrator of the estate of William T. Sharp, deceased, was permitted to intervene, such intervention being treated substantially as a substitution of the administrator for all the former plaintiffs, and the litigation thereafter proceeded as an action between him and the bank alone. In his petition he sought to recover as upon a demand arising upon open, check or deposit account and claimed interest from the alleged date of the deposit, or February 6, 1888, alleging that the fact of the deposit and indebtedness had been fraudulently concealed by the bank and its officers, and that the same did not come to his knowledge until within a year prior to the filing of his petition, and that if any certificate of deposit or other evidence of it had been ever executed or issued it had been lost or destroyed, but that in truth and in fact none such had ever been made or issued. Before answering, the defendant, for no very well-defined reason, moved the court for an order requiring the plaintiff to separately state and number causes of action in his petition, but there being but one cause alleged, the motion was overruled, and the defendants filed an offer to confess judgment for the principal of the sum sued for, viz., $938.10, together with 7 per cent. interest thereon from June 1, 1904, and costs of suit. The offer was declined. The answer, besides a qualified general denial, pleads affirmatively that at the time the deposit of money was alleged to have been made the Citizens Bank of Stanton was a private institution, owned by Frank P. Hanlon and John Eberly, as partners, and that the books of said partnership showed that a certificate of deposit was issued therefor to the deceased, William T. Sharp, which was negotiable in form, and payable upon

demand and its return, but that such demand and return had not been made. It was further alleged that the defendant bank was an incorporation which had become such in May, 1890, and that after its incorporation it was informed by the said Sharp that no such deposit had ever been made, and that the defendant had since relied upon said statement, believing it to be true. They demanded therefore that a recovery, if any, should be conditioned upon the execution by the plaintiff, with surety, of a good and sufficient bond of indemnity against said outstanding certificate of deposit, if there was one. The answer concluded with a plea of the statute of limitations. A reply was filed, denying new matter, and alleging that the incorporated bank was a successor both ostensibly and in fact to the name, business, assets and liabilities of the private institution. It is assigned for error that the court erred in refusing to strike out this allegation, but it is implied by the language of the answer also, and evidence in support of it would have been admissible in its absence, so that, if there was error, it was without prejudice. There was a trial, verdict and judgment for the plaintiff for the amount prayed for, and defendant appeals to this court.

There is no complaint as to instructions, and but little opportunity to err with respect to them. The litigation involved issues of fact only, which appear to have been fairly tried and submitted to the jury, and we know no reason why their verdict should be disturbed. The question whether a certificate of deposit had been issued against which the defendant is entitled to be indemnified is, if an issue at all, one of fact which was disposed of with the rest; there was no separate or special finding of it made or demanded, and no bond of indemnity was therefore requisite. We are also of opinion that the defendant is estopped with respect to it by their present and former pleadings.

The cashier of the defendant was examined as a witness by the plaintiff concerning his knowledge of entries upon the books of the bank for the purpose of proving the alleged

fact of concealment, and certain letters written by him to the widow of the deceased were admitted for the same purpose, and counsel complain because the defendant was not permitted to cross-examine concerning certain alleged conversations between the witness and the deceased with reference to these entries and to matters mentioned in the letters. But it was the existence of the entries and the witness' knowledge of their existence, and not the reason or occasion of their having been made, that was the subject of the examination in chief, and the matter sought to be drawn out was not a proper subject of cross-examination. In other words, the object and effect of the examination in chief was not to prove by the witness any transaction between him and the deceased, but to prove that he had known of the existence of certain alleged evidence of such a transaction, and he was not called upon to tell what that transaction was or whether the supposed evidence thereof was true or false. If the deceased had been alive, and plaintiff in the action, the attempted cross-examination would have been equally objectionable, and, hence, a construction of section 329 of the code, which is urged upon our attention, is not called for.

We 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 is

AFFIRMED.

MICHAEL CIZEK V. ANNA CIZEK.

FILED JUNE 8, 1906. No. 14,172.

1. Divorce: ALIMONY: JURISDICTION. Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist. *Cizek v. Cizek*, 69 Neb. 800, followed and approved.

2. **Alimony: POWER OF COURT.** Under section 27, ch. 25, Comp. St. 1905, the district court has a continuing power, after a decree of divorce and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on petition of either of the parties.

3. ———: ———. If the decree of the trial court awarding alimony in a divorce proceeding is void for want of jurisdiction, the court may at a subsequent term award suitable alimony upon application and a sufficient showing.

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

Talbot & Allen and *Hainer & Smith,* for plaintiff in error.

J. E. Philpott, contra.

OLDHAM, C.

This is an action by supplemental petition to review, revise and amend a former decree attempting to award Anna Cizek alimony in a divorce proceeding, originally instituted by Michael Cizek against her in the district court for Lancaster county, Nebraska. The facts underlying the controversy are that in March, 1902, Michael Cizek brought an action for divorce against his wife, Anna Cizek, and in his petition alleged that he was the owner in fee of certain lots situated in Lincoln, Nebraska, and further alleged that it was his wish that his wife, Anna Cizek, should be allowed a reasonable sum for alimony. Anna Cizek, the wife and present plaintiff, filed an answer and cross-petition in which she also asked for alimony. A decree of divorce was granted on the cross-petition of the wife, and, in lieu of all other orders of alimony, the court attempted to decree a conveyance of the lands owned by the husband to the wife, with a provision that when the lands were so conveyed the wife should execute a mortgage for $250 on the lands in favor of the husband, payable six months after date and bearing interest at the rate of 6 per

cent. This decree was not appealed from by either of the parties, but the husband, Michael Cizek, refused to comply with the decree, and the wife attempted to enforce it by a suit for the possession of the land, and succeeded so far as the judgment of the district court was concerned. But on a review of the judgment by this court, in *Cizek v. Cizek,* 69 Neb. 800, it was held that the decree of the court, in so far as it attempts to award the real estate of the husband to the wife as alimony, was void and subject to collateral attack. After the rendition of this opinion, and more than a year after the first judgment, plaintiff, Anna Cizek, instituted this suit, in which she alleges all the proceedings heretofore had in the case, and prays the court to so alter, amend and correct its former decree as to grant her a reasonable allowance for support and alimony. Defendant, Michael Cizek, answered plaintiff's petition by admitting the former decree of divorce, and pleading the former judgment as a bar to any subsequent suit by the wife for alimony. On issues thus joined, there was a trial to the court and a judgment for the plaintiff for $375 alimony in gross. To reverse this judgment defendant, Michael Cizek, brings error to this court.

The contention of the defendant is that, as the judgment of the district court, which attempted to award alimony in the original suit, was not appealed from by either of the parties, it is a final and binding judgment, which, although erroneous, could at most only be reviewed, after the term in which it was rendered, under the provisions of section 318 of the code, and that to entitle plaintiff to a new trial under this provision of the code the action should have been instituted within one year from the date of the judgment. If plaintiff's right of review depends on section 318 of the code, there can be no doubt that the defendant's position is well taken; but, as said by this court at the former hearing of this case: "Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist." The

sections of the statute providing for divorce and alimony are contained in chapter 25, Comp. St. 1905, and section 27 of this chapter is as follows: "After a decree for alimony or other allowance for the wife and children, or either of them, and also after a decree for the appointment of trustees to receive and hold any property for the use of the wife or children, as before provided, the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof, and also respecting the appropriation and payment of the principal and income of the property so held in trust, and may make any decree respecting any of the said matters which such court might have made in the original suit." This section of the statute has been interpreted by this court in *Ellis v. Ellis*, 13 Neb. 91, a case in which the wife had been awarded the lands of the husband as alimony in a divorce proceeding, and, after the adjournment of the term of court at which the decree of divorce had been granted, the wife by a supplemental petition asked to have the former decree amended and revised. In considering the question, COBB, J., speaking for the court, said:

"In decreeing the conveyance of the land, the court exceeded its powers under the statute: yet, had the defendant seen fit to make the conveyance according to the decree, it would have been a full discharge thereof. He not having done so, it was within the power of the court, upon proper notice, to revise and alter such decree in respect to the payment of such alimony or allowance, this supplemental or revised decree being one which 'such court might have made in the original suit.'"

In the recent case of *Chambers v. Chambers*, 75 Neb. 850, the construction of the statute in question was considered, and some of the authorities reviewed and the conclusion was reached that an application for permanent alimony or for a modification of a decree for alimony at a subsequent term must be based upon facts which did not exist when the decree was entered, or show a sufficient

reason why the issues tendered by the application were not litigated and determined in the original suit.

In the case at bar a good and sufficient reason is shown why the former decree for alimony should be modified. The condition is similar to that involved in *Ellis v. Ellis, supra,* with the additional circumstance that in this case the defendant challenged the jurisdiction of the court to award the alimony allowed in the original decree, and was successful in that challenge. Having demonstrated that the attempted adjudication of the court upon the question of alimony was nugatory and of no effect, he cannot now be heard to urge it as a final adjudication of the matter. This brings the case precisely within the rule announced in *Chambers v. Chambers, supra,* in that a sufficient reason is shown why the issues tendered by the application in the original suit were not litigated and determined.

The judgment of the district court is therefore right, and we recommend that it be affirmed.

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

AFFIRMED.

BYRON REED COMPANY, APPELLEE, V. ERNEST KLABUNDE ET AL., APPELLEES; MARY MANGOLD, APPELLANT.

FILED JUNE 8, 1907. No. 14,376.

1. **Vendor and Purchaser:** QUITCLAIM. A purchaser of real estate, who takes by quitclaim deed, takes subject to all existing equities against the grantor.

2. **Wills:** PROBATE. The county court has original jurisdiction in the probate of a will, and its order admitting a will to probate is conclusive, unless by a direct proceeding, by appeal, or otherwise, it is reversed. *Loosemore v. Smith*, 12 Neb. 343, followed and approved.

3. **Trusts:** POWER TO MORTGAGE. Where a trust is created for the support and maintenance of the beneficiary, neither the trustee nor

the beneficiary has the power to assign or mortgage the trust estate, without such power is expressly conferred in the instrument creating the trust.

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

J. J. O'Connor, for appellant.

Dexter L. Thomas, Hall & Stout, Paul L. Martin and *Morning & Berge, contra.*

OLDHAM, C.

On November 3, 1888, Ernest Klabunde and his wife, Wilhelmina Klabunde, purchased an eighty-acre tract of land in Douglas county, Nebraska, from the Byron Reed Company, plaintiff in this action, and on March 16, 1891, they bought an adjoining sixty-acre tract from the same company. The title to the lands was taken in the name of Wilhelmina Klabunde, and the lands were occupied as a homestead by Ernest Klabunde and wife. As part of the purchase price of these tracts of land, three mortgages were executed to the Byron Reed Company for the respective sums of $1,350, $750 and $550. While these mortgages were unpaid, Wilhelmina Klabunde departed this life on the 11th day of February, 1894. After her death a paper, purporting to be the last will of the deceased, duly attested and witnessed as such, was offered and admitted to probate in the county court of Douglas county on the 10th day of March, 1894. There was no contest over the probate of the will, which was entered of record. The material provisions of the will, as probated and entered on the records of Douglas county, are as follows:

"I give to my son, August Klabunde, my home farm, where I now reside (describing it), all my household goods, four horses, two colts, four milch cows, ten head of young cattle, fifteen hogs, and all my farm machinery belonging to the farm, and now in my possession, with the

following condition: That my son, August Klabunde, shall give to Ernest Klabunde, my husband, a good home with board and $150 per year, during the natural term of Ernest Klabunde's life, and this shall be a mortgage on said above described premises, nor shall my son, August Klabunde, have a right to sell the within described real estate without the consent of my husband, Ernest Klabunde." August Klabunde, the beneficiary in this will, was the only child and sole heir at law of Wilhelmina and Ernest Klabunde. He married; and the father, Ernest Klabunde, made his home with him in harmony with the provisions of the will until June 26, 1896, when, as appears from the testimony in the record, August Klabunde and his wife drove the old man from the premises, and since then have utterly refused to comply with the provisions of the will.

On December 12, 1894, and after the death of Wilhelmina Klabunde and the probate of her will, August Klabunde and wife executed a mortgage on the real estate for $2,500, for the purpose of renewing and taking up the three mortgages which had been executed by Wilhelmina Klabunde and her husband as before set out. Ernest Klabunde joined in this mortgage, and the three prior mortgages were accordingly satisfied. At the same time a commission mortgage of $125 was executed to the Byron Reed Company for its commission on the renewal. On December 20, 1895, in payment of certain instalments of interest and certain taxes, a new mortgage for $450 was given to the Byron Reed Company to cover these items.

On the 30th day of April, 1896, a suit was instituted by the Byron Reed Company to foreclose this latter mortgage for $450, subject to the $2,500 mortgage, which had been indorsed for value to one George W. Cook, and the $125 commission mortgage. The Mangold & Glandt Bank of Bennington, Nebraska, was made a party defendant in this action, because it was the holder of a junior mortgage on the premises, executed by August Klabunde and wife alone. When this foreclosure proceeding was instituted,

defendant Ernest Klabunde called at the office of the Byron Reed Company concerning the suit, and they advised him to go to their attorney and have an answer prepared. This he did, and an answer was accordingly prepared for him and filed, admitting the execution of the mortgage sued upon and its priority as a lien over his equity as provided in the will of his deceased wife. Judgment was accordingly rendered and sale of the premises had, the Byron Reed Company being the purchaser at the sale, which was subsequently confirmed on the 22d day of March, 1898, and no appeal was taken from the decree of confirmation.

On December 7, 1898, the Byron Reed Company, by a quitclaim deed, conveyed its interest in the property to George M. Mangold, son of the cashier of the Mangold & Glandt Bank, which had paid the amount of the claim of the Byron Reed Company, and later paid the $2,500 mortgage owned by George W. Cook. On October 30, 1901, George M. Mangold, at the request of Peter Mangold, executed a warranty deed purporting to convey the said real estate to one Ed Wiese, then a tenant on the land, who in turn executed a mortgage to the Mangold & Glandt Bank, and, as a part of the same transaction, conveyed the premises to Mary Mangold, wife of Peter Mangold. These two last mentioned deeds and the last mentioned mortgage were held in escrow in the Mangold & Glandt Bank, and neither delivered nor filed for record until the fall of 1903, and after Ernest Klabunde had begun an action to set aside the decree of foreclosure and the confirmation of the sale on the ground of mistake and fraud, and filed a notice of *lis pendens*.

On the 23d day of March, 1901, Ernest Klabunde commenced a suit in equity in the district court for Douglas county against the Byron Reed Company, seeking to set aside and vacate its decree of foreclosure and all proceedings had thereunder, including the sheriff's deed to the Byron Reed Company, on the ground of fraud and mistake. His petition was dismissed in the district court, but

on an appeal to this court, and on a rehearing of the cause, in an opinion delivered by HOLCOMB, C. J., 69 Neb. 126, the decree of the district court dismissing the plaintiff's bill was reversed, and a decree was entered here vacating and setting aside the decree of foreclosure and the sale had thereunder, and the cause was remanded for a new trial. When, in conformity with this mandate, a new trial was granted, amended pleadings were filed and all subsequent parties to the record were brought in. The Byron Reed Company filed an amended petition for the foreclosure of the $450 mortgage and alleged that it had conveyed all its interest in the premises by quitclaim to George M. Mangold, who in turn had conveyed to Weise, and Weise to Mary Mangold, who was alleged then to be the owner of the premises in controversy. Ernest Klabunde filed an answer and cross-petition in which he alleged the priority of his lien under the will of Wilhelmina Klabunde, and denied the execution and validity of the several mortgages executed after the probate of the will of his deceased wife. August Klabunde answered, denying the validity of the mortgages and alleging his interest in the land under the will of his mother. The Mangold & Glandt Bank answered, disclaiming interest, and alleging that their subsequent mortgage had been paid and satisfied by August Klabunde. George M. Mangold answered, alleging that he had conveyed all his interest in the premises to Wiese, and that Wiese in turn had conveyed to Mary Mangold. Wiese answered, alleging his conveyance to Mary Mangold and disclaiming further interest in the land. Mary Mangold answered, alleging ownership of the premises and her purchase for value without notice of the rights of Ernest Klabunde, and also setting up the fact that the land in controversy was never owned by Wilhelmina Klabunde, and that it was held by her in trust for Ernest Klabunde. She also alleged that the purported will of Wilhelmina Klabunde was a forgery written after the death of Wilhelmina Klabunde, and that its probate was procured by fraud and perjury. These allegations were denied by the reply of Ernest Kla-

bunde. On issues thus joined there was a trial to the court, and a judgment and decree, in which it was held that the Byron Reed Company and their successors in interest purchased with actual and constructive notice of the rights and equities of Ernest Klabunde; that the will, having been duly admitted to probate, was not subject to collateral attack by the Byron Reed Company or their successors; that the will created an inalienable trust estate upon the real estate in favor of Ernest Klabunde, and under its provisions Ernest and August Klabunde had no right or authority to execute any of the mortgages made by them after the probate of the will, but that the $2,500 renewal mortgage and the $125 commission mortgage and the $450 mortgage for interest and taxes, set up in the plaintiff's petition, represented renewals of valid mortgages which were on the said real estate at the time of the death of Wilhelmina Klabunde, and created in the holders thereof an equitable lien against said real estate, by way of subrogation, superior to the interests of both August and Ernest Klabunde. The court then rendered an accounting between Mary Mangold, as a mortgagee in possession, and Ernest and August Klabunde, and allowed her the face of the mortgages with 7 per cent. interest and taxes paid, amounting to $6,523.36, and charged her with the rents and profits of the land, while occupied by her, at the rate of $420 a year, making a total of rents and profits and interest to be deducted in the sum of $3,470.20, leaving a balance due of $3,053.16, which was declared to be a first lien on the premises. As between August and Ernest Klabunde, the court found that the terms of the trust had been violated and repudiated by August Klabunde, and found the amount due from him to his father under the terms of the will, and taxed the gross amount as a second lien on the premises, and the land was ordered to be sold to satisfy the first and second liens so found. To reverse this judgment and decree defendant Mary Mangold appeals to this court.

As the Byron Reed Company disclaimed any interest in

its amended petition, and the court properly found that it had conveyed all its interest to the grantors of Mary Mangold, it plainly has no cause for complaint in this tribunal. So we will only examine the decree so far as it affects the rights of Mary Mangold. In the brief filed in her behalf, it is urged that the judgment and findings of the court are erroneous in three particulars: First, in holding that Mary Mangold bought with notice of the rights of Ernest Klabunde; second, in determining the rights of Ernest Klabunde under the will, which was charged to have been a forgery; third, in treating the land as having been the property of Wilhelmina Klabunde, when it was in fact always the property of Ernest Klabunde. We will consider these alleged errors in the order assigned in the brief. It is conceded in the brief that, when Mary Mangold took the deed to the premises and paid the consideration therefor, she had constructive notice by a *lis pendens* of the suit of Ernest Klabunde to set aside the foreclosure decree. But it is contended that the Byron Reed Company had no notice of the claim of Ernest Klabunde at the time it purchased at the foreclosure sale, and the rule is invoked, which was recognized by this court in *Snowden v. Tyler,* 21 Neb. 199, that "a purchaser *pendente lite* from a purchaser who bought without notice, and for a valuable consideration, may protect himself under the first purchaser." The rule announced is sound in principle, but how can we now say that the Byron Reed Company purchased at the foreclosure sale without knowledge of the rights of Ernest Klabunde, in view of our holding in this case at its former hearing, when we set aside that sale for the very reason that a constructive fraud had been practiced upon Ernest Klabunde by the Byron Reed Company in procuring the decree of foreclosure? Again, the Byron Reed Company conveyed to its grantee by quitclaim and not by warranty deed, and in conveyances of real estate a quitclaim deed is of itself a red light to warn the grantee that the rear end of the transaction is exposed to equities. *Arlington Mill & Ele-*

vator Co. v. Yates, 57 Neb. 286; *Bowman v. Griffith,* 35 Neb. 361; *Pleasants v. Blodgett,* 39 Neb. 741.

Passing then to the second question, which is as to the right of Mary Mangold to assail collaterally the validity of the will of Wilhelmina Klabunde, it is plain that Mrs. Mangold could not have assailed or contested the probate of the will in the county court, because she was not a party in interest in the controversy. And, again, if she had been a party in interest, she could not, after the will had been admitted to probate, assail the decree in a collateral matter. In *Loosemore v. Smith,* 12 Neb. 343, it was held:

"The county court has original jurisdiction in the probate of a will, and its order admitting a will to probate is conclusive, unless by a direct proceeding, by appeal, or otherwise, it is reversed."

This case was cited with approval in the recent case of *Williams v. Miles,* 63 Neb. 859, and is conclusive of the question that a will duly admitted to probate is not subject to collateral attack.

With reference to the third objection that the property was always, in fact, the property of Ernest Klabunde, we think that it does not lie in the mouth of defendant, who holds her equities as the successor of the Byron Reed Company, to assert such a defense. The land was purchased from the Byron Reed Company and deeded by it to Wilhelmina Klabunde. The original mortgages were taken from her and her husband in recognition of her ownership of the fee. The land, when purchased, was occupied as a homestead and was not a subject of fraudulent conveyance between husband and wife. It is not necessary to decide whether or not, under the terms of the trust created in the will of Mrs. Klabunde, the property could have been conveyed by deed by the son, even if the father had joined in the conveyance. But it is clear to us that the trial court properly held that, under the provisions of the will, there was no authority conferred on the trustee to incumber the trust estate by mortgage, even by consent of the father, who was the *cestui que trust.* In 1 Perry, Trusts, sec. 386*a*,

it is said: "If a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities and is in other respects legal, neither the trustees, nor the *cestui que trust,* nor his creditors or assignees, can divest the property from the appointed purposes." And it is generally held that, where a trust is created for the support and maintenance of the beneficiary, neither the trustee, nor the beneficiary, has the power to assign or mortgage the trust estate without such power is expressly conferred in the instrument creating the trust. *Bloomer v. Waldron,* 3 Hill (N. Y.), 361; *In re Hoyt,* 5 Dem. Sur. (N. Y.) 432; *Meek v. Briggs,* 87 Ia. 610, 43 Am. St. Rep. 410; *Willis v. Smith,* 66 Tex. 31, 17 S. W. 247; *Stokes v. Payne,* 58 Miss. 614, 38 Am. Rep. 340.

We are therefore of the opinion that all the rights and equities of the appellant were fully protected and enforced in the judgment and decree of the district court, and we recommend that the judgment 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.

NICHOLS & SHEPARD COMPANY V. AUGUST H. MILLER ET AL.

FILED JUNE 8, 1906. No. 14,104.

Instructions examined, and *held* erroneous.

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

M. D. Tyler, for plaintiff in error.

A. R. Oleson and *W. W. Young, contra.*

EPPERSON, C.

In this proceeding the plaintiff in error seeks to reverse the judgment of the district court for Stanton county in an action instituted by the plaintiff in error against the defendants in error on two promissory notes. It is admitted by the pleadings that the notes sued on, with others, were given by defendant August H. Miller, as principal, and Wilhelm Miller, as surety, in consideration of the purchase of a threshing outfit consisting of a traction engine, separator and appliances. In their answer, defendants alleged that they suffered a total failure of consideration, and that the property was not as represented by the plaintiff's sales agent. In reply the plaintiff exhibited a written instrument signed by the defendants, which it alleged was a contract of purchase. This instrument contained a warranty of the property, and imposed conditions to be performed by the purchasers precedent to a rescission thereof in case the machinery was not as represented. And it also provided: "This order is subject to the acceptance of the said company, and, when so accepted, is a binding contract"; but did not state in what manner the company's acceptance should be evidenced.

Defendants sought to impeach this instrument on the grounds that it had not been accepted by the plaintiff, and that the signature of the defendant thereto had been obtained by fraud. Some evidence was given in support of the latter contention. This instrument was signed by the defendants and delivered to plaintiff or its agent. Thereupon the property was delivered to defendants. It was *prima facie* evidence of the contract, and the burden rested upon the defendants to impeach it by proving fraud, or to defeat it by showing a compliance with its conditions on their part, or a waiver thereof by plaintiff. This was the most important issue in the case, regarding which the jury should have been, but were not, instructed. This contract provided that in case the machinery proved defective, the defendants should notify the plaintiff by writing. No

evidence whatever was introduced to show an attempt on the part of the defendants to comply with this provision of the contract. The court in two instructions, excepted to by the plaintiff, assumed that such evidence had been submitted, prefacing the same with the following: "If you further find that defendants failed and neglected to notify the plaintiff company of such defects, and afford the plaintiff an opportunity to remedy the same as required by said written warranty, then," etc. Such instructions were not sustaind by the evidence, and the giving of the same was error.

Defendants' counsel contend that there was a total failure of consideration, and that it is immaterial whether or not the written order was binding upon the defendants. We cannot apply that rule to this case as it is now presented. The contract itself contemplated a total failure by providing: "If any part of the machinery cannot be made to fill the warranty, that part which fails shall immediately be returned to the place where it was received, with the option of the company to either furnish another machine, or to return the money and notes." This, also, is a condition with which the defendants should have either complied, or shown a waiver thereof by the company or an agent having actual or ostensible authority. And the evidence on this point should also be submitted to the jury under proper instructions.

We recommend that the judgment of the district court be reversed and this cause remanded for a new trial.

AMES and OLDHAM, CC., concur.

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

REVERSED.

BRITISH-AMERICAN INSURANCE COMPANY OF NEW YORK v. COLUMBIAN OPTICAL COMPANY.

FILED JUNE 8, 1906. No. 14,238.

Evidence examined, and *held* insufficient to sustain the verdict.

ERROR to the district court for Douglas county: HOWARD KENNEDY, JR., JUDGE. *Reversed.*

Greene, Breckenridge & Kinsler, for plaintiff in error.

Hall & Stout, contra.

EPPERSON, C.

On the 20th day of June, 1903, the plaintiff held a policy of fire insurance issued by the defendant company upon plaintiff's stock of optical goods situate at No. 211 South Sixteenth street, Omaha, Nebraska. The plaintiff also held $8,000 concurrent insurance issued by other companies. On that day there was a fire in plaintiff's place of business, which it alleges resulted in its damage to the extent of $6,594.03. To recover one-fifth of this amount, with interest, the plaintiff brought this action. A trial was had to a jury, which resulted in a verdict and judgment for the plaintiff in the amount sued for. The defendant prosecutes error to this court.

Many assignments of error were argued, but we find it necessary to consider only the sufficiency of the evidence as to the damages sustained. The proof shows that the property damaged consisted almost entirely of 175,000 lenses, evidence as to the value of which was very unsatisfactory and indefinite; and it is maintained by the defendant that the same is insufficient to sustain the verdict of the jury. Mr. Agnew, the president of the plaintiff company, was the principal witness in behalf of the plaintiff. He testified that the value of the damaged property was $6,594.03. He reached this conclusion by taking the inventory of his stock

of goods made in January, 1903, adding thereto the amount of the goods bought prior to June 20, 1903, and deducting the goods sold. There is a manifest difference between the value of the damaged goods and the amount of damage to the goods, and as to the latter no definite amount is fixed by the witness, nor was there testimony given from which the jury could intelligently arrive at the amount. The proof shows that the damaged lenses at the time of the fire were packed in small boxes, each containing about twelve dozen, and that they have been kept separate since the fire from the other merchandise of the plaintiff company. Mr. Agnew testified: "I mean that I did not take each lens, but I looked at a great many boxes, and my judgment, in the optical business for years, told me that the stuff that was there was not worth while doing anything with." He further said that many of the lenses would have to be thrown away, but did not know what proportion; that the rest of them, if they are not scratched, or broken or damaged in any way, can be cleaned; that his investigation of the damage was only of a part of the boxes; that since January 1, 1904, he has cleaned a part of them; that at the time of the trial he was unable to tell how many of them could be cleaned, and that such as could be cleaned would have a value for second quality lenses. He said: "Q. They would have a value for second quality lenses, then, wouldn't they? A. Yes, sir. Q. How much? A. Well, that is a question. I do not know how much. I will have to find out. Q. In proportion? A. I will have to find out. I can tell you, as I say, this summer, when I find out how many I have got. Q. When we take this case up after our summer vacation you can let us know? A. Yes. * * * Q. All that is necessary to do to these lenses is to clean them up? A. No, sir; many of them we have to throw away. Q. How many, what proportion? A. I don't know; I can tell you this summer some time. Q. These lenses there can all be cleaned, can they not? A. No, a good many of them are broken and lost. Q. All that are not broken; all that are

not water stained? A. No, there is a lot with scratches in. Q. All that are not scratched? A. Yes. Q. The rest can be cleaned? A. Yes; if they are not scratched or broken or damaged in any way, of course, we can clean them. Q. How many are there of that kind? A. I will tell you this summer. * * * Q. Then you could have found out, could you not, Mr. Agnew, exactly what amount of merchandise you had left after the fire? A. If you had not denied liability. That is what I am doing now, and I expect it will take one man over a year at the rate of one lens apiece for ten hours a day—one lens per minute, ten hours a day; and then he can't do that average. What I mean is this: On the lenses that I had in the place it will take one man 290 some days—I figured it up—at the rate of one lens a minute for ten hours a day, to handle them. Now then, some of those lenses it takes us four or five and ten minutes to clean." Mr. Riggs, an expert optician, testified also that, in his opinion, it would cost more to clean and focus the lenses than they were worth. He testified: "I selected lenses from what appeared to me to be the best, and also what appeared to be the ones in the worst condition, and also at different parts at random; not any special part of the lenses, but just as I would naturally go through them to estimate the amount of the loss." As to the condition in which he found the property after the fire, he says: "The envelopes in which the lenses were contained were, in a great majority of cases, destroyed. The ends of the boxes were destroyed, and the lenses themselves were covered with the result of a combination of smoke and water, I presume. It was a dark stain—looked like smoke—which could not be removed by any ordinary means, and some of them, of course, worse than others; but the ones that were the least damaged were not fit for use, and those that were the most damaged were covered with a thick gummy substance, probably the result of action of creosote or from the smoke, I presume." On cross-examination, however, it developed that this witness had made several visits to inspect the damaged property.

He could not say that he had at any one time inspected as many as 100 lenses; but he gave no number definitely, but thinks he did handle as many as 100 on one occasion; would not go beyond that; couldn't say that he handled different lenses at different times; thinks that altogether he handled at least 700. It is not shown that he examined the lenses contained in the envelopes which had not been broken by or as a result of the fire, and no evidence was given which would justify the jury in finding that such were damaged, and a total loss of all the lenses was necessary to sustain the verdict. The general statement made by Mr. Agnew, as well as Mr. Riggs, that the work necessary to clean and separate the lenses would cost more than they were worth was not evidence, but simply the conclusion of the witnesses; and, in the face of the other testimony, we are convinced that, from the proof, the jury could not conclude that there was a total loss. That there was a fire is admitted. That there was damage is proved. But the amount of such damage was not shown. We do not mean to hold the plaintiff to the difficult task of inspecting carefully each of the 175,000 lenses; but an inspection of each box or envelope and a careful estimate of the damage is not unreasonable, and is a duty the plaintiff owes to itself, the defendant and the court. The trial was had in April, 1905, and since that time many months have elapsed. The interested parties have had their vacation, and the witness, Agnew, has had the opportunity to inspect his goods, and, presumably, may now give intelligent information as to the amount of the damage.

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

AMES and OLDHAM, CC., concur.

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

REVERSED.

JOHN VAN BURG V. JOHN VAN ENGEN.

FILED JUNE 8, 1906. No. 14,350.

1. **Pleading**: DEFENSE OF LIMITATIONS: BURDEN OF PROOF. In an action to recover an amount alleged to be due upon a verbal contract, the burden of proof is upon the defendant to prove that plaintiff's cause of action was barred by the statute of limitations, when that defense is in issue.
2. **Instructions**: REVIEW. The trial court's instructions and rulings denying instructions requested examined, and *held* without error.
3. **Evidence**: REVIEW. The rulings of the trial court on the admission and rejection of evidence offered examined, and found not erroneous.

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

Billingsley & Greene and *R. H. Hagelin,* for plaintiff in error.

Rose & Comstock, contra.

EPPERSON, C.

The plaintiff was employed under a verbal contract to dig a well for the defendant; and, on September 30, 1904, brought this suit to recover $65, the remainder alleged to be due upon the contract price. Plaintiff introduced evidence to the effect that said contract was entered into and completed in May, 1901. Defendant testified that the contract was entered into in the spring of 1900. The main contention in the case is that the action is barred by the statute of limitations. The jury returned a verdict for plaintiff for $65 and interest, and defendant prosecutes error to this court.

1. Upon the trial the court instructed the jury that, in order to sustain his defense of the statute of limitations, the burden was upon the defendant to show that the well in question was dug more than four years prior to Septem-

ber 30, 1904. Defendant contends that there was error in the giving of this instruction. There is a conflict of authority upon this proposition. See cases cited in 3 Elliott, Evidence, sec. 2461. Some of the courts hold that the burden of proof is upon the plaintiff to prove that the action accrued within the period of limitation. Other courts take the opposite view, imposing the burden upon the defendant. We were not favored with an oral argument of this case, and the briefs of counsel do not enter upon a discussion of the decisions bearing upon this point. It has, however, been established as a rule of practice in this state that, when the bar of the statute does not appear upon the face of the petition, the defense is waived, unless pleaded by the defendant. *Hanna v. Emerson, Talcott & Co.,* 45 Neb. 708; *Eayrs v. Nason,* 54 Neb. 143; *Hobson v. Cummins,* 57 Neb. 611; *McCormick Harvesting Machine Co. v. Cummins,* 59 Neb. 330. Under this rule of pleading, the statute of limations is an affirmative defense. To require the defendant to plead that defense and to impose upon the plaintiff the burden of disproving it would be inconsistent. We are, therefore, of opinion that the burden is upon the one pleading such defense to prove it, and we adopt that line of authorities casting the burden of proof upon the defendant. See cases collected in 3 Elliot, Evidence, sec. 2461, note 7.

Again, the evidence in the case did not show when the action was begun, and the defendant argues that it was error for the court to recite that fact in the instruction complained of. The case was brought to the district court by appeal from a justice of the peace, and the trial judge had before him the original papers, and it was proper for him to take judicial notice of the time when the action was instituted and base his instruction as to the period of limitation upon the information contained in the justice's transcript. The record before us does not show that the recitation in the instruction complained of, as to when the action was commenced before the justice, was a misstatement of fact, and we cannot presume error.

2. Prior to the trial the defendant filed his application for a continuance of the case for the reason that certain witnesses named were unable to attend the trial; that, if present, they would testify that the well in controversy was constructed in 1900. The plaintiff offered to admit that the witnesses, if present, would testify as stated in the affidavit, and the motion for a continuance was thereupon overruled. Upon the trial that portion of the affidavit relative to the proposed testimony of the absent witnesses was read in evidence, and the court instructed the jury in reference thereto as follows: "The jury are instructed that the credibility of the witnesses, and also the weight to be given to the admissions contained in the recital in the affidavit received in evidence are questions exclusively for the jury to determine." The defendant requested the court to instruct that such testimony is to be regarded and is entitled to like weight and credibility as if the said named witnesses were present in court and upon the witness stand testifying to said facts. The court refused so to instruct. This evidence, as shown by the affidavit, was immaterial, because it did not disclose at what time in 1900 the work was performed. If subsequent to September 30, 1900, then it clearly appears that their testimony would tend to show that the defendant was liable, and prejudice in refusing the instruction is not disclosed.

3. The other assignments of error pertain to the court's rulings upon the rejection and reception of evidence. We have carefully examined all of the assignments of error, and are clearly of the opinion that no prejudicial error was committed by the trial court. We therefore recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

GILALMOUS MCCARTY, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT.

FILED JUNE 8, 1906. No. 14,368.

Trial: QUESTION FOR JURY. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether or not there was negligence, the determination of the matter is for the jury.

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

Clark & Allen, for appellant.

Rose & Comstock, contra.

EPPERSON, C.

The only question presented for our consideration is the sufficiency of the evidence to support the verdict. The action was to recover damages for a personal injury sustained by the plaintiff alleged to have been inflicted through the negligence of the defendant's employees. The injury occurred while the plaintiff was in the act of alighting from one of the defendant's street cars upon which he was a passenger. The evidence shows that the plaintiff and another passenger, Hawkins, who was plaintiff's traveling companion, were at the time of the accident engaged in a business mission, and desired to alight from the car near the courthouse in Lincoln. Hawkins gave the signal to stop, and at the usual stopping place immediately east of the courthouse the car either stopped or nearly so. Plaintiff and Hawkins arose from their seats, and, while standing, asked for and received transfers from the conductor. Hawkins received his transfer and alighted from the car. Plaintiff then received his transfer, walked to the east side of the car, stepped upon the foot board or platform, then fell upon the pavement, receiving the in-

jury complained of. The plaintiff testified that the car had stopped; and, while he was about to alight, it started with a sudden jerk, throwing him violently upon the pavement. His testimony as to the car stopping was corroborated by one of the defendant's witnesses. Other witnesses testified that the car had not stopped, but that it was greatly reduced in speed, and was moving very slowly when the plaintiff alighted therefrom; that the plaintiff stepped from the car, facing the rear, or, in other words, stepped off backwards. There was also testimony that the car had moved from 20 to 30 feet from the place where Hawkins alighted to the place where plaintiff alighted.

The place of accident was about one-third of a mile from the O street junction, where the plaintiff and Hawkins would each be required to board the car to which he had received a transfer. Defendant contends that the fact that the plaintiff had asked for and received a transfer ticket amounted to a notice to defendant that the plaintiff did not intend to alight from the car until he reached the junction point. The testimony of the defendant's conductor is to the effect that, after issuing the transfer, he saw all of plaintiff's movements up to and including the injury; that he had no knowledge that the plaintiff and Hawkins were traveling companions, nor that the plaintiff had occasion to stop at the courthouse. The facts that the defendant's conductor saw the plaintiff walk to the exit side of the car immediately after receiving the transfer, and the plaintiff's conduct in arising and following Hawkins, it seems would challenge the conductor's attention to the plaintiff's probable intention to alight. On the other hand, there is some merit in the defendant's argument that the facts regarding the issuance of the transfer ticket would justify the conductor in believing that the plaintiff did not intend to leave the car until the junction point was reached. Such, however, defendant cannot contend was always the rule, for the conductor had just a moment previous issued a similar transfer to Hawkins, who immediately left the car. After a careful considera-

tion of this question, we consider that we cannot say that, as a matter of law, the fact regarding the issuance of the transfer ticket was sufficient to relieve the defendant from liability for which otherwise it was liable. It has been announced by this court that "when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury." *Omaha Street R. Co. v. Craig,* 39 Neb. 601. Under this rule, and after a careful consideration of the evidence, we are convinced that there was sufficient evidence introduced by plaintiff to authorize the submission of the case to the jury.

Defendant, however, contends that the evidence clearly shows contributory negligence on the part of the plaintiff. As to this point, it clearly appears that, if the plaintiff's testimony is true (and this was a question for the jury to determine), he was not guilty of contributory negligence as alleged by defendant.

For these reasons and in view of the conflicting testimony as to the manner in which the injury occurred, we recommend that the judgment of the district court be affirmed.

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

FARMERS & MERCHANTS BANK, APPELLEE, V. WILLIAM CARLSON, APPELLANT.

FILED JUNE 8, 1906. No. 14,359.

Evidence examined, and *held* to support the judgment of the district court.

APPEAL from the district court for Polk county: ARTHUR J. EVANS, JUDGE. *Affirmed.*

John Tongue, for appellant.

E. E. Stanton, contra.

DUFFIE, C.

William Carlson, appellant, made his note to the People's Medical Dispensary of Chicago, Illinois, for $50, due six months from date. The note was executed in consideration of a contract made by the payee for six months' medical treatment, such treatment to be continued without further compensation if a cure was not effected within that time. The evidence is undisputed that the Farmers & Merchants Bank purchased this note in the usual course of business, paying full value therefor before its maturity. The defense relied upon is that, before signing the note, Carlson insisted that there should be indorsed on the back thereof the following: "Payable according to contract." It is claimed that these words have been erased from the back of the note and this worked a material alteration thereof. The case was tried to the court without a jury, and judgment entered in favor of the bank.

The agent of the medical company who took the note from Carlson testifies that no indorsement whatever was made upon the back of the note, and that it is now in the same condition as when signed by Carlson. Altschuler, who acted as the agent of the medical company in selling this and other notes to the bank, testifies that it is in the

same condition as when received by him. The original note is found in the bill of exceptions, and a careful examination fails to disclose any evidence that the note was indorsed as claimed, or any signs that any erasure has been made or attempted. The finding of the district court is fully sustained by the evidence. Objections were made to the depositions of Collins and Altschuler, two of the plaintiff's witnesses, but of so technical a character that they do not call for any discussion.

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.

OLAF ISAAC ET AL., APPELLANTS, V. W. J. HALDERMAN ET AL., APPELLEES.

FILED JUNE 8, 1906. No. 14,365.

1. **Wills: SIGNATURE.** A testator, being unable to write his own name, said to the draftsman of his will, in the presence of two witnesses: "You know I cannot write. You will have to sign it for me." *Held*, That this was a sufficient request to authorize the draftsman to sign the testator's name.
2. **Nonexpert witnesses** called upon the question of the mental capacity of a testator must state the facts upon which their opinion of incapacity is based.
3. **Evidence** examined, and *held* insufficient to show either mental incapacity or undue influence.

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

W. H. Richards and *L. W. Colby*, for appellants.

G. T. Belding, J. C. Dort and *F. Martin, contra.*

DUFFIE, C.

In 1867 Nels Isaac and his two brothers came to Nebraska, and each took up a homestead in Pawnee county in the same neighborhood. Nels Isaac and his brother Fred were bachelors. Some years later Fred Isaac died from injuries received in an accident, and Nels purchased from the administrator of his estate the 160 acres of land of which he died seized. Nels resided on his own homestead until a short time previous to his death, living alone and usually renting his two farms. About ten years previous to his death, which occurred August 9, 1902, Frederick Southard rented from him the place formerly belonging to his deceased brother, and continued as his renter up to the time of his death. The evidence is quite conclusive that Nels was a strong, hearty man up to a date not longer than one year previous to his decease; that something like two weeks previous to his death he left his own house and went to live with his renter, Frederick Southard, at whose place he died from inflammation of the bladder. On July 30, 1902, he executed his last will and testament, by the terms of which he devised to his renter, Frederick Southard, and Alvaretta Southard, his wife, the 160 acres of land upon which they were living as his tenants. To his brother, Swen A. Isaac, he bequeathed $10. The balance of his estate he bequeathed to his other brothers and sisters who were then living, and to the legal heirs of his brothers and sisters who were dead. He named W. J. Halderman as executor of this will. The will was admitted to probate, but before the estate was finally settled the contestants moved to have the probate thereof set aside, and to be allowed to offer objections, which was done. Upon a trial in the county court the will was again admitted to probate, and from this order of the county court an appeal was taken by the contestants to the district court.

The objections made to the probate of the will are (1) That the instrument is not executed as required by law; (2) that it is not properly attested; (3) that at the date

of its execution Nels Isaac was not possessed of sufficient mental capacity to make a will; (4) that the will was executed in its present form by reason of the undue influence exerted upon the testator by Frederick and Alvaretta Southard. The jury returned a verdict finding that the testator was of sound mind and memory, and not under any restraint or undue influence when the same was executed. The following special interrogatories and answers were also returned by the jury: "(1) Was the instrument 'Exhibit A' signed by Nels Isaac, or was it signed by some other person in his presence and by his express direction? A. Yes. (2) At the time of the alleged execution of 'Exhibit A' was Nels Isaac of sound mind and memory? A. Yes. (3) Was the execution of the instrument 'Exhibit A' obtained by the undue influence of Frederick and Alvaretta Southard? A. No." From the order entered on this verdict admitting the will to probate, and directing a distribution of the estate in accordance with its terms, the contestants have appealed.

The evidence discloses that Nels Isaac, the testator, could not read, and it is earnestly insisted that the evidence fails to show that his name was signed to the will by his express direction as required by our statute. The testimony relating to the execution of the will may be briefly summarized as follows: On the day previous to the making of the will the decedent asked Dr. Plehn, who attended him in his last illness, to call on W. J. Halderman, a banker of the town of Burchard, and with whom the decedent had transacted his banking business for many years, and request him to come to the house and write his will and to bring witnesses. On the next evening Mr. Halderman, together with his son, Fulton Halderman and Dr. Plehn, drove out to the decedent's farm occupied by Southard, and found the decedent sitting or lying in a hammock in the yard. The elder Halderman and decedent went into the house and into the room occupied by Isaac, where the will was written. Halderman testified that Isaac would dictate to him a section of the will, which

would then be read over to him, after which another section of the will would be dictated, written and read to Isaac, and that after it was completed the whole instrument was read to Isaac who manifested his assent thereto. The decedent himself then opened the door into the kitchen where the doctor and young Halderman were sitting, and asked them to come in and witness his will. The younger Halderman started to read the instrument, when his father said it was unnecessary as Mr. Isaac was fully acquainted with its provisions, and turned to Isaac and told him that it was ready for his signature. Isaac then said to him: "You know I cannot write. You will have to sign it for me," and thereupon the elder Halderman signed Isaac's name to the instrument and afterwards made his mark, Isaac placing his hand upon the top of the pen. Dr. Plehn and young Halderman then signed as witnesses. This is the testimony of the two Haldermans and Dr. Plehn, and is uncontradicted. In *Murry v. Hennessey,* 48 Neb. 608, it was held that, where a will was signed by a third party and no proof offered of any request so to do from the testatrix, valid execution of the will was not established. But in *Elliott v. Elliott,* 3 Neb. (Unof.) 832, the testator said to Mr. Peterson that the latter would have to write his name, and that he did so, and the testator after that touched the pen while his mark was made. This was held a sufficient request upon the part of the testator that his name be signed by Peterson. The case is a direct authority in support of the finding in this case that the will was properly executed.

We have read with care the voluminous record containing the evidence in this case, and can find no testimony which would go to support a verdict, if such had been returned, that the testator was of unsound mind or not perfectly capable of transacting business at the time the will was made. He had lived in Pawnee county since 1867. He had accumulated property estimated to be worth about $20,000 at the time of his death. His mental capacity and good business judgment had not been questioned up to

the time this contest was filed. The doctor who attended him in his last illness, and another physician called in for consultation a few days previous to his death, both affirm his mental capacity. The banker with whom he transacted his business for years had no doubt of his ability to thoroughly understand and appreciate what he was doing. Numerous neighbors and acquaintances with no interest in the case testified to his capacity. On the other hand two or three physicians having no personal acquaintance with him, and in answer to hypothetical questions based upon his mode of living, of a secret habit which he is said to have practiced, and the fact that he usually kept a supply of beer on hand and of which he drank about one bottle a day, gave their opinion that he was not of sufficient mental capacity to make a will or to transact business. He never used intoxicants to excess. Being a bachelor, and living by himself, his house was not in the best of order nor tidily kept, and while some parties, apparently disinterested, testified to his want of mental capacity, the facts upon which they based their opinion are either not shown in the record or are clearly insufficient to sustain a finding of mental incapacity. We doubt whether we should pay any attention to the evidence of most of contestants' witnesses. In numerous cases we have held that a nonexpert witness can be permitted to express his opinion as to the sanity or insanity of a person only when he has shown other sufficient qualifications and has stated the facts and circumstances upon which his opinion of such mental condition is based. *Hoover v. State,* 48 Neb. 184; *Snider v. State,* 56 Neb. 309; *Lamb v. Lynch,* 56 Neb. 135, and cases found in 1 Page, Digest, 835. As said by the supreme court of Michigan in *Hibbard v. Baker,* 141 Mich. 124:

"It may be a question of some difficulty to determine in all cases whether a witness has shown himself competent, nor do we intimate that he may not be able to state to the jury his opinion, after showing that there were acts and appearances of the party which he is unable to describe to the jury, but which left an impression upon

his mind; but in the absence of this, and where the testimony of the witness only goes the length of showing acts which are entirely consistent with sanity, and which have not the slightest tendency to show insanity, it would be a dangerous rule which would permit his opinion to be received." The reason for this is well stated by the same court in *Beaubien v. Cicotte*, 12 Mich. 459:

"The general doctrine is, that all witnesses speaking from observation must, as far as possible, state such facts as they can give as the basis of their opinion. This rule does not require them to describe what is not susceptible of description, nor to narrate facts enough to enable a jury to form an opinion from those alone. This would be impossible; and if it could be done, there would be no occasion for any opinion from the witness. * * * But, if witnesses were not compellable to state such facts as are tangible, there would be no means of testing their truthfulness. When they state visible and intelligible appearances and acts, others who had the same means of observation may contradict them, or show significant and explanatory facts in addition; and if their story is fabricated, or if they describe facts having a medical explanation, medical experts may detect falsehood in inconsistent symptoms, or determine how far the symptoms truly given have a scientific bearing."

We fail to discover any evidence of undue influence exerted upon the testator by Frederick Southard or his wife. It is true they resided on the testator's farm for ten years or more, and had the opportunity to approach and influence him, but opportunity alone is not sufficient. It is quite evident that the deceased was well pleased with Southard's management of his farm and that he took a great liking to Southard's children, a young boy and girl. The children apparently reciprocated this kindly feeling and were in the decedent's company a great deal. He often took them to town and expressed great love for them, and on several occasions had said that he would will them the farm upon which their father and mother resided. It

appears, however, that about the middle of July previous to his death he changed his mind and concluded to give the land upon which plaintiff lived to Southard and his wife rather than to the children. J. S. Harrod testified that on July 18, 1902, Isaac brought a load of oats to town; that he shoveled out a part of the load, when Harrod took the shovel and unloaded the balance. After some conversation about other parties Isaac said to the witness: "'Do you remember what I told you down town about the children?' I said, 'Fred Southard's?' And he said, 'Yes.' Well, he said, 'I have changed my mind about that. Sometimes, when a boy get 19 or 20 years old, they get kinda smart with older heads to nag them on, and Frank might tell his father and mother, when he was 19 or 20 years old, to get off there, that he owned the property.' He said, 'I would hate to have that happen, when I kicked the bucket. When I am gone, I wouldn't want that to happen. Fred Southard and his wife has been the best friends I ever had. They have treated me better than my own relations,' and he said, 'I am going to give the property to Fred and his wife, and let the children have it after they get through with it.'" Southard nor his wife were present when the will was made. It does not appear that they had knowledge of his intention to make a will at the time. So far as the record discloses, there is absolutely no evidence of any influence brought by them to bear upon the testator relating to the disposition of his property. It is further evident that the testator was not on the best of terms with some of his own relatives. His brother Swen, who lived in the same neighborhood, rarely called on him, and for years they did not visit back or forth to exceed half a dozen times. The evidence indicates that some trouble arose out of the settlement of the estate of the deceased brother, and this may, and probably does, account for the small amount bequeathed to him. The fact that the decedent bequeathed a large part of his property to strangers in blood is not an evidence either of mental incapacity or undue influence. Courts and juries are not warranted in setting aside last wills and

testaments, and substituting in lieu thereof their own notions as to what a testator should do with his property, except upon satisfactory evidence. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of that right. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. The law wisely secures equality of distribution where a man dies intestate, but the very object of a will is to produce inequality and to provide for the wants of the testator's family, to protect those who are helpless, to reward those who have been affectionate, and to punish those who have been disobedient. In this country a man's prejudices form a part of his liberty. He has a right to them. He may be unjust to his children or relatives. He is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, it is not to be set aside without sufficient evidence, nor upon sentimental notions of equality. The verdict being the only one which the evidence warrants, errors in the instructions, if any, are immaterial and need no consideration.

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.

IDA M. HEIM, APPELLEE, V. FIRST NATIONAL BANK OF HUMBOLDT, APPELLANT.

FILED JUNE 8, 1906. No. 14,367.

Banks: DEPOSITS: ACTION. A party went to the banking house of the defendant bank to make a time deposit, and asked the president of the bank what interest they were paying on money. His own testimony is to the effect that he asked the party what amount she had and how long it would be left. The reply was: About $1,600, to be left for six months. He replied: "The bank is paying three per cent., but since you have come up here so far I will pay you four." The party then handed him an eastern draft for an amount exceeding $1,600, and he wrote out and returned a time check for the amount, payable at the bank in six months, with interest at four per cent. This time check was signed by the president in his individual capacity, and it contained nothing to indicate that the money was deposited with the bank or that the bank assumed any obligation for its repayment. *Held*, That the depositor might recover from the bank in an action for money had and received.

APPEAL from the district court for Richardson county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

F. Martin, E. Falloon and *Stewart & Munger*, for appellant.

J. H. Broady, contra.

DUFFIE, C.

In March, 1903, Mrs. Ida M. Heim received $1,652.42 from her father's estate. The amount was sent her in a draft drawn by the Citizens State Bank of Keithburg, Illinois, on the Continental National Bank of Chicago. The testimony discloses that Mr. and Mrs. Heim, who reside on a farm near Dawson, intended to build a new dwelling house that season, and they concluded to deposit the money in some bank where it would draw interest as a time deposit for six months, and where it would be immediately available for use when they commenced their build-

ing operations. The bank at Dawson was not paying interest on deposits, and the testimony of the plaintiff is to the effect that she indorsed the draft in blank and gave it to her husband, who drove to Humboldt for the purpose of depositing it in the First National Bank at that place. F. W. Samuelson was president of the First National Bank of Humboldt and had occupied that position for about 20 years. Mr. Heim relates what took place between himself and Mr. Samuelson in the following language: "I stepped up to the window, and Mr. Samuelson came forward, and I told him my wife had some money and she wanted to leave it at the bank. I asked him if they were paying any interest on time deposits, and he asked me my name and where I was from, and I told him. He wanted to know what amount I had, and I told him, and I asked him how much interest he would pay if I left it six months, and he said, 'We usually pay but 3 per cent., but since you have come up here so far I will give you 4 per cent. I told him all right, I would leave it, and he went and wrote out a paper and handed it to me, and I took it." The paper referred to, and which Samuelson gave in acknowledgment of the money, is in the following language: "F. W. Samuelson, Loans. $1,652. Humboldt, Neb., Mar. 12, 1903. Pay to the order of Ida M. Heim $1,652.42, sixteen hundred fifty-two and 42-100 dollars. Due in six months at 4% Int. F. W. Samuelson. Payable at The First National Bank, Humboldt, Neb." Mr. Heim returned with this paper to his home near Dawson, where he and his wife read and examined it, after which they put it in an envelope and placed it in the safe of Mr. Heim's brother, a merchant doing business in Dawson, where they kept other papers. Both Mr. and Mrs. Heim testified that they had never seen a certificate of deposit; and this was the first transaction of the kind they ever had and they supposed that the paper given them by Mr. Samuelson was regular in all respects. Samuelson failed in the summer or fall of 1903, and sent Mrs. Heim a notice stating that fact and requesting her to meet him in an office at Falls City. Upon

receiving this notice the paper was taken from the safe, and its true character ascertained from the cashier of the bank at Dawson, and thereupon this action was commenced to recover from the bank the sum of $1,652.42, which the petition alleges was deposited in the bank by Mrs. Heim. The petition contains a detailed statement of the facts. The answer of the bank is a general denial, except that it admits that Samuelson was president of the bank at the time of the transaction. The jury returned a verdict in favor of the plaintiff, upon which judgment was entered, and the defendant has appealed the case to this court.

Samuelson was called as a witness for the defendant, but, before giving his version of the occurrence, it might be well to state that Mrs. Heim had testified that she had never been in the Humboldt bank, and both Mrs. Heim and her husband testified that on the day of the transaction she visited her husband's mother and was there when Mr. Heim returned from Humboldt. His story of the transaction is as follows: "Q. Now, you may go on and tell the jury what took place at that time—what conversation took place between you and him at that time? A. It puts me in rather an embarrassing situation, for the reason Mrs. Heim testified she was not in the bank that day. Q. Go on and tell which one of them did this business. Give your version of it. A. Mr. and Mrs. Heim were both in the bank that day. Q. Now, who transacted that business with you, Mr. or Mrs. Heim? A. Mrs. Heim. Q. What conversation took place between you and Mrs. Heim leading up to this paper that Judge Broady introduced in evidence, the time check? A. Mrs. Heim and Mr. Heim came into the bank on the 13th day of March, 1903, and Mrs. Heim stepped up to the counter and asked what interest we would pay on money, or 'what interest will you pay on money,' and I asked her how much she wanted to leave, and she said about $1,600. I asked her how long a time she wanted to leave it, and she said about six months. Q. What did you tell her? A. I said to her the bank was paying 3 per cent. interest, but that I would pay her 4 per cent. Q.

What did she say? A. She then handed me the draft or check on some eastern bank, and she indorsed it, and then I went to my private check book and wrote a check payable to Mrs. Ida M. Heim for $1,652.42, drawing 4 per cent. interest on six months time, payable at the First National Bank of Humboldt, Nebraska. Q. You say, at the time, she gave you the draft on some bank in the east? A. Yes, sir. Q. That is the draft introduced in evidence? A. I think so. Q. What did you do with that? A. I deposited the draft to my credit in the First National Bank of Humboldt." The defendant's evidence further showed that Samuelson had received credit on his pass book for the amount of this draft.

It is strenuously insisted by the bank that the transaction was one between Mrs. Heim and Samuelson; that the bank never received the money; that it was a loan made to Samuelson individually and for which the bank cannot be held liable. If we place the evidence of Mr. Heim and Mr. Samuelson side by side, and read the statement of each relating to what transpired in the bank, no express words used by the parties could make it clearer that Heim wished to deposit this money with the bank, and that Samuelson so understood it. Whether it was Mr. or Mrs. Heim who visited the bank, the purpose was to make a deposit, and not a personal loan to Samuelson. For nearly 20 years he had been president of the defendant bank. It is probably true that during this time he was engaged in many private transactions in which the bank had no interest, and it may be true that he borrowed money on his own account from outside parties, but the question asked him concerning this particular deposit was what interest the bank was paying on deposits, which was a clear indication that the customer wished to deal with the bank, and not with him in his individual capacity. The fact that he replied, "The bank is paying 3 per cent., but I will pay you 4 per cent.," could leave but one impression upon the mind of a customer who came for the purpose of making the deposit there, viz., that the bank would make an exception in his favor and that 4

per cent. would be allowed by the bank on that particular deposit. We must bear in mind that the customer went to the bank for the purpose of making a deposit, and with no thought of effecting a private loan; that the talk which he had was with the president of the institution; that Samuelson represented the institution, and what he said was taken by the customer as speaking for the bank. It was the bank that was speaking, in contemplation of the customer, and to make it a dealing with Samuelson individually a plain statement putting the customer upon notice and imparting knowledge of that fact should be made to appear. It is true that Samuelson did not, in words, represent that the paper given the Heims was the paper of the bank; but the circumstances of the case, the conversation had even on his own version of it, can leave no doubt that it led the customer to believe he was receiving a certificate of deposit issued for the bank and by the bank, and we have no doubt that Samuelson himself was fully aware that such was the case and desired it to be so understood. Actions often speak louder than words, and this is as true where fraud is attempted and perpetrated as in other matters.

Section 341 of our code is peculiarly applicable to the facts here shown. It provides: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Again, this case seems to be ruled by *Patterson v. First Nat. Bank,* 73 Neb. 384. *Ziegler v. First Nat. Bank,* 93 Pa. St. 393, is a case in point. We cannot do better than to quote the language of Judge Paxton in that case:

"When the plaintiff took his money to the First National Bank of Allentown, and handed it to the cashier for deposit, the bank became responsible therefor. The cashier was the executive officer of the bank, and authorized by the very nature of his office to receive money on deposit. After receiving it, no trick or fraud on his part, by means of which the money was passed over to Blumer & Co., a

firm in which the bank officers were largely interested, and appeared to have had the control, could absolve the bank from its liability. No class of men have the confidence of the people to a greater extent than bank officers. Depositors do not deal with them at arm's length, and can be imposed upon with the greatest ease by such officials. It would be monstrous to allow them to take advantage of the ignorant and unwary, by reason of their position and the confidence which it inspires. It was doubtless a misfortune to this bank to have unworthy officials, if such should prove to be the case. It certainly was unwise to permit its chief officers to occupy a dual position with divided interests, but the consequences resulting therefrom cannot be visited upon those who dealt in good faith with the bank."

Coleman v. First Nat. Bank, 53 N. Y. 388, is also directly in point. In that case the plaintiff handed a sum of money to defendant's teller in defendant's banking office and over its counter, stating he desired to leave it on deposit with the bank. The teller gave him a certificate which was in form an acknowledgment that plaintiff had deposited the money with S. R. VanCampen and contained a personal obligation on the part of the latter to repay the amount. VanCampen was the bank president. The certificate was signed by him, but not in his official capacity. The bank was not named in it, and there was nothing on its face indicating that the money was deposited with the bank or that it assumed any obligation in respect thereto. Plaintiff did not read the certificate when he received it. In an action to recover the amount of the deposit, it was held that the plaintiff was not precluded by the certificate; that the doctrine of constructive notice of its contents from the fact of possession thereof did not apply, and that it was a question of fact for a jury whether the deposit was with the defendant or VanCampen.

In the case we are considering it is not entirely clear that the bank did not in fact get the benefit of this money. It is true that Samuelson testifies that he deposited the

draft to his own private account, but the draft does not bear his indorsement. It is a rule so universally observed among bankers that judicial notice thereof may well be taken, that all deposits of paper of this character made either by regular customers or by officers and employees of the bank must bear the indorsement of the party making the deposit. This is for the purpose of informing the bank from whom the deposit came, and to allow its officers to trace the paper to the party from whom it was received in case inquiry and investigation become necessary. The objections to the instructions urged by the appellant do not require discussion. We think they were as favorable to the bank as the law and the testimony required. The jury were fully informed regarding the legal rules which should govern them in arriving at their verdict, and hypercritical objections to instructions which fairly reflect the law of the case and which in reason are not calculated to mislead the jury should not be encouraged or work a reversal where no injustice has been done.

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.

CHARLES P. HAHN ET AL., APPELLEES, V. THOMAS BONACUM, APPELLANT.*

FILED JUNE 8, 1906. No. 14,339.

1. **Mechanics' Liens: FORECLOSURE.** In a suit to foreclose a mechanic's lien for labor performed on a building under a contract, relief will not be denied the plaintiff because of a trifling omission in the performance of the contract, where there has been a substantial performance on his part.

* Rehearing denied. See opinion, p. 846, *post*.

2. Evidence examined, and *held* to show a substantial performance on the part of the plaintiff and sufficient to entitle him to the relief granted.

3. Evidence as between the owner and a defendant lien-holder examined, and *held* sufficient to justify a finding in favor of the latter for a greater sum than that found by the trial court.

4. Liens: PRIORITIES. A mechanic's or materialman's lien duly filed within the time required by law takes precedence over a mortgage subsequently executed by the owner.

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

A. J. Sawyer, for appellant.

Billingsley & Greene, Kirkpatrick & Hager and *Milton Schwind, contra.*

ALBERT, C.

On the 9th day of May, 1902, Charles Hahn, plaintiff, entered into a contract in writing with the defendant, Right Reverend Bishop Bonacum, whereby it was agreed that the plaintiff should furnish the labor for the brick work required in the erection of a certain building on the premises belonging to the bishop, in consideration whereof the bishop was to pay the plaintiff $3,500. The bishop was to furnish the material. The work was to be performed to the satisfaction of the bishop and to the satisfaction of the superintendent employed by him to supervise the work. Payments were to be made as the work progressed, upon estimates made and signed by the superintendent, a certain percentage to be retained until the completion of the work. The contract also contains these provisions: "The last payment not to become due until sixty days after completion of the building, and the full payment and satisfaction of said contractor of all mechanics' liens or claims, if any, filed or made on said building on account of labor performed on account of said contractor. The aforementioned estimates to be furnished

and signed by T. G. Kelly, superintendent. Provided, that before the last payment is made a certificate shall be obtained by the contractor from the clerk's office of Lancaster county, signed by said clerk, that he has carefully examined the records and finds no liens or claims recorded against said works or on account of said contractor. * * * Sixth. The party of the first part to have not less than ten bricklayers employed on the work daily. * * * Ninth. Should the contractor fail to finish the work on or before the twelfth day of August, 1902, or within the ninety working days agreed upon, he shall pay or allow the proprietor by way of liquidated damages the sum of ten (10) dollars *per diem* for each and every day thereafter the said works shall remain incomplete. When any instalment becomes due under the terms of this contract, the proprietor shall be entitled to deduct from the amount thereof any sum or sums such proprietor may have paid any subcontractor, laborer or other person for work done for said building to be used in the performance of this contract at the request or with the knowledge of said contractor, and on the payment of the balance of such instalment, after making such deduction, shall be discharged from the liability therefor." On the 16th day of December, 1902, the plaintiff filed a mechanic's lien against the property in question for labor furnished under the contract, including certain items of extra labor, which he claimed were furnished by him, but not included in the contract, claiming a lien on the property in the sum of $1,312. On the 20th day of April, 1903, he commenced this suit for a foreclosure of his said lien, bringing in Ernest C. Thym, another lien-holder, and the Security Mutual Life Insurance Company, a mortgagee, as parties defendant.

Thym filed a cross-petition in which he also prayed the foreclosure of a lien against the same property for certain cut stone which he had furnished to the bishop for the construction of the building. His claim is based on a written contract whereby he agreed to furnish certain

cut stone for a consideration of $700. His lien also covers the following items which he claims to have furnished but which are not included in the contract: six stone caps of the value of $42.60; 150 feet of stone belt course of the value of $90; one stone platform in three pieces of the value of $16; changing caps to nine-inch bed of the value of $60. The material was furnished between the 1st day of April and the 21st day of October, 1902, the latter being the date the lien was filed. The insurance company also filed a cross-petition, praying that a certain mortgage executed to it by the bishop on the same property be established as a first lien on the premises. The mortgage was executed on the 22d day of October, 1902, and filed for record one day later. As to this mortgage there is no contest save as to the question of its priority.

As to the plaintiff's cause of action, the contest is between him and the bishop. One defense is that the plaintiff has never completed the work; another that the suit was prematurely brought, in that the plaintiff had never obtained a certificate from the clerk of Lancaster county showing that he, the clerk, had examined the records and found no liens against the property for work performed for the plaintiff by his workmen. Plaintiff's claim for extra work is denied. The bishop also filed several counterclaims against the plaintiff: (1) $2,400 liquidated damages for 240 days' default after the 12th day of August, 1902, in the completion of the work under the contract; (2) $240 damages for plaintiff's failure to keep 10 men at work daily on the building; (3) $360 for pipes, tanks, barrels, an engine, etc., furnished to supply water for mixing the mortar; $500 damage for the wrongful filing of the lien in question. Answering Thym's cross-petition, the bishop admits the contract, but denies that it was fully performed by Thym; he admits that certain "extras" were furnished by Thym, but denies that they were furnished in pursuance of any agreement between them, and puts in issue the reasonable value of the "extras" furnished. He also claims a payment of $100, for which he asks credit.

He also pleads several counterclaims, or what are designated as counterclaims, consisting of alleged overcharges, damages for inferior material, and for failure to furnish certain items required by the terms of the contract, aggregating nearly $1,000. As between the plaintiff and the defendant (the bishop) the court found in favor of the plaintiff on all issues save as to the extra labor, all claims therefor being disallowed. As between Thym and the bishop, the court found in favor of Thym on all the issues save as to the extras which were rejected. A decree was entered for the foreclosure of each lien, subject to the mortgage of the insurance company which the court held was a first lien on the premises. The bishop appeals.

First, as to the controversy between the plaintiff and the bishop. Several pages of the latter's brief are devoted to an argument to justify the disallowance of the extras by the trial court. While the argument has not served to convince the plaintiff, it appears to have reconciled him to the decree, for he now expresses his willingness to abide by it; consequently, the plaintiff's claim for extras requires no further attention. This brings us to the bishop's contention that the work was not completed according to the terms of the contract. This contention is grounded on three propositions: (1) That two openings for stovepipes were not left in the flues; (2) that some brick work was left unfinished; (3) that the debris had not been removed from some of the flues, whereby they could not be used.

As to the first, the evidence justifies a finding that the openings were not provided for by the contract. As to the second, the evidence shows that it was completed in a couple of hours by a third party employed by the bishop. The third was not discovered until sometime in the winter following the date fixed for the completion of the contract. The entire contention has the appearance of an afterthought. No testimony was offered by the bishop tending to show what it would have cost to complete the building in the particulars mentioned, but the plaintiff testified

that it would not have cost $3. He also testified that on the 10th day of December, 1902, he asked the superintendent whether he was required to do anything further to complete the contract, and was informed that he was not, and that the work was in fact completed within the time fixed by the contract. On the same day the superintendent made out the final estimate of the work, and stated therein that $593 was the final amount due the plaintiff under the contract. Still later, in a letter published under the direction of the bishop, the reason given for his refusal to make final settlement was that a suit had been entered against the plaintiff by the widow of a laborer who had been killed on the building for damages, and that, in thus refusing, he was acting on the advice of counsel. In view of all the evidence, we think the court was amply justified in finding that there had been a substantial performance by the plaintiff of his part of the contract. That is all that is required, and the slight omissions, even if they exist, would not defeat a recovery. *Leeds v. Little,* 42 Minn. 144; *Woodward v. Fuller,* 80 N. Y. 312; *Heckmann v. Pinkney,* 81 N. Y. 211; *Crouch v. Gutmann,* 134 N. Y. 45, 30 Am. St. Rep. 608, and note.

It is also insisted that the plaintiff must fail in this action because he failed to furnish a certificate from the county clerk, showing that no liens had been filed against the property for labor performed for him. True, the contract provides for such certificate, but the evidence shows no such liens, nor is it claimed that any existed. The time for filing such liens had expired long before the suit was tried. It is a maxim of equity that it looks to the substance, rather than to the form. No substantial right of the bishop has been violated by the failure to furnish such certificate. It does not appear that he ever insisted upon it, but, as we have seen, based his refusal to settle on other grounds. No advantage could result to him by requiring the plaintiff to furnish the certificate, and to require it at this time would be to sacrifice the substance for the form, and to require what would be purely a work

of supererogation. We think the court very properly disregarded this part of the defense.

We come now to the bishop's counterclaims against the plaintiff. Two items thereof, aggregating $2,640, are for damages for failure to perform the work within the time fixed by the contract, and to keep ten bricklayers at work daily on the work. Without going into this claim, which is unreasonable on its face, it will suffice to say the evidence is ample to sustain a finding of a substantial completion of the work within the time fixed by the contract, and that, as we have seen, is sufficient. Another item is $360 for pipes, tanks, etc., required to furnish water used in doing the work. The bishop was to furnish the material, and water, it appears, falls within that category in this instance as the parties construed the contract before this controversy arose. As to the $500 item for damages sustained by the bishop by reason of the wrongful filing of plaintiff's lien, it is now tacitly conceded to be without merit, hence, it requires no further notice. The court awarded the plaintiff $593, with interest from October 18, 1902. This is exactly the amount the superintendent gave as the fixed estimate, and practically the same as that stated in the bishop's public letter hereinbefore mentioned. The decree as between the plaintiff and the bishop appears to be equitable, and the latter, at least, has no just ground to complain of it. After the decree was entered the plaintiff's claim was assigned to Robert J. Greene, and by order of the court he was substituted as plaintiff.

We come now to the controversy between Thym and the bishop. To understand this it should be stated that Thym operated a stone-cutting establishment in Kansas City under the trade name of Carthage Stone Yard. He also acted as agent for a corporation, known as Carthage Stone Company of Carthage, Missouri. The two establishments were wholly disconnected save as to Thym's agency for the corporation, but he was sole proprietor of the establishment in Kansas City. The corporation furnished rough stone; Thym furnished cut or dressed stone. Each

had a contract to furnish some of the material for the building in question, but they were separate and distinct, and were so recognized by all parties. The contract of the corporation was in the corporate name; Thym's was signed by him. The defenses urged against Thym's claim, for the most part, are based on transactions had between the bishop and said corporation and for which Thym is in no way liable. The evidence as to these matters is scattered through the entire record and it would be profitless to review it at length. For example, the alleged payment of $100 for which the bishop asks credit on Thym's account was made by a check, payable to the Carthage Stone Company, and bears its indorsement. The evidence shows that the bishop received credit therefor on the account of that corporation. Eliminating the evidence bearing solely on the bishop's transactions with the corporation, the controversy between him and Thym narrows down to a few items, which we shall proceed to notice. First, as to the counterclaims, which are narrowed down to these items: $13 for cutting down 26 caps; $30 for recutting large flue caps; $26 for not cutting water drips. As to the first two, the evidence is abundantly sufficient to sustain a finding against the bishop. As to the third, the contract called for the "water drips," and Thym furnished them, but they were not cut just as the plans called for. They were used, however, without change, and there is no evidence showing the extent the bishop was damaged, if at all, by this deviation from the plans. Consequently, a finding against him as to that item is the only finding thereon that could be sustained. The same may be said of all the items included in the counterclaims.

Thym's claim for "extras" was wholly disallowed. The bishop admits that one of the items thereof should have been allowed, namely, for 150 feet of "stone belt course." The reasonable value of this item according to the undisputed evidence is $90, and it should have been allowed. There is another item, namely, "stone platform in three pieces," which the bishop admits he received, but which he

claims was used for other purposes. The evidence is clear that this item was furnished by Thym outside the contract and was worth $16. It also should have been allowed. There is still another item, six stone caps for windows, that should have been allowed. These six windows were not included in the original plans and were ordered after the contract was made. The evidence satisfies us that these window caps were "extra," and shows that they were reasonably worth $42.60. As to the remaining items, it must suffice to say that the record justifies the trial court in rejecting them, but the three mentioned, aggregating $148.60, should be added to the amount found due Thym by the trial court. The trial court awarded him $823.32, with interest from December 29, 1904, the date of the decree. Thym contends that he is entitled to interest from six months after the date of the last item, which was furnished June 23, 1902. No date of payment is fixed by the contract, and he is entitled to interest for at least the time claimed, which would be from December 23, 1902. In short, Thym is entitled to recover of the bishop $965.92, with interest thereon from the 23d day of June, 1902, at the rate of 7 per cent. per annum.

There remains to be considered the question of the priority of the mortgage of the insurance company. The plaintiff's lien was filed December 16, and Thym's October 22, 1902. Each was filed within 60 days from the completion of the contract upon which it is based. Comp. St. 1901, ch. 54, art. I, sec. 2. Both liens therefore attached to the property before the mortgage, which was executed October 22, 1902, and filed for record the following day. *Henry & Coatsworth Co. v. Fisherdick*, 37 Neb. 207. The decree of the district court, therefore, making their liens subordinate to that of the insurance company is erroneous.

It is therefore recommended that the cause be remanded to the district court, with directions to modify the decree in accordance with this opinion.

DUFFIE and JACKSON, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, this cause is remanded to the district court, with directions to modify the decree in accordance with this opinion.

REVERSED.

The following opinion on motion for rehearing was filed October 18, 1906. *Rehearing denied:*

ALBERT, C.

One matter discussed in the brief on rehearing is that no cross-appeal was taken. This is a mistake. The cross-appellant filed a brief in due season pointing out certain errors of which he complained. That is all that is required to perfect a cross-appeal. *Meade Plumbing, H. & L. Co. v. Irwin,* 77 Neb. 385. It is also pointed out that at one place in the opinion we inadvertently used the words June 23 instead of December 23, as the date from which interest should be computed on Thym's claim. While the error, owing to the context, could hardly be misleading, it should be corrected.

It is recommended that the error in the dates herein mentioned be corrected, and the motion overruled.

By the Court: For the reasons above stated, the decree is modified so as to allow interest from December 23, 1902, and the motion for rehearing is

OVERRULED.

EDWIN H. LAHRMAN, APPELLANT, V. ELLA BAUMAN ET AL., APPELLEES.

FILED JUNE 8, 1906. No. 14,357.

Notes: DEFENSE OF FRAUD: BURDEN OF PROOF. In an action by the indorsee against the maker, where fraud in the inception of the note is relied on as a defense and shown by the evidence, the burden is upon the plaintiff to show that h . is a *bona fide* holder.

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

Alexander Searl, E. H. Benedict and *John C. Landis, Jr.*, for appellant.

M. F. Harrington, contra.

ALBERT, C.

This is an appeal to reverse a judgment rendered against the plaintiff in an action on a promissory note brought by the indorsee against the makers. The defendants answered, admitting the execution and delivery of the note to plaintiff's indorser, but denying all other allegations of the petition. The answer also sets up two affirmative defenses: Fraud in the inception of the note, and a failure of consideration. The facts relied on as constituting those defenses are thus pleaded in the answer: "The defendants aver that one E. F. Collins came to the home of these defendants about the 15th day of July, 1903, and fraudulently and falsely represented himself to be a practicing physician, and a duly authorized physician and surgeon authorized to practice medicine and surgery in Holt county, Nebraska, and that he was able and capable of curing all diseases to which the human system is heir, and each and every one of said representations were false, and known by said Collins to be false; that said Ella Bauman was then sick, having dizziness in the head and her nervous system affected, and said Collins falsely and fraudulently represented to these defendants that he could cure said disease and would treat her with medicine and cure her, and that each and every one of said representations was false and fraudulent and made with the intent to deceive, and that he further contracted, promised and agreed to cure her of said sickness, and contracted, promised and agreed that unless he did fully cure her of said sickness, the said promissory note should not be paid, and

that the said consideration for said note was the contract, promise and agreement of said Collins to fully cure said Ella Bauman of her said sickness; that the said consideration wholly failed, and said Collins, when he obtained said note, knew and intended that it should fail, and that he has not treated her for said sickness, and has given no consideration whatever for said note." The evidence adduced on behalf of the plaintiff tended to show that the note was indorsed and transferred to him in the usual course of business, before maturity, and for a valuable consideration; that adduced on behalf of the defendants, that the note was given under the circumstances, upon the representations and for the consideration alleged in the answer. The plaintiff failed to reply, but no objection was made upon that ground, and the case was tried as though the allegations of the answer were denied.

In an action by the indorsee against the maker the rule is that, where fraud in the inception of the note is shown, the burden is upon the plaintiff to prove that he took the note without notice of the fraud. Selover, Negotiable Instruments, p. 234; *National Bank v. Miller*, 51 Neb. 156. The plaintiff wholly failed to bring himself within this rule, or to make any showing whatever of his want of notice of the fraud. That being true, a verdict for the defendants is the only one that could have been rendered under the law and the evidence. It responds to the issues, and accords with the instructions of the court. There appears to be no good reason for disturbing 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.

ELMER E. SALISBURY, APPELLANT, V. PRESS PUBLISHING COMPANY, APPELLEE.

FILED JUNE 8, 1906. No. 14,379.

1. **Master and Servant: APPLIANCES: DUTY OF EMPLOYEE.** Ordinarily, it is the duty of an employer to use reasonable care 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. *Standard Distilling & Distributing Co. v. Harris*, 75 Neb. 480.

2. **Instructions.** The statute requiring instructions to the jury to be in writing has no application to a mandatory direction to return a verdict in favor of one of the parties to the litigation.

3. **Directing Verdict.** On the facts stated, *held* that the trial court properly directed a verdict for the defendant.

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

Field, Ricketts & Ricketts, for appellant.

Halleck F. Rose and *W. B. Comstock, contra.*

ALBERT, C.

This is an appeal from a judgment in favor of the defendant in an action for personal injuries. The petition so far as is material is as follows: "The plaintiff complains of the defendant, for that on and prior to the 8th day of October, 1903, the defendant was a corporation duly organized under and by virtue of the laws of the state of Nebraska, and was extensively engaged in the printing, publication and circulation of certain newspapers, with its place of business in the building at the southwest corner of Thirteenth and N streets in the city of Lincoln, Nebraska; that the papers, so printed, published and circulated by

the defendant were stacked and made ready for transfer to the postoffice on the third floor of the building occupied by it, and to facilitate the delivery of its sacks of mail from the third floor of said building to wagons on the street, it had theretofore caused to be constructed an iron chute attached to the south wall of its publishing house, and extending from the third floor thereof over and across the sidewalk to the pavement on Thirteenth street of said city, so that sacks of mail placed in the chute would be carried by gravity down the inclining chute to wagons on the street; that said chute was provided with a hinge or joint at the lot line, whereby that part of the chute that extended across and over the sidewalk space on the east side of the building, when not in use, might, by means of an apparatus operated by a rope, pulley and heavy iron weight, be turned over and doubled back on that part of the chute fastened to the building, and when loading mail, might be extended across and over the sidewalk to wagons in the street; that on the 8th day of October, 1903, the plaintiff proceeded to the defendant's place of business at Thirteenth and N streets in the city of Lincoln to transfer its sacks of mail to the postoffice, pursuant to orders from the defendant to plaintiff's employer. When plaintiff arrived at defendant's place of business, the sidewalk extension of the iron chute was doubled back, and before the plaintiff could receive the sacks of mail into his wagon from the third floor of defendant's building, it was necessary to extend the iron chute over and across the sidewalk by means of the apparatus provided by the defendant for such purpose. While the plaintiff was extending said chute across the sidewalk by means of the apparatus provided therefor by the defendant, and had his weight on the rope, and without any fault or negligence on his part, the apparatus provided by the defendant for raising and extending said chute gave way, precipitating the heavy iron weight used in connection therewith upon the plaintiff, breaking the bone of his right leg between the knee and the hip so that it protruded through the flesh, thereby seri-

ously and permanently injuring the plaintiff. * * * Plaintiff further alleges that the apparatus by which said iron chute carrying defendant's mail sacks to the street was doubled back or extended over and across the sidewalk was carelessly, negligently and insecurely constructed by the defendant, and was made of defective and unsuitable material for the purposes for which it was used, and the defendant carelessly, negligently and unnecessarily suspended said heavy iron weight, which fell upon plaintiff, directly above where plaintiff was compelled to stand to operate the apparatus in extending the chute over and across the sidewalk; that the giving way of said apparatus and the precipitation of said heavy weight upon plaintiff, resulting in his injury as hereinbefore alleged, was directly caused by the defective material used, and the negligent, careless and insecure manner in which defendant constructed said apparatus and suspended said heavy weight."

The answer charges that the plaintiff, in attempting to operate the chute at the time of the accident, was a mere volunteer or intermeddler, and was assisted by another intermeddler, without the knowledge or consent of the plaintiff; that they applied greater force to the rope used to operate the chute than the appliances provided for that purpose were intended to bear, and that the accident resulted in consequence thereof, and from no other cause. The reply is a general denial. At the close of the trial the court sustained a motion to direct a verdict for the defendant, and the correctness of that ruling is the principal question now presented by the record.

It is conclusively established that at the time of the accident the plaintiff was in the employ of a transfer company, which was under contract with the defendant to carry the printed-matter ready for the mails from the defendant's place of business to the postoffice. The amount of this matter was so great as to require drays to carry it. It was no part of the transfer company's duty under the contract to operate the chute described in the petition. But, while the chute was generally operated by the defend-

ant's employees, it was a common practice, in case of delay on their part to do so, for the employees of the transfer company, after placing their wagons in position to be loaded, to raise and lower the chute to a position to deliver the mailing matter on the drays at the edge of the sidewalk. The plaintiff had done this on several occasions previous to the accident. On the day of the accident, the defendant notified the transfer company that it had some matter ready for delivery to the postoffice, and the plaintiff was sent in charge of a wagon to receive it. In this instance the matter was not such as could be loaded by means of the chute, but the plaintiff was not aware of that fact. He drove his wagon to defendant's place of business and placed it in position to be loaded by means of the chute; the defendant's employees were not aware of his arrival. He then undertook to extend the movable section of the chute across the sidewalk to his wagon. The movable section of the chute weighed about 200 pounds. It was connected with the other section by a joint, and, when not in use, was folded back upon it, along the side of the building. In order to raise and lower it a rope passed through a pulley overhead, one end of which was attached to the free end of the movable section, the other to a weight of 50 or 60 pounds used as a counterbalance. A rope hung from this weight to the ground, whereby one standing on the ground could raise and lower the movable section. Another rope was also used to overcome the "dead center" when the section was raised to the perpendicular. As the appliances were arranged the force necessary to apply to the rope to raise the chute, in addition to the counterbalance, was less than 50 pounds. When the plaintiff undertook to raise the chute at the time of the accident it had become fastened in some way and he was unable to raise it. A bystander volunteered to assist him, and joined him in pulling on the rope which extended downward from the counterbalance. The pulley broke and the counterweight fell, striking the plaintiff, who had fallen to the ground, breaking his leg.

The plaintiff contends that from the foregoing state of facts, in which we have tried to include every fact favorable to him which the evidence proves or tends to establish, two propositions are deducible: (1) That at the time of the accident he stood in the relation of employee to the defendant, and in attempting to operate the chute was acting within the scope of his employment; (2) that his injury was the proximate result of a negligent omission on the part of the defendant to furnish reasonably safe appliances for the operation of the chute. A large part of the argument on either side is directed to the first proposition. But we do not deem it necessary to go into that question because, were it resolved in favor of the plaintiff, it seems clear to us the plaintiff must still fail. Assuming that the plaintiff's relation to the defendant was that of an employee, then it was undoubtedly the duty of the defendant to see that the appliances furnished him for use in his employment were reasonably safe for the use for which they were furnished. But it is equally true that an employer is not liable for injuries to an employee caused by the unauthorized or improper use of appliances, and that the latter is bound to exercise reasonable care to protect himself from injury. 20 Am. & Eng. Ency. Law (2d ed.), pp. 134-141, and notes. In this case the pulley and its connections were furnished to bear the strain necessary to overcome a weight of about 100 pounds. Owing to the counterweight, a force of 50 pounds applied to the rope hanging from the counterweight would raise the movable section of the chute. The mechanism was simple, and hung in plain sight. The plaintiff was acquainted with it. In view of these facts, when he, a man weighing over 175 pounds, was unable by his own strength to raise the chute, he must have known as a reasonable person that the ropes had fouled or for some other reason the appliance was not in proper working order, and that the combined strength of himself and another man exerted on the rope would subject the pulley and its fastenings to a greater strain than they were calculated to bear. He was in a

position of obvious danger, with the weight which fell on his leg suspended overhead. While it is the duty, ordinarily, of an employer to use reasonable care that the tools and appliances which he furnishes his employees 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. *Standard Distilling & Distributing Co. v. Harris,* 75 Neb. 480. In this case, the rope and pulley were furnished to overcome a definite weight. The plaintiff, instead of confining their use to that end, blindly undertook to use them to overcome some unknown force or obstruction interfering with the operation of the chute, and subjected them to a strain many times greater than was required to serve the purpose for which they were furnished. In doing so he acted under no command, but purely on his own volition, and his injury resulted, not from the omission of the defendant to provide a reasonably safe appliance for operating the chute, but from his misuse of the appliance furnished, and his own omission to make reasonable use of his own faculties to guard against injury.

The plaintiff contends that the judgment must be reversed because the direction to return a verdict for the defendant was given orally, and in support of this contention, invokes the statute requiring all instructions to be in writing, unless such requirement be waived. The statute has reference to instructions proper, that is, instructions given to guide the jury in their deliberations when some issue of fact is submitted for their determination. Where there is no such issue to submit, a mere mandatory direction, which is in no proper sense an instruction, is all that is required, and like other rulings of the court may be given orally.

Complaint is also made of the exclusion of certain evidence tending to sustain plaintiff's theory that at the time

of the injury he stood in the relation of employee to the defendant. As we have seen, that relationship may be assumed, and still the record would necessitate an affirmance of the judgment, hence, further notice of this assignment is unnecessary.

What has been said disposes, we think, of all the assignments, and we recommend that the judgment of the district court be affirmed.

DUFFIE and JACKSON, CC., concur.

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

AFFIRMED.

FLAVIA WATTERS, ADMINISTRATRIX, APPELLEE, V. CITY OF OMAHA, APPELLANT.*

FILED JUNE 8, 1906. No. 14,355.

Cities: PUBLIC WORKS: LIABILITIES. Where a city in the erection of a public work exercises reasonable care and judgment, and adopts plans approved and recommended by engineers having all the knowledge that skill and experience in such work would naturally give them, it should not be held liable in damages on account of an alleged defect in the plan, unless the construction is so manifestly dangerous that all reasonable minds must agree that it was unsafe.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JR., JUDGE. *Reversed.*

Harry E. Burnam, I. J. Dunn and *A. G. Ellick,* for appellant.

Weaver & Giller and *John M. Macfarland, contra.*

JACKSON, C.

The plaintiff, as administratrix of the estate of her deceased husband, recovered judgment against the defendant city because of the death of the decedent, which it is

* Rehearing allowed. See opinion, p. 859, *post.*

alleged occurred through the negligent acts of the defendant. The deceased was a laborer in the employ of a distilling company, and was returning to his home by way of Eleventh street. On this street is a viaduct over the Union Pacific and Burlington railroad tracks. The viaduct covers a distance of four blocks or more, and an open stairway extends from the roadway of the viaduct into one of the streets below, constructed for the convenience of foot passengers. The deceased was seen to turn into this stairway, and an instant later to fall into the street. He sustained injuries from which his death occurred within two or three hours. His only statement about the fall was that he slipped. It is charged in the petition that he slipped upon one of the steps which had become worn and slippery on account of continuous rainfall for several days previous to the accident. Negligence is attributed to the city because the railing at the stairway was not sufficiently high to prevent persons from falling over, because of a failure to cover the stairway and because of the rise exceeding six inches in twelve, thereby rendering the descent dangerously steep.

The evidence discloses without question that the viaduct and stairway were constructed jointly by the city of Omaha and the railroad company over whose tracks it was built. Plans and specifications were submitted by contractors, and the one adopted had the approval of Andrew Rosewater, city engineer of the defendant, the chief engineer of the Burlington railroad company, the chairman of the board of public works of the defendant, at one time chief engineer of the Union Pacific Railroad Company, and another engineer who had occupied a similar position. They were all of recognized and known ability and eminent as civil engineers. They recommended the adoption and approval of the plans by the board of public works, and acting upon their advice and recommendation the plans were adopted by that board and afterwards approved by the city council. The viaduct was constructed according to these plans and specifications. The

same is true of the stairway and railing, although action was taken at a later date, but prior to the construction of the bridge. Mr. Rosewater was a witness at the trial and testified that the railings were of standard manufacture and height. There is no claim of a defective construction, and the single question presented by the record is the sufficiency of the evidence to sustain the verdict of the jury and judgment of the court. The railing is two feet six inches above the outer edge of the step and about three feet above the inner edge.

Special interrogatories were submitted to the jury, who found that the accident occurred because the city did not build the banisters of sufficient height. The contention of the city is that, based upon this finding, the verdict cannot stand. The position of the defendant in this respect is fortified by abundant authority and, in our judgment, well taken. In planning a public work municipal authorities are required to exercise reasonable care and judgment, and if the services of professional men, experts in the work contemplated, are needed, they should employ those who have all the knowledge and skill that experience in such work would naturally give them. *Diamond Match Co. v. Town of New Haven,* 55 Conn. 510. When that course has been pursued in good faith, and the work has been carried on and completed as planned and specified, the municipality should not be held responsible, unless the structure is so manifestly dangerous that all reasonable minds must agree that it was unsafe. *Gould v. City of Topeka,* 32 Kan. 485. The principle involved was recently thoroughly discussed in *Shannon v. City of Omaha,* 73 Neb. 507, in an opinion by Mr. Commissioner LETTON, now a justice of this court, and was sustained to that degree contended for by the defendant. Any other rule would render precautionary measures on the part of municipal authorities without avail, and the judgment of engineers skilled in their profession would afford no protection, because the possibility of accident cannot be provided against, and, after all, it became a question for a jury, who out of just sympathy for

a bereaved family might readily find the existence of negligence, notwithstanding the exercise of the highest degree of caution and the employment of the best skill obtainable. There may be a difference of opinion whether the rail or banister on the stairway where the accident occurred was of sufficient height to afford the proper protection to the public, but we are not prepared to say, as a matter of law, that it was insufficient.

Such of the authorities cited by plaintiff as we have examined are easily distinguishable from the case at bar. *Blyhl v. Village of Waterville,* 57 Minn. 115, is a case where, in the construction of a walk along a part of a block, at the junction of the old walk there was left a drop of some seven or eight inches, and, passing along there in the night season, a person struck his foot against the face of the drop, fell and was injured. As a matter of law such an imperfect construction was manifestly dangerous. In *McDonald v. City of Duluth,* 93 Minn. 206, it appeared that in constructing a rail over the sides of a bridge one of the guard rails was imperfectly placed and not sufficiently fastened, it was loose and liable at any time to slip out of place and over the bridge. The supreme court of Minnesota, however, so far as we are able to determine, has never departed from the rule that, if reasonable minds might differ as to whether the plan adopted or some other plan is the better, the decision of the city authorities on the question is conclusive and cannot be reviewed by the courts. That rule is expressly recognized in *Conlon v. City of St. Paul,* 70 Minn. 216. Authorities may be found holding, in effect, that, although streets are built and maintained according to plans adopted, if they are so built as to cause an obstruction or impediment to travel, the city might still be liable; but none of these authorities are applicable to this case.

We are convinced that the verdict of the jury has no support in the evidence, and we recommend that the judgment of the district court be reversed.

DUFFIE and ALBERT, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed February 8, 1907. *Judgment of reversal adhered to:*

ALBERT, C.

In this case, as in ordinary cases grounded on negligence, the acts or omissions of the defendant upon which the charge of negligence is based are to be tested by the conduct of a man of ordinary care and prudence in like circumstances. The improvement of which the stairway in question is a part is of such a character that it could be planned and constructed only by men of peculiar skill and knowledge in that line. The city authorities therefore were compelled to employ experts to plan and construct it. In doing so they did precisely what a man of ordinary care and prudence would have done in like circumstances. Where, then, is the point of departure from the course of conduct such a man would have pursued? Is it in the adoption of the plan? They had employed men skilled in their profession to prepare it. Had they not a right to rely on the superior judgment and skill of such men? Would not a man of ordinary care and prudence have done so in like circumstances, unless the plan was so obviously defective that there could be no difference of opinion among reasonable men with respect to it?

On account of the engineering problems involved, there is a strong analogy between an improvement of this character and the construction of sewers, and the cases growing out of the latter, on that account, have a strong bearing on the case at bar. In the study of those cases, however, the distinction between a defect in a plan and a defect in the execution of the plan should be kept in mind. In *Johnston v. District of Columbia,* 118 U. S. 19, it was said:

"The duties of the municipal authorities, in adopting a

general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a *quasi* judicial nature, involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion, in the selection and adoption of the general plan or system of drainage, is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land."

To the same effect are the following: *Fair v. City of Philadelphia,* 88 Pa. St. 309, 32 Am. Rep. 455; *Mills v. City of Brooklyn,* 32 N. Y. 489; *Child v. City of Boston,* 4 Allen (Mass.), 41, 81 Am. Dec. 680; *Attwood v. City of Bangor,* 83 Me. 582; *Wicks v. Town of DeWitt,* 54 Ia. 130; *Merrifield v. City of Worcester,* 110 Mass. 216, 14 Am. Rep. 592; *Van Pelt v. City of Davenport,* 42 Ia. 308, 20 Am. Rep. 622; *Foster v. City of St. Louis,* 71 Mo. 157; *City of Denver v. Capelli,* 4 Colo. 25, 34 Am. Rep. 62. In *City of Detroit v. Beckman,* 34 Mich. 125, this rule was limited somewhat, the court holding that municipal corporations are not liable for injuries resulting from the plan of a public work as distinguished from its mode of execution, unless such plan must necessarily result in an invasion of private property. Judge Dillon commends this rule as thus limited. 2 Dillon, Municipal Corporations, secs. 1046, 1047.

In the adoption of a plan the city was not entirely free-handed. The character of the location, the necessities of street traffic, and the safety of the public, all had to be taken into account. The sum total of the advantages and disadvantages of the improvement had to be weighed and set over against each other. The adoption of plans therefore was not a mere ministerial act, but one of a *quasi* judicial nature, and ought not to be subject to revision by a jury in a private action. I am unable to discover any difference in principle between this case and that of an

employer who acts upon the advice of experts as to the tools and appliances to be used, or a railroad company which adopts the devices and appliances in common use and recommended by experts. See *O'Neill v. Chicago, R. I. & P. R. Co.*, 66 Neb. 638.

By the Court: For the reasons stated in the foregoing opinion, our former judgment is adhered to.

REVERSED.

KEARNEY COUNTY, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JUNE 8, 1906. No. 14,372.

1. **Railroads: FIRES: EVIDENCE.** In an action for damages for negligently setting out a fire, the origin of the fire may be proved by circumstantial evidence.
2. **Evidence** examined, and *held* that the circumstances proved are sufficient to sustain the verdict of the jury as to the origin of the fire by reason of which the plaintiff sustained damages.

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

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

Lewis C. Paulson, contra.

JACKSON, C.

The county of Kearney recovered judgment against the Chicago, Burlington & Quincy Railway Company for the loss of a bridge by fire, which it is charged was negligently set out by the company. On appeal the railway company submit the case on the single question of the insufficiency of the evidence to show the origin of the fire.

The burned bridge was about one mile south of the railway track. On the day of the fire a high wind was blow-

ing from the northwest. John Kroskurth, a witness for the plaintiff, lives about three-quarters of a mile from the bridge and about 60 rods from the railway track. He testified that he saw a train passing over the defendant's line, and about five minutes afterwards discovered the fire south of the railway track about a quarter of a mile burning in the direction of the bridge, and had burned over the ground to within three or four rods of the track. George Kroskurth, another witness on behalf of the plaintiff, testified to substantially the same facts, except that he testified that the ground had been burned over to within two or three rods of the track. There is no conflict in the evidence, and no other theory of the origin of the fire advanced, except the one that it was caused by sparks escaping from a passing train. The evidence is not entirely satisfactory, but the circumstances are such that minds might reasonably differ as to the deductions to be drawn, and in such cases the verdict of the jury should not be disturbed.

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.

JAMES WRIGLEY, APPELLANT, V. FARMERS & MERCHANTS STATE BANK OF BEATRICE, APPELLEE.

FILED JUNE 8, 1906. No. 14,375.

Banks: DRAFTS: LIMITATIONS. Where the holder of a bank draft neither demands payment of the bank on which it is drawn nor takes any other step to secure payment within five years from the time it came into his possession, his right of action against the bank issuing the draft because of the failure of the bank on which it was drawn to pay the same when it was presented is barred by the statute of limitations.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

E. O. Kretsinger, for appellant.

Rinaker & Bibb, contra.

JACKSON, C.

On August 10, 1894, the Farmers & Merchants State Bank of Beatrice, Nebraska, sold to Robert Wrigley a draft on the American Exchange National Bank of Lincoln, Nebraska, for the sum of $90. This draft was immediately indorsed by Robert Wrigley, and by indorsement made payable to James Wrigley, the plaintiff, appellant herein, and was either delivered or sent to plaintiff at Broken Bow, Nebraska, on the day it was issued. At any rate, it was received by the plaintiff within a day or two of the date of its issuance, and was by him mislaid and forgotten until the month of October, 1899, when he discovered the draft in an inside vest pocket. In the meantime the American Exchange National Bank of Lincoln had consolidated with the First National Bank of Lincoln, and to the latter bank the plaintiff presented the draft for payment soon after its resurrection from his inside pocket. The Farmers & Merchants State Bank of Beatrice, prior to the presentment of the draft for payment, had gone into voluntary liquidation, paid all of its ascertained indebtedness, and distributed the balance of its assets among its stockholders. Its account at the American Exchange National Bank had been closed, and the First National Bank of Lincoln had no funds of the Farmers & Merchants State Bank with which to meet the draft at the time it was presented. After presenting the draft to the First National Bank of Lincoln for payment and ascertaining that there were no funds, the plaintiff left the draft at the Lincoln bank for collection. It was sent to Beatrice, where demand was made of the defendant for payment. Pay-

ment was refused, and on April 7, 1903, this action was instituted in the county court of Gage county to recover payment from the defendant. From a judgment in that court the case was appealed to the district court, where the finding was against the plaintiff, and he appeals.

The trial court found that the action was barred by the statute of limitations, and the correctness of that conclusion is challenged, the contention of the appellant being that the cause of action against the appellee did not accrue until the draft was presented for payment in November, 1899. Counsel for appellant has presented an interesting discussion of the distinction between a draft drawn by one bank on another and a bank check drawn by a customer. We are inclined, however, to adopt the view of the counsel for appellee that the distinction is not important to the inquiry. In *Scroggin v. McClelland,* 37 Neb. 644, it was held that the statute of limitations commences to run in favor of the drawer of a check, at the latest, after the lapse of a reasonable time for the presentment of the check. We see no reason for adopting a different rule in favor of the holder of a bank draft.

It is urged, however, that the case of *Scroggin v. McClelland* was overruled by *Connor v. Becker,* 56 Neb. 343. The question involved and determined in the latter case was whether the cause of action was barred by the statute of limitations in four years, as contended by one of the parties, or in five years, as insisted by the other party. There was, in fact, a demand in that case, and the question of when the demand should be made was not involved in the inquiry and was not determined. The rule there stated is:

"An action on a check by the holder against the maker after demand of the drawee and nonpayment is a suit on a written instrument, within the meaning of section 10 of the code of civil procedure, and the limitation is five years."

The general rule seems to be that, where a demand is necessary, the demand must be made and the action com-

menced within the statute of limitations. *Brust v. Barrett,* 16 Hun (N. Y.), 409; *Palmer v. Palmer,* 36 Mich. 487; *Lower v. Miller,* 66 Ia. 408. The reason for the rule is that it was the right of the creditor by his own act to make the demand payable. He might by such act have perfected his cause of action, and it would be both unjust and unreasonable to hold that he could postpone indefinitely the time for enforcing his claim. The supreme court of Ohio seems to have adopted a somewhat different rule, but under the holdings in that state the demand, at least, must be made within the statute of limitations. *Keithler v. Foster,* 22 Ohio St. 27. The same principle is involved and determined in *Atchison, T. & S. F. R. Co. v. Burlingame Township,* 36 Kan. 628.

There having been neither a demand of payment nor action instituted to secure payment within the time fixed by the statute of limitations, the judgment of the district court was right, and we recommend that it be affirmed.

DUFFIE, C., concurs.

ALBERT, C. I concur in the conclusion.

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

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Banks and Banking.

1. Where a time check was signed by the president of a bank individually, depositor *held* entitled to recover from the bank for money had and received. *Heim v. First Nat. Bank*, 831
2. Action against bank issuing draft for failure of bank on which it was drawn to pay it when presented, *held* barred by limitation. *Wrigley v. Farmers & Merchants State Bank* 862

Bastardy.

Where there is a variance between the testimony of the complaining witness given at the preliminary and her testimony at the trial in a bastardy proceeding, *held* error to refuse to instruct on this variance as affecting her credibility. *Quinn v. Eggleston* 409

Beneficial Associations. See INSURANCE, 6-17.

Bills and Notes.

In an action by the indorsee against the maker of a note, where fraud in its inception is relied on as a defense and shown by the evidence, the burden is on plaintiff to show that he is a *bona fide* holder. *Lahrman v. Bauman* 846

Bonds. See APPEAL AND ERROR, 2, 3. COUNTIES AND COUNTY OFFICERS, 1-3. MUNICIPAL CORPORATIONS, 9, 10, 15, 16.

Boundaries.

In an action to establish a section line, where the trial is conducted on the theory that there was not a lost corner, it is not error to charge the jury that they are to determine the original boundary line, though evidence was admitted that a corner had been established by the county surveyor on the theory that the original corner was lost. *Stryker v. Meagher* 616

Brokers.

1. Evidence in action for commissions *held* to support verdict. *Reeves & Co. v. Curlee* 55
2. The written contract for the sale of land required by sec. 74, ch. 73, Comp. St., may be evidenced by letters. *Holliday v. McWilliams* 324
3. Where letters contain data from which a description of land placed with an agent for sale can be ascertained, the contract may be enforced. *Holliday v. McWilliams* 324
4. Where a contract for the sale of real estate is void because not in writing, as required by sec. 74, ch. 73, Comp. St., the broker cannot recover on a *quantum meruit* for services rendered. *Barney v. Lasbury* 701

Building and Loan Associations.

1. A contract with a foreign building and loan association authorized to transact business in this state when the contract is made does not become unenforceable by failure of the association to renew its authority to transact business. *Eastern B. & L. Ass'n v. Tonkinson* 470
2. In determining whether a contract with a building and loan association is usurious, it is proper to consider only payments of interest and premiums on the loan. *Eastern B. & L. Ass'n v. Tonkinson* 470

Carriers.

1. One who has done nothing to indicate that he intends becoming a passenger, *held* not a passenger being transported and under protection of the statute of the state. *Hicks v. Union P. R. Co.* 496
2. Carriers insure delivery of goods to consignees against loss or injury from whatever cause, except the act of God or the public enemy. *Wabash R. Co. v. Sharpe*..... 424
3. Carrier *held* responsible for injury to goods by floods. *Wabash R. Co. v. Sharpe*..... 424
4. Secs. 4386, 4387, U. S. Rev. St., do not relieve carriers from liability for failure to care for animals, the transportation of which is delayed by an act of God. *Chicago, B. & Q. R. Co. v. Slattery*..... 721
5. A common carrier of live stock is an insurer of their safe delivery. *Chicago, B. & Q. R. Co. v. Slattery*..... 721
6. The delivery of animals to a carrier in good order and their arrival at the place of destination in bad order makes a *prima facie* case against the carrier. *Chicago, B. & Q. R. Co. v. Slattery*..... 721
7. A cause for unavoidable delay in shipment affords no excuse for failure to exercise that degree of care required of a carrier in the transportation of stock. *Chicago, B. & Q. R. Co. v. Slattery*..... 721
8. A carrier is not relieved from its responsibility to care for animals transported because of a contract, requiring the shipper to accompany the stock, where the carrier, with knowledge of the failure of the shipper so to do, proceeds under the contract. *Chicago, B. & Q. R. Co. v. Slattery*.... 721
9. Evidence in an action to recover from a sleeping car company for loss of valuables, *held* to sustain verdict. *Pullman Palace Car Co. v. Woods*..... 694
10. Evidence in an action for damages for delay in shipping stock *held* to sustain judgment. *Union P. R. Co. v. Nelson*, 72
11. Instructions in an action for delay in shipping stock *held* not prejudicial. *Union P. R. Co. v. Nelson*..... 72

Chattel Mortgages.

The making of a written contract by a mortgagor of chattels in possession, providing for sale and future disposition of the property, and payment of the mortgage debt, is neither *malum in se* nor *malum prohibitum*. *Morris v. Persing*... 80

Compromise and Settlement.

1. A compromise whereby one party agrees to pay and the other to receive a certain sum in satisfaction of a doubtful claim

Compromise and Settlement—*Concluded.*
rests upon a sufficient consideration. *Gering v. School District* 219
2. Where one knowing his claim is groundless forces another to a compromise by threats of suit, there is no consideration and the compromise will not be enforced. *Gering v. School District* 219
3. Forbearance to prosecute proceedings to reverse a judgment is a sufficient consideration for a compromise, and, unless the good faith of the claimant is in issue, whether he intended to prosecute such proceedings is immaterial. *Gering v. School District*..... 219
4. In an action on the promise of a school district to pay a certain amount in composition of a doubtful claim, where there is testimony to support a defense that claimant secured the adoption of a resolution for the compromise by intimidation, evidence as to his reputation for not being peaceable *held* properly received. *Gering v. School District*, 219
5. Declarations of parties made at a meeting where such resolution was adopted, tending to show that they were intimidated and for that reason refrained from voting, *held* properly receivable as part of the *res gestæ*. *Gering v. School District* 219

Constitutional Law.
Sec. 7, ch. 82, laws 1905, known as the "Dipsomaniac Law," *held* unconstitutional, as in violation of the right to personal liberty. *In re Schwarting*..... 773

Contempt. See NOTARIES, 2.

Contracts.
1. The dismissal by a child of proceedings for a guardian for her mother is not a valid consideration for a promise by the mother to the child. *Simmons v. Kelsey* 124
2. Public policy will not permit one who institutes proceedings for a guardian to make the abandonment thereof a source of profit. *Simmons v. Kelsey*..... 124
3. Evidence *held* to sustain finding that plaintiff's assent to a contract was obtained by undue means and without consideration. *Simmons v. Kelsey*..... 124
4. When one has an option to pay a debt in money or by the conveyance of property, and deprives himself of power to make the conveyance, his obligation to pay cash becomes absolute. *Irving v. Bond*..... 293
5. A contract will be treated as abandoned, where the acts of one party, inconsistent with its existence, are acquiesced in by the other. *Herpolsheimer v. Christopher*..... 352

Contracts—*Concluded.*

6. A defense as to one of two joint obligors inures to both, but, when such defense is infancy, the infant may be discharged and a recovery had against his co-obligor. *Cole v. Manners* 454
7. A repudiation of an oral contract to share profits of a land transaction by the party having title will give rise to a cause of action for damages. *Rice v. Parrott*..... 501
8. A contract will ordinarily be construed as it was understood by the contracting parties. *School District v. Davis*, 612
9. Under a legislative appropriation for "240 steel cells and sewerage," a contract to construct 240 cells, *held* not void because it provided no sewerage for six of the cells. *Van Dorn Iron Works Co. v. State*..... 713
10. If one's mind is so weak or diseased that he is incapable of understanding the act to be performed, he is incompetent to make a contract, whether such state of mind be the result of sickness, accident or voluntary intoxication. *Hauber v. Leibold* 706
11. Provision in a contract of membership in the relief department of a railroad that, if an action for damages be brought against the company, the benefit otherwise payable shall be forfeited, is against public policy. *Chicago, B. & Q. R. Co. v. Healy* 786
12. Under a contract of membership in the relief department of a railroad company, receipt of benefits by the beneficiary, *held* a bar to action for damage for herself, but not a bar to an action by her as administratrix for the benefit of her minor children. *Chicago, B. & Q. R. Co. v. Healy*... 786
13. Evidence in an action for breach of contract not to engage in job printing for 10 years, *held* to sustain verdict. *Skinner v. Wilson* 445
14. To establish as a contract a proposition made by letter, proof of its acceptance is necessary. *Sennet v. Melville*.. 690

Corporations.

1. A corporation organized to continue the business of a firm, which takes over the assets thereof, thereby assumes the debts of such firm to the extent of the property received. *Baker Furniture Co. v. Hall* 88
2. To render a corporation liable for the debts of a firm to whose business and property it has succeeded, it should appear that the transaction is fraudulent as to creditors, or that the new corporation is a mere continuation of the old firm. *Baker Furniture Co. v. Hall*..... 93

Corporations—*Concluded.*

3. Under facts stated new corporation *held* not to be a mere continuation of old firm. *Baker Furniture Co. v. Hall*.... 93

4. Where a new corporation takes all the property of a partnership and pays for it in its stock, the creditors of the partnership may enforce their claims in equity against the interests of the former partners in the hands of fraudulent grantees, but an innocent purchaser will be protected. *Baker Furniture Co. v. Hall*..... 93

5. That an agent of a domestic corporation is temporarily in a county does not subject such corporation to the jurisdiction of the courts of that county under sec. 55 of the code. *Security Mutual Life Ins. Co. v. Ress*..... 141

6. The residence of an agent of a corporation is personal, and is immaterial in an inquiry as to whether a domestic corporation is situated in a county within the meaning of sec. 55 of the code. *Security Mutual Life Ins. Co. v. Ress*..... 141

7. Misnomer in contract *held* immaterial. *Kannow & Sons v. Farmers C. S. Ass'n*..... 330

8. One dealing with a *de facto* corporation, *held* estopped to deny its corporate existence. *Lincoln Butter Co. v. Edwards-Bradford Lumber Co*..... 477

9. After the dissolution of a corporation an action may be maintained in the corporate name on a cause of action which accrued to the corporation. *Lincoln Butter Co. v. Edwards-Bradford Lumber Co*..... 477

Costs.

Where a plaintiff recovers a judgment in justice's court from which defendant appeals, and plaintiff has judgment in the district court, he is entitled to costs without regard to the amount of his judgment. *Miller v. Henderson*..... 383

Counties and County Officers. See RAILROADS, 1, 2.

1. A bond of a deputy county treasurer is an official bond, and statutory provisions are part of the contract. *United States F. & G. Co. v. McLaughlin*..... 307

2. A clause in the bond of a deputy county treasurer, which limits the right of action thereon to defaults discovered during the continuance of the bond or within six months thereafter, cannot be enforced. *United States F. & G. Co. v. McLaughlin* 310

3. A recital in a bond that the principal is deputy treasurer of the county will estop the sureties on the bond to deny that he was such deputy treasurer and that the bond was an official bond. *United States F. & G. Co. v. McLaughlin*, 310

Counties and County Officers—*Concluded.*

4. Where a prisoner is convicted of a felony, and the judgment is reversed, and at a new trial he is acquitted, the county, and not the state, must pay the cost of keeping such prisoner between the time of his conviction and acquittal. *Brown County v. Lampert*..... 536

Courts. See TRUSTS, 3.

Criminal Law. See RAPE. WITNESSES, 1.

Evidence.

1. In a trial for rape, admissions by the accused, *held* sufficient corroboration of positive testimony to support conviction. *Loar v. State*..... 148

2. On sustaining an objection to an offer of testimony, the court may allow part without stating reasons for excluding the remainder. *Haddix v. State*..... 369

Instructions.

3. Where the evidence is not preserved by bill of exceptions, the presumption is that instructions which refer to testimony are supported by evidence. *Von Haller v. State*..... 161

4. On trial for murder, and plea of self-defense, instructions set forth *held* not erroneous. *Von Haller v. State*..... 161

5. Where the evidence makes it proper to submit the question of the defendant's guilt of murder in the first degree, instructions submitting that question will not be erroneous because the jury found the defendant guilty in the second degree only. *Haddix v. State*..... 369

6. Where the defendant is found guilty of murder in the second degree only, prejudice will not be presumed because of repetitions in the instructions of principles of law applicable to an issue of murder in the first degree, if the evidence justified the submission of both issues. *Haddix v. State* 369

7. Where an instruction is given without testimony to sustain it, and prejudice results thereby, a new trial will be granted. *Parker v. State*..... 765

Review.

8. Affidavits found in the files cannot be considered as used on a motion for new trial, unless shown by the certificate of the proper officer to be a part of the bill of exceptions, and to have been used on the hearing. *Loar v. State* 148

9. Remarks by the court reflecting on the evidence of an expert witness, *held* not prejudicial, where there is no evidence rendering the expert evidence applicable. *Haddix v. State*, 369

Damages. See SALES, 8.

1. In an action for damage to merchandise, the measure of damages is the difference between the value of the goods immediately before and after the injury. *City of McCook v. McAdams* 1
2. Where there is a single cause of action for damages, it is sufficient to claim damages in gross, but if the pleader claims a named sum for any item of damage he can recover on such item only the amount named. *Habig v. Parker* 102
3. In an action for breach of contract of sale, where the pleadings and evidence fail to furnish data for computation, only nominal damages can be recovered. *Parkins v. Missouri P. R. Co.* 242
4. The measure of damages to growing trees is their value with reference to the land prior to the damage, less their value afterwards. *Union P. R. Co. v. Murphy*..... 545

Deeds.

1. As between the parties a deed of real estate, not a homestead, is good without being acknowledged. *Martin v. Martin* 335
2. Delivery of a deed to a third person, with directions to deliver it to the grantee, is a good delivery. *Martin v. Martin*, 335
3. A deed executed, acknowledged, and delivered is valid between the parties and those having knowledge of its existence, though not witnessed. *Adams v. Dennis*..... 682

Descent and Distribution.

The right of heirship can be established only in a suit in equity; and one cannot recover at law the value of an undivided half of an unsettled estate on the ground that the decedent agreed to make the claimant his heir. *Peterson v. Estate of Bauer*..... 661

Dismissal and Nonsuit.

Where plaintiff appeals from the county to the district court, he can there dismiss his action without prejudice. *Thornhill v. Hargreaves* 582

Divorce.

1. Decree dismissing petition and cross-petition upheld. *Judkins v. Judkins*..... 213
2. An agreement between parties to a suit for divorce for the collusive rendition of a decree therefor will defeat the action. *Branson v. Branson*..... 780
3. Jurisdiction of divorce and alimony is statutory. *Cizek v. v. Cizek* 797

Divorce—*Concluded.*

4. Under sec. 27, ch. 25, Comp. St., the district court has power after decree to revise alimony at its subsequent terms. *Cizek v. Cizek*..... 797

5. If a decree awarding alimony is void for want of jurisdiction, the court may grant it at a subsequent term. *Cizek v. Cizek* 797

Drunkards.

1. Under secs. 64-66, ch. 40, Comp. St., providing for the commitment of inebriates to the state hospital for the insane, *held*, that a commitment without an information and finding is void. *In re Simmons*..... 639

2. The provisions of ch. 82, laws 1905, known as the "Dipsomaniac Law," are *in pari materia* with other laws providing for the detention, care and discharge of persons committed to the hospital for the insane, and must be construed in connection therewith. *In re Schwarting*..... 773

3. A person who has been confined in the hospital for the insane under ch. 82, laws 1905, until he has been cured, may not be subjected to further restraint without new cause. *In re Schwarting*..... 773

Ejectment.

Where a purchaser in possession of land recovers a judgment against his vendor, and the vendor appeals, he cannot, pending the appeal, use the judgment to oust the purchaser from possession. *Gray v. Nolde*..... 106

Election of Remedies. See CONTRACTS, 12.

A suit by an administrator of a member of the relief department of a railroad company to recover damages for wrongfully causing death, *held* a bar to an action on the membership certificate, when the administrator is the beneficiary in the contract. *Chicago, B. & Q. R. Co. v. Healy*..... 783

Elections.

1. A proposition submitted at a special election, *held* to contain but one question, to wit, whether bonds should be issued to procure engine houses. *Linn v. City of Omaha*... 552

2. An inscription on the ballot label of a voting machine may be abbreviated to meet the requirements of the limited space. *Linn v. City of Omaha*..... 552

3. A city election will not be annulled because the council delegated the ministerial duty of assisting the clerk in tabulating the returns, in the absence of fraud or mistake. *Linn v. City of Omaha*..... 552

Eminent Domain.

1. Compensatory damages should be allowed for land taken from the right of way of a railroad for a public road. *Missouri P. R. Co. v. Cass County*..... 396
2. Where, in making approaches to a railroad track, it is necessary to grade through the right of way, the company should be allowed such damages as the county would have expended in grading had the railroad never been built. *Missouri P. R. Co. v. Cass County*..... 396
3. Under its charter in 1901, the city of South Omaha *held* entitled to damages in an action to condemn a right of way over its streets. *City of South Omaha v. Omaha B. & T. R. Co.* 718

Equity.

1. That one loans money to another to buy land, gives the lender no equity in the land. *Fike v. Ott*..... 439
2. A suit in equity will not lie where plaintiff has a plain, adequate and speedy remedy at law. *Western Union T. Co. v. Douglas County* 666
3. A contract in writing for the adoption of a child, though ineffective as a legal adoption, may be enforced in equity. *Pemberton v. Heirs of Pemberton*..... 669

Estates.

There can be no merger where intervening rights or estates interfere, nor where the intention to keep the estates separate can be inferred. *Topliff v. Richardson*..... 114

Estoppel. See APPEAL AND ERROR, 2. INSURANCE, 15. JUDICIAL SALES, 1. PUBLIC LANDS, 3.

1. Where a widow purchased the heirs' interest in a homestead, and they remained silent for more than ten years, *held* they are estopped from asserting title against the widow's grantee. *Staats v. Wilson*..... 204
2. Where one pleads an estoppel the burden is on him to establish it. *Parkins v. Missouri P. R. Co*..... 242

Evidence. See APPEAL AND ERROR, 4-7. COMPROMISE AND SETTLEMENT, 5. CONTRACTS, 13, 14. CRIMINAL LAW, 1, 2.

1. To prove damages a witness should state facts and not conclusions. *City of McCook v. McAdams*..... 1
2. Evidence which tends to negative that offered by defendant to establish an affirmative defense is not objectionable as not proper rebuttal. *City of McCook v. McAdams*..... 1
3. Proof of a statute of a sister state and of a judicial record appointing trustees *held* sufficient. *Topliff v. Richardson*.. 114

Evidence—*Concluded.*

4. No proof is needed of admitted facts. *Kannow & Sons v. Farmers C. S. Ass'n*..... 330
5. An expert accountant may testify to the results of an examination and computation of complicated accounts, the books or memoranda making up the account being first introduced in evidence. *Kannow & Sons v. Farmers C. S. Ass'n* 330
6. It is sufficient foundation for the introduction of letters to show that they were received in due course of mail in answer to letters written by an agent to his principal, and duly mailed to the address of the party sought to be bound. *Peycke v. Shinn* 364
7. Nonexpert witnesses to the mental capacity of a testator must state the facts. *Isaac v. Halderman* 823

Execution.

In a sale on execution under sec. 497 of the code, notice of the sale must be published for 30 days. *Young v. Figg*..... 526

Executors and Administrators. See WILLS.

1. In appointing an administrator the court exercises its discretion, and on appeal the issue is for the court and not for the jury. *In re Estate of Scott*..... 28
2. Where the next of kin are unable to agree on an administrator and the probate court appoints one other than the next of kin, the appointment will not be disturbed unless there is an abuse of discretion. *In re Estate of Scott*..... 28
3. When the next of kin disagree as to an administrator, and the court appoints one requested by one of the next of kin, it will not be presumed, in the absence of evidence, that the court abused its discretion. *In re Estate of Scott*.. 30
4. A corporation cannot act as an administrator under the laws of this state. *Continental Trust Co. v. Peterson*..... 411
5. Evidence *held* to sustain finding that a former administrator received certain money as a gift and not as assets of the estate. *Foster v. Murphy*..... 576

Fraud.

1. False representations as the basis of an action are such only as mislead a party to his damage. *Jakway v. Proudfit*, 62
2. In an action for false representations in the sale of stock, exclusion of evidence *held* prejudicial. *Jakway v. Proudfit*, 62
3. In an action for false representations in the sale of stock, instructing that, if representations of indebtedness of the corporation were false, though no damage accrue, plaintiff may rescind, *held* error. *Jakway v. Proudfit*..... 62

Fraud—*Concluded.*

4. Every contracting party has a right to rely on a statement of fact, the truth of which is known to the opposite party, and unknown to him. *Farley v. Weiss*..... 402

5. Instructions as to measure of damages in an action for fraud in the sale of land, *held* not prejudicial. *Farley v. Weiss* 402

Fraudulent Conveyances.

1. Where a transfer is made when the grantor's indebtedness is small compared with the value of his property, and is secured by a mortgage, the *bona fides* of the transaction is established. *Seeley v. Ritchey*..... 433

2. Evidence *held* sufficient to overcome presumption of fraud in a transfer from father to son. *Seeley v. Ritchey*..... 433

3. A conveyance made by father to son, or other near relative, is presumptively fraudulent as to existing creditors. *Seeley v. Ritchey* 427

4. Evidence *held* not to overcome presumption of fraud arising from a conveyance by father to son. *Seeley v. Ritchey*..... 427

Gifts.

1. The indorsement and delivery of a certificate of deposit, with the intent of making a gift of the deposit, operates as a gift of the fund. *Foster v. Murphy*..... 576

2. Evidence *held* to establish a gift of notes and a mortgage. *Adams v. Dennis*..... 682

Health.

Complaint *held* not to charge the manufacture of cigarettes within the meaning of the statute. *Dempsey v. Stout*..... 152

Highways.

1. To establish a highway by prescription there must be a user by the public under claim of right, and adverse to the owner, of a defined way or track, for a period of ten years. *Nelson v. Sneed*..... 201

2. The decision of the expediency of establishing or vacating a public road is vested in county boards and other like agencies, and is not subject to judicial review. *Otto v. Conroy* 517

Homicide. See CRIMINAL LAW, 5, 6. JURY.

Husband and Wife.

A married woman may convey her lands, other than a homestead, without her husband joining in the conveyance. *Jordan v. Jackson*..... 15

Infants.

1. A judgment against a minor will not be set aside on account of his minority unless the action for that purpose is commenced within one year after the minor arrives at the age of 21 years, as provided in sec. 442 of the code. *McCreary v. Creighton*..... 179

2. While in possession under a lease, the plea of infancy is not available in a suit to restrain an infant from inflicting irreparable injuries upon his landlord. *Cole v. Manners*.... 454

Injunction.

1. Where the nature and frequency of trespasses prevent or threaten rights of possession and property in land, an injunction will be granted. *Sillasen v. Winterer*..... 52

2. The title to a public office and the right to exercise the functions thereof by one claiming title thereto by election, cannot be determined in a suit for injunction. *School District v. Cowgill*..... 317

3. An injunction suit cannot be maintained to restrain the teaching of school by a qualified teacher under a contract signed by *de facto* officers of the school district. *School District v. Cowgill*..... 317

4. An injury which cannot be measured by any pecuniary standard or compensated in damages is irreparable. *Cole v. Manners* 454

5. Pleadings and evidence in a suit to enjoin lessees from permitting lessor entering under his lease *held* to sustain decree. *Cole v. Manners* 454

Insane Persons.

1. Where mental capacity to maintain a suit is in issue, disposition is not a subject of expert investigation. *Simmons v. Kelsey* 124

2. Where plaintiff understands the nature of her suit, and has the will to decide whether it be prosecuted, she has sufficient mental capacity to maintain it. *Simmons v. Kelsey*, 124

Instructions. See ADVERSE POSSESSION, 4. APPEAL AND ERROR, 11-17. BOUNDARIES. CARRIERS, 11. CRIMINAL LAW, 3-7. FRAUD, 3. MUNICIPAL CORPORATIONS, 3-6. SALES, 12. TRIAL.

Insurance.

1. Where a policy of insurance contained a provision that if the buildings insured become vacant the policy shall be void, and after loss the company, being informed of the loss and the breach of condition, cancels the policy and retains the premium, *held* a waiver. *Farmers & Merchants Ins. Co. v. Bodge* 31

Insurance—*Continued.*

2. A stipulation in a contract for insurance that the policy shall be void if the buildings insured become vacant, will be enforced. *Farmers & Merchants Ins. Co. v. Bodge*..... 35

3. The cancelation of a policy of insurance after loss and notice of facts constituting a forfeiture, and the return of unearned premium from date of forfeiture, *held* not a waiver. *Farmers & Merchants Ins. Co. v. Bodge*..... 35

4. Evidence in an action on a policy insuring against burglary *held* to justify submitting case to jury. *Maryland Casualty Co. v. Bank of Murdock*..... 314

5. Evidence of loss *held* insufficient. *British-American Ins. Co. v. Columbian Optical Co*..... 812

Beneficial Associations.

6. Questions and answers in an application made part of a contract of insurance are construed most strongly against the insurer. *Modern Woodmen v. Wilson*..... 344

7. Whether in making answers in an application for insurance the applicant acted in good faith is a question for the jury. *Modern Woodmen v. Wilson*..... 344

8. In answer to a question in an application for insurance calling for ailments for which the assured has been treated, the assured may confine his answers to ailments which are serious. *Modern Woodmen v. Wilson*..... 344

9. Evidence *held* to sustain a finding that answers of assured were given in good faith. *Modern Woodmen v. Wilson*..... 344

10. If a beneficial association collects dues and mortuary assessments after knowledge of a forfeiture, it waives the forfeiture. *Pringle v. Modern Woodmen*..... 384

11. A subordinate lodge of a mutual benefit society and its clerk, designated by the supreme lodge to receive and forward dues and assessments, are agents of the supreme lodge. *Pringle v. Modern Woodmen*..... 388

12. The collection of assessments from a member convicted of a felony, by the clerk of a subordinate lodge, with knowledge of that fact, forwarded to and retained by the supreme lodge until after the death of the member, *held* a waiver of a forfeiture on the ground of such conviction. *Pringle v. Modern Woodmen*..... 388

13. Where the constitution of a benefit society requires initiation and payment of one assessment as indispensable to membership, no liability arises before compliance with these requirements. *Loyal Mystic Legion v. Richardson*..... 562

14. Where an insurance certificate provides that if the member engage in prohibited occupation the certificate becomes void

Insurance—*Concluded.*

as to any claim for death traceable to employment in such occupation, the society is exempted from liability for death resulting therefrom, but otherwise the certificate remains in force. *Modern Woodmen v. Talbot*..... 621

15. A beneficial society is not estopped to claim exemption from liability for the death of a member, due to engaging in a prohibited occupation, by accepting dues and assessments with knowledge that he had entered such occupation. *Modern Woodmen v. Talbot*..... 621

16. Where the constitution and laws of a beneficial association provide that members shall pay one assessment each month, payment cannot be resisted on the ground that it was not lawfully made. *Sovereign Camp, W. O. W., v. Ogden*..... 643

17. In an action on a benefit certificate, an answer which set out the delinquency of the member *held* to state a defense. *Sovereign Camp, W. O. W., v. Ogden*..... 643

Intoxicating Liquors.

1. Where in a prosecution for a violation of sec. 20, ch. 50, Comp. St., intoxicating liquor is found in the possession of the accused, the statute makes such possession, when not satisfactorily explained, presumptive evidence of guilt. *O'Neil v. State* 44

2. Evidence in a prosecution for unlawfully keeping liquors, *held* not to sustain a conviction. *O'Neil v. State*..... 44

3. Evidence *held* to support findings denying mandamus to compel city council to revoke a liquor license, and to fix time for hearing remonstrance. *Middlekauff v. Adams*..... 265

4. Possession of real estate *held* insufficient to establish a freehold estate. *Swihart v. Hansen*..... 727

5. In a hearing on a remonstrance against granting a liquor license, a witness who testified that the petitioners told him they were freeholders, and that he examined a list of freeholders, *held* not qualified to testify who are freeholders of the village. *Swihart v. Hansen*..... 727

6. Upon contest of application for liquor license, the board is not bound by a stipulation involving unusual expense in reducing the evidence to writing, and mandamus will not lie to procure a transcript without payment of the extra expense of taking the evidence. *State v. Board of Fire & Police Commissioners* 741

7. An appeal from the decision of the board in granting a liquor license is taken by giving notice of appeal, and procuring a transcript of the proceedings and filing it in the appellate court, and the court may compel the board to fur-

Intoxicating Liquors—*Concluded.*

nish a transcript of the evidence. *State v. Board of Fire & Police Commissioners* 741

8. One appealing from the board of fire and police commissioners of Omaha in a liquor license contest is entitled to a transcript of the proceedings, upon demand and the payment of reasonable fees therefor, but the board is not required to furnish a transcript without payment of the fees. *State v. Board of Fire & Police Commissioners*..... 741

Judgment.

1. A minor suing on a cause of action will be bound by the decree the same as an adult if the suit was brought and prosecuted in good faith. *McCreary v. Creighton*..... 179
2. Prior decree *held* a bar to a suit for accounting by executors and trustees. *McCreary v. Creighton*..... 179
3. Decree in partition *held* conclusive, though the proceedings were irregular and the shares determined according to an unconstitutional statute. *Staats v. Wilson*..... 204
4. One essential of a judgment in support of a plea in bar is that it was rendered in a suit involving the same subject matter. *Gering v. School District*..... 219
5. Where a second action is on a different claim or demand, the judgment in the former operates as an estoppel only as to those matters in issue on the determination of which the judgment was rendered. *Gering v. School District*..... 219
6. Where a judgment is pleaded in bar, if there be uncertainty as to the issues, the burden of proof is on the party relying on the estoppel to show that a question raised in the present suit was litigated and determined in the former. *Gering v. School District*..... 219
7. A judgment is an estoppel only as to matters in issue and determined. *Mercer Co. v. City of Omaha*..... 289
8. Where plaintiff appeals from the county to the district court, a dismissal there is not an affirmance of the judgment, which becomes a bar to a future action. *Thornhill v. Hargreaves*..... 582
9. That an order of revivor does not expressly award execution does not invalidate it. *Thornhill v. Hargreaves*..... 582
10. Proceedings to revive a judgment should not be had in the name of an administrator, unless he has succeeded to the rights of the decedent. *Vogt v. Binder*..... 361

Judicial Sales.

1. One purchasing at judicial sale is estopped from questioning the validity of an incumbrance shown by the appraise-

Judicial Sales—*Concluded.*

ment and deducted from the appraised value of the estate sold. *Topliff v. Richardson*..... 114

2. The district courts may set aside judicial sales for fraud or unfairness. *Strode v. Hoagland*..... 542

Jury.

1. Where the sheriff called as talesmen, pursuant to order of court, persons having the qualifications of jurors, who had been, before the order was made, requested by the sheriff to attend court for that purpose, *held* not ground for challenge. *Haddix v. State*..... 369

2. On trial for murder in the first degree, it is ground for challenge of a juror that he has such opinions as would preclude him from finding the accused guilty of an offense punishable with death. *Haddix v. State*..... 369

Justice of the Peace.

Pending appeal from justice's court, the judgment creditor filed in the district court a transcript, and after dismissal of the appeal and remand caused execution to issue out of the district court. *Held*, That the execution was void. *Jenkins v. Campbell* 138

Landlord and Tenant.

1. Ordinarily there is an implied covenant in a lease that the demised premises shall be open to entry by the lessee at the time fixed as the beginning of the term. *Herpolsheimer v. Christopher*..... 355

2. The measure of damages for breach of implied covenant of entry is the difference between the rental value and the rent reserved, and any special damages. *Herpolsheimer v. Christopher* 355

3. Whether plaintiff rescinded contract of leasing and abandoned a claim for damages, *held* questions for the jury. *Herpolsheimer v. Christopher* 355

Limitation of Actions. See TRUSTS, 2.

1. Sec. 16 of the code is applicable only to civil actions. *Mercer Co. v. City of Omaha*..... 289

2. In an action on contract, the burden of proof of defense of limitations is on defendant. *Van Burg v. Van Engen*..... 816

Lost Instruments.

Where the issue is as to whether a certificate of deposit was issued, and the verdict is for plaintiff who denied its existence, the court need not require indemnity against such instrument. *Emley v. Citizens State Bank*..... 794

Mandamus. See INTOXICATING LIQUORS, 6. WATERS, 2.

1. Mandamus will not lie to compel the president *pro tempore* of a city council to preside and appoint its standing committees, where that duty is not enjoined by statute or ordinance. *State v. Dunn*..... 155
2. Evidence in proceeding to compel a railroad company to furnish cars on a side-track for grain shipments, *held* to sustain finding that the side-track was a public highway under sec. 4, art. XI of the constitution. *Roby v. State*... 450

Marriage.

1. In dealing with a marriage contract or the status resulting therefrom the state is always a party. *Willits v. Willits*.. 228
2. A marriage, where one of the parties is under age of consent but competent by the common law, is not void but voidable. *Willits v. Willits*..... 228
3. A court annuling a marriage at the suit of a husband who was under the age of consent when the marriage was solemnized may require him to pay a reasonable amount for the support of the issue of such marriage. *Willits v. Willits* 228
4. In such case the court may also require the husband to pay reasonable suit money and to reimburse the wife for expenditures for the family during the existence of the marriage relation. *Willits v. Willits*..... 228
5. Suit money may be allowed at any stage in the litigation and may be included in the final decree. *Willits v. Willits* 228

Married Women. See HUSBAND AND WIFE.

Master and Servant.

1. The master is not liable for an injury to one employee by the tort of another outside of his employment, though the coemployees are not fellow servants. *Younkin v. Rocheford* 528
2. A master is not responsible for the wrongful acts of his servant, when unauthorized and not within the servant's employment. *Younkin v. Rocheford* 531
3. Evidence in a personal injury case *held* to justify directing verdict for defendant. *Hargadine v. Omaha B. & T. R. Co.*, 729
4. In an action for injury *held* that the trial court properly directed verdict for defendant. *Salisbury v. Press Publishing Co.* 849
5. While an employer must use reasonable care to provide safe appliances, this does not relieve the employee if he puts

Master and Servant—*Concluded.*
them to a use for which they are not designed or subjects them to a strain beyond their capacity. *Salisbury v. Press Publishing Co*..... 849

Mechanics' Liens.
1. A mechanic's lien takes precedence over a mortgage subsequently executed. *Hahn v. Bonacum*..... 837
2. Evidence *held* to show substantial performance of contract. *Hahn v. Bonacum* 837
3. Evidence as between owner and lien-holder *held* to justify finding for a greater sum than found by the trial court. *Hahn v. Bonacum* 837
4. In a suit to foreclose a mechanic's lien, relief will not be denied where there has been substantial performance of the contract. *Hahn v. Bonacum* 837

Mortgages. See ASSISTANCE, WRIT OF. MECHANICS' LIENS, 1. RECEIVERS.
1. Evidence *held* to show that a mortgagee was agent of its assignee, and payments to it satisfied the mortgage debt. *Pine v. Mangus* 83
2. A mortgage to a trustee may be foreclosed without joining the beneficiary. *Abrams v. Taintor* 109
3. A mortgagor's possession of mortgaged premises after foreclosure and sale will not become adverse until notice that he is holding adversely to purchaser. *Abrams v. Taintor*.. 109
4. Prior to 1903 a surety on a waste bond given in a foreclosure proceeding was not liable for taxes pending appeal. *United States F. & G. Co. v. Rieck*..... 300

Municipal Corporations. See MANDAMUS, 1.
1. Evidence *held* to sustain finding that loss by flood was not occasioned by the act of God. *City of McCook v. McAdams*, 1
2. Evidence *held* insufficient to submit question of contributory negligence to the jury. *City of McCook v. McAdams*..... 1
3. Instruction covering defendant's theory that loss by flood was occasioned by the act of God, *held* favorable as the law would warrant. *City of McCook v. McAdams*..... 1
4. Instruction as to burden of proof *held* not erroneous. *City of McCook v. McAdams* 1
5. In an action against a city for damages caused by defective drainage, where the defense is that the loss was occasioned by the act of God, *held* error to instruct that the burden is on defendant to establish such defense. *City of McCook v. McAdams* 7

Municipal Corporations—*Concluded.*

6. In an action against a city for damages occasioned by defective drainage, instruction as to burden of proof *held* proper. *City of McCook v. McAdams* 11

7. City councils have power to adopt rules for their own government in matters of procedure. *State v. Dunn* 155

8. Where a city receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action to recover the reasonable value of the benefits. *Rogers v. City of Omaha* 187

9. Cities of the second class may vote bonds to the amount of 5 per cent. of the assessed valuation to establish a heating or lighting system, under secs. 1-5, art. V, ch. 14*a*, Comp. St. 1903, or 2½ per cent. under ch. 33, laws 1905. *State v. Searle* 272

10. Bonds of a city of the second class, designated electric light bonds, to the amount of 5 per cent. of the assessed valuation, issued under ch. 26, laws 1903, *held* valid and entitled to registration. *State v. Searle* 272

11. Omaha charter (Comp. St. 1897, ch. 12*a*, sec. 192), *held* to contain authority for relevy of special assessment which failed for irregularity in procedure. *Mercer Co. v. City of Omaha* 289

12. In an act incorporating a certain class of cities, it is competent to enact that the treasurer of the county in which the only city of that class is situated shall be *ex officio* treasurer of the city. *Cathers v. Hennings* 295

13. Notice to nonresidents to construct sidewalks *held* sufficient to authorize a special assessment to pay the cost thereof. *State v. Several Parcels of Land* 320

14. Publication of notice to nonresident property owners to construct sidewalks may be proved otherwise than by affidavit under an ordinance. *State v. Several Parcels of Land* 320

15. Under its charter the city council of Omaha may provide for calling a special election to vote on a proposition to issue bonds. *Linn v. City of Omaha* 552

16. The power to issue bonds to construct buildings, conferred by sec. 195 of the Omaha charter, carries with it authority to provide sites for such buildings. *Linn v. City of Omaha,* 552

17. Where a city in erecting public works exercises reasonable care and adopts plans approved by skilled engineers, it is not liable for defects in the plans, unless the construction is so dangerous that all reasonable minds must agree that it was unsafe. *Watters v. City of Omaha* 855

Negligence.

Where reasonable men may fairly differ on the question of negligence, its determination is for the jury. *McCarty v. Lincoln Traction Co*..... 819

New Trial.

Mere indiscretion of a juror *held* insufficient to avoid a verdict. *Wessel v. Bishop* 74

Notaries.

1. In taking depositions notaries do not exercise judicial functions. *In re Butler*..... 267
2. Where a witness fails to attend before a notary in obedience to a subpœna, he may be punished as for a contempt, but such punishment cannot exceed a fine of $50. *In re Butler*, 267

Officers. See INJUNCTION, 2, 3.

Parties.

A bailee of property may sue to recover the value thereof against one through whose negligence it is lost. *Union P. R. Co. v. Meyer*..... 549

Payment.

1. Rulings on objections to instructions as to proof of payments in an action for attorney's fees, *held* without error. *Wessel v. Bishop* 74
2. Evidence *held* insufficient to sustain a finding of payment. *Parker v. Leech* 135

Pleading. See RAILROADS, 6.

1. Amended cross-petition *held* not a departure, and sufficient to support a decree for specific performance. *Jordan v. Jackson* 15
2. In an action on an appeal bond the petition is not open to demurrer because it does not show a judgment which could be paid, where it shows the breach of another condition. *Locke v. Skow* 39
3. A petition setting up numerous and continued trespasses to personal property states but one cause of action. *Habig v. Parker* 102
4. Where a plea in abatement was stricken and defendants incorporated the same matter in the answer and litigated it, *held* that they were not prejudiced by the ruling on the motion to strike. *Simmons v. Kelsey*..... 124
5. Where one proceeds to trial on the theory that the petition tenders a certain issue, if the pleadings can be construed to raise such issue they will be held to do so. *Perkins v. Missouri P. R. Co*..... 242

Pleading—*Concluded.*
6. Objection to petition in alleging plaintiff's capacity to sue can be raised by demurrer. *Meyer v. Omaha F. & C. Co....* 405
7. Petition in an action on contract *held* not demurrable. *Harris v. Paine* 523
8. A variance in the time of alleged damage by fire between petitions in the county and district courts, *held* immaterial. *Union P. R. Co. v. Murphy*..... 545
9. Refusal to strike from a reply matter embraced in the petition and answer *held* not prejudicial. *Emley v. Citizens State Bank* 794

Principal and Agent. See MORTGAGES, 1.
1. An agent authorized to receive payment has no authority to commute his principal's debt for a debt due from himself to his principal's debtor, nor to receive payment other than in money. *Parker v. Leech* 135
2. The declarations of an alleged agent are not admissible to establish or enlarge his authority. *Fitzgerald v. Kimball Bros. Co*..... 236
3. The authority of an agent to execute a contract cannot be established by evidence of his declarations as to a conversation between him and his alleged principal by telephone. *Fitzgerald v. Kimball Bros. Co*..... 236
4. Knowledge by the principal of the material facts is an essential element of an effective ratification of an unauthorized act of his agent. *Fitzgerald v. Kimball Bros. Co*..... 236
5. Evidence *held* insufficient to sustain finding that an alleged agent had authority to bind the principal. *Fitzgerald v. Kimball Bros. Co.* 236
6. A principal who ratifies a contract of his agent is thereafter estopped from denying the authority of the agent to enter into the contract. *Lutjeharms v. Smith*..... 260
7. The authority of an agent may be shown by letters of his principal. *Peycke v. Shinn*..... 364
8. In an action between a principal and an adverse party, the agent is presumed to have communicated to his principal facts coming to his knowledge affecting his agency. *Pringle v. Modern Woodmen*..... 384
9. The doctrine of ostensible authority of an agent can be invoked only by such as have dealt with him on the faith of such authority. *Fike v. Ott*..... 439

Principal and Surety. See MORTGAGES, 4.
1. In the absence of fraud or mistake, a surety upon a supersedeas bond can be held only for consequences of the pro-

Principal and Surety—*Concluded.*
ceeding in which the instrument was given. *American Bonding Co. v. Heye* 511

2. Where a creditor to whom two persons are obligated releases one he discharges the other, though the person released is surety only, if he is ultimately liable to the party not discharged. *Brown v. Chicago, R. I. & P. R. Co.*..... 797

Process.

1. Service by publication on three defendants, two of whom were residents and the third deceased, *held* void. *Topliff v. Richardson* 114

2. Where plaintiff is given leave to amend a defective affidavit for service by publication and return of service of summons, but fails so to do, he will be deemed to have elected to stand on the original affidavit and return. *Goldie v. Stewart*.... 168

Public Lands.

1. Under sec. 4, art. IV, ch. 80, Comp. St. 1897, persons who complied with the act had a preference right of purchase or lease of land known as indemnity school land, and had title to the improvements made by them thereon. *State v. McCright* 732

2. Occupants of indemnity school lands who had complied with the act of 1875 (laws 1875, p. 123) were entitled to have the land appraised separately from the improvements, and to be given an opportunity to lease the land upon such appraisement before being ejected therefrom. *State v. McCright* 732

3. One who has attempted to make entry under the homestead laws of the United States, and has contested the right of the state to indemnity school lands, is not estopped to assert his right under the act of 1875 (laws 1875, p. 123) relating to the improvements of actual settlers upon lands so obtained by the state. *State v. McCright*..... 732

Railroads. See CONTRACTS, 11.

1. Under sec. 110, ch. 78, Comp. St., it is the duty of a railroad company to make and keep in repair suitable crossings with approaches, but the county is required to build that part of a highway within the right of way which it would have been required to make had the railroad not been constructed. *Missouri P. R. Co. v. Cass County*..... 396

2. Under sec. 110, ch. 78, Comp. St., a railroad company cannot recover damages from a county for the cost of putting in cattle guards, erecting sign-posts, building wing-fences, planking the track, and constructing approaches at crossings. *Missouri P. R. Co. v. Cass County*..... 396

Railroads—*Concluded.*

3. A side-track, though used exclusively by a milling company, *held* a public highway within sec. 4, art. XI of the constitution. *Roby v. State* 450
4. The term railroad includes all side-tracks necessary or convenient for the transaction of the company's business. *Roby v. State* 450
5. Sec. 1, art. I, ch. 72, Comp. St., was not intended to provide a penalty for failure to maintain fences, but merely to render companies liable to owners of stock injured in consequence of such failure. *Chicago, B. & Q. R. Co. v. King*.... 591
6. A petition for damages for loss of stock under sec. 1, art. I, ch. 72, Comp. St., which contains no allegation tracing such loss to failure to maintain fences, is fatally defective. *Chicago, B. & Q. R. Co. v. King*..... 591
7. In an action for negligently setting out a fire, the origin of the fire may be proved by circumstantial evidence. *Kearney County v. Chicago, B. & Q. R. Co*..... 861
8. Evidence in an action for setting fire to a bridge *held* to sustain verdict for plaintiff. *Kearney County v. Chicago, B. & Q. R. Co*..... 861
9. Evidence in an action for damages to trees by fire from a locomotive, *held* to support verdict for plaintiffs. *Union P. R. Co. v. Murphy*..... 545
10. Evidence in an action for damages for killing stock *held to* sustain verdict. *Union P. R. Co. v. Meyer*..... 549

Rape. See CRIMINAL LAW, 1.

1. In a prosecution for rape, the testimony of the prosecutrix, if denied, must be corroborated. *Klawitter v. State*..... 49
2. Evidence *held* insufficient to sustain conviction of rape. *Klawitter v. State* 49
3. The uncorroborated evidence of the prosecutrix is insufficient to sustain a conviction of rape. *Livinghouse v. State*, 491
4. Where the testimony of the prosecutrix lacks probability, and the corroborating evidence is of a doubtful character, conviction of rape will be set aside. *Livinghouse v. State*, 491

Real Estate Agents. See BROKERS.

Receivers.

1. In an action for damages for the wrongful appointment of a receiver, the rental value of the property sequestered and attorney's fees are elements of damages. *Joslin v. Williams* 594
2. The approval of the accounts of a receiver wrongfully appointed does not adjudicate the question of damages between

Receivers—*Concluded.*

the litigants, where the party resisting such appointment does not participate in the accounting. *Joslin v. Williams*, 594

3. That the supreme court in vacating an order appointing a receiver puts its decision on a ground different from the one urged does not deprive the party procuring the vacation of the right to recover for services of his attorney in procuring the vacation. *Joslin v. Williams*..... 594
4. The value of a mortgagor's homestead pending foreclosure cannot be diminished by the costs of a receivership or unnecessary repairs, where the receiver ought not to have been appointed. *Joslin v. Williams* 602
5. In an action on the bond of a receiver in foreclosure of a homestead, defendants cannot recover costs of the foreclosure for which the owner of the homestead was not personally liable. *Joslin v. Williams*..... 602

Replevin.

In a replevin suit, where plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff. *Meyer v. Omaha F. & C. Co*..... 405

Revivor. See JUDGMENT, 9, 10.

Error in reviving a suit *held* without prejudice where deceased was not a necessary party. *Abrams v. Taintor*..... 109

Sales.

1. Where a seller by fraud induces one to accept something not contemplated by his contract, he may rescind the sale and recover what he has paid. *Jakway v. Proudfit*..... 67
2. Where a purchaser receives what he actually purchased, and bases his right to rescind on some false representation, he must show that such representation was material and that he was damaged. *Jakway v. Proudfit*..... 67
3. Any form of words to induce a sale, that the subject matter of the sale is of a particular quality or fitness, constitutes a warranty. *Shuman v. Heater*..... 119
4. Evidence *held* sufficient to show a warranty and breach thereof. *Shuman v. Heater*..... 119
5. Evidence in an action for breach of contract of sale *held* to sustain a finding that the commodity which plaintiff was willing to deliver answered the requirements of the contract. *Parkins v. Missouri P. R. Co*..... 242
6. In an action for breach of contract of sale, the burden of proof that the goods tendered met the requirements of the contract is on plaintiff. *Parkins v. Missouri P. R. Co*..... 242

Sales—*Concluded.*

7. Where goods tendered do not meet requirements of contract, the vendee may refuse to accept them. *Parkins v. Missouri P. R. Co.* 242
8. In an action for breach of contract of sale, where the vendor procures the goods from third parties, the measure of damages is the difference between the cost at the time and place specified and the contract price, with interest. *Parkins v. Missouri P. R. Co.* 242
9. Contract *held* entire in the sense that either party had the right to a full performance. *Peycke v. Shinn* 364
10. Before a seller can maintain an action for the price of a chattel, there must be such a delivery as will pass the title. *Murphy Co. v. Exchange Nat. Bank* 573
11. Where possession and title to chattels remain in the seller, and the purchaser renounces his contract, the seller can only sue for damages sustained. *Murphy Co. v. Exchange Nat. Bank* 573
12. Instructions in an action for goods sold, *held* proper. *Lawrie v. Lininger & Metcalf Co.* 165

Schools and School Districts. See INJUNCTION, 3.

1. Under sec. 2, subd. 14, ch. 78, laws 1881, as amended by sec. 6, ch. 62, laws 1899, state officers living in Lincoln may send their children to the public schools without paying tuition, though they retain their legal residence elsewhere. *State v. Selleck* 747
2. If a family, or one having legal custody of children, live in a school district other than the district of their legal residence, not to obtain school privileges, but from other motives, the children are entitled to free school privileges in the former district. *State v. Selleck* 747

Specific Performance.

1. In a suit for specific performance, *held* that an account of rents and profits should be taken. *Jordan v. Jackson* 26
2. Specific performance will not be awarded, where the evidence discloses gross laches and time is of the essence of the contract. *Bradley & Co. v. Union P. R. Co.* 172
3. Where the vendee is willing to accept the title of the vendor, the courts will not refuse to compel specific performance because of defective title. *Lutjeharms v. Smith* 260
4. A proceeding to enforce an alleged oral contract to adopt a child and to make a bequest to him, is in substance a suit for specific performance, cognizable only in equity. *Peterson v. Estate of Bauer* 652

Specific Performance—*Concluded.*

5. A written contract of adoption binding the foster-parents to make the child an equal heir may be specifically enforced against the estate of the foster-parents. *Pemberton v. Heirs of Pemberton* 669

Statute of Frauds.

1. An oral contract, on sufficient consideration, to divide the profits of a purchase and sale of land is not within the statute of frauds. *Rice v. Parrott*.....501, 505
2. Part performance by the vendor, including surrender of possession, and full performance by the vendee, removes a parol agreement for the sale of land from the statute of frauds, and the vendee in possession may sue to quiet title. *Morrison v. Gosnell*..... 539

Statutes. See DRUNKARDS, 2.

1. It is competent to embrace in one act every detail of legislation having direct reference to the subject expressed in the title. *Cathers v. Hennings*..... 295
2. The provisions of sec. 24 of the code providing for actions by or against a firm must be strictly followed. *Meyer v. Omaha F. & C. Co*..... 405
3. The provisions of a penal statute will not be extended by construction so as to apply to persons not clearly within its terms. *State v. Dailey*..... 770
4. Statutes *in pari materia* should be construed together and harmonized, if possible. *State v. Dunn*..... 155

Taxation.

1. The action of the county board of equalization in fixing the place for listing and assessment of personalty under sec. 42, art. I, ch. 77, Comp. St., will not be disturbed, unless abuse of discretion is shown. *Diemer & Guilfoil v. Grant County*.. 78
2. On appeal from a county board of equalization for overvaluation, the sole question is, what was the actual value of the property in the market in the ordinary course of trade? *Lancaster County v. Brown*..... 286
3. Where the county board acts in good faith in designating newspapers in which to publish a delinquent tax list under sec. 196, art. I, ch. 77, Comp. St., the courts will not restrain its action. *Getzschmann v. County Commissioners*.. 648
4. The statute affords a plain, adequate and speedy remedy to one whose property has been excessively valued for taxation and in cases of errors or irregularities, and equity will not interfere. *Western Union T. Co. v. Douglas County*..... 666
5. A commercial college is a school under sec. 13, art. I, ch.

Taxation—*Concluded.*

77, Comp. St., providing for exemptions. *Rohrbough v. Douglas County* 679

6. In assessing property for taxation, used partly for school purposes, the value of the part used exclusively for school purposes should be deducted from the total value of the property. *Rohrbough v. Douglas County*..... 679
7. Where the assessor's valuation of property of a precinct is relatively too low, it may be raised by the board of equalization without notice. *Lancaster County v. Whedon*..... 753
8. The statute requires no formal finding by a board of equalization as a basis for equalizing assessments between precincts. *Lancaster County v. Whedon*..... 753
9. On appeal from the board of equalization in the matter of an assessment, the burden is on appellant to show error. *Lancaster County v. Whedon*..... 753
10. Opinion of witness without stating facts, *held* insufficient to overthrow the judgment of the board of equalization. *Lancaster County v. Whedon*..... 753
11. The purchaser at a tax sale takes free from any incumbrances or equities connected with the prior title. *Topliff v. Richardson* 114
12. To invalidate a claim under a tax sale, one must show all valid taxes paid, either by himself or the party through whom he claims. *Thomas v. Farmers L. & T. Co*..... 568
13. Appeal does not lie from an order of a county board in making the tax levy provided for by sec. 136, art. I, ch. 77, Comp. St. *Whedon v. Lancaster County*..... 761

Tender.

1. Where no place is specified for a tender, the law will presume that it be made at the place of the contract; but an unconditional refusal to accept a tender waives the necessity therefor. *Hefner v. Robert*..... 192
2. Where a tender other than money is made, the tenderer must, if possible, keep the property in condition to make the tender good while an action for rescission is pending. *Hefner v. Robert* 192
3. Certain acts *held* to amount to a withdrawal of a tender. *Hefner v. Robert* 192

Trespass. See INJUNCTION, 1.

Trial.

1. Instructions should be read in open court, and where the jury desire further instructions they should be brought into court, and if sent to the jury room the record should show the consent of the parties. *Martin v. Martin*..... 335

Trial—*Concluded.*

2. In an action for injury on a railroad track, *held*, that the court erred in withdrawing the questions of negligence and of contributory negligence from the jury and directing a verdict for defendant. *Hicks v. Union P. R. Co*..... 496
3. It is not error to omit to submit evidence in support of a cause of action not embraced within the issues. *Andresen v. Jetter* 520
4. Evidence in an action for damages for assault, *held* to justify an instruction to return a verdict for defendants. *Andresen v. Jetter* 520
5. Where an instruction is not founded on evidence, and is misleading, the judgment must be reversed. *Mannion v. Talboy* 570
6. A party is entitled to have the jury instructed as to his theory of the case, when it is supported by competent evidence. *Hauber v. Leibold*..... 706
7. Instructions unsupported by evidence are erroneous. *Nichols & Shepard Co. v. Miller*..... 809
8. The statute requiring instructions to be in writing has no application to a directed verdict. *Salisbury v. Press Publishing Co.* 849
9. If a juror has failed to hear a witness, he should be required to repeat his evidence. *Haddix v. State* 369
10. The prosecution of a suit to enforce an oral contract to adopt a child and make a bequest to him, is an appeal to the conscience of the judge, who should admit in evidence every matter tending to enlighten him as to the situation and circumstances of the parties. *Peterson v. Estate of Bauer*.. 652

Trover.

1. Petition *held* good as against a general demurrer. *Fike v. Ott* 439
2. Evidence *held* to sustain verdict. *Fike v. Ott*..... 439

Trusts.

1. Where different persons convey their property in trust to secure the same debt, it is not a misjoinder of causes of action to unite them as parties in one action to enforce the trust. *Michigan Trust Co. v. City of Red Cloud*..... 634
2. A debtor in an action instituted in his own behalf cannot invoke the statute of limitations, in an action to relieve his property from a trust relation, in the absence of fraud, unless the trust has been executed. *Michigan Trust Co. v. City of Red Cloud* 634
3. The district courts have jurisdiction in cases involving

Trusts—*Concluded.*
ownership of property held in trust, though claimed by an administrator. *Adams v. Dennis* 682

4. Where a trust is created, neither the trustee nor the beneficiary has power to mortgage the trust estate, unless expressly conferred in the instrument creating the trust. *Byron Reed Co. v. Klabunde*..... 801

Vendor and Purchaser. See EJECTMENT.
A purchaser by quitclaim takes subject to equities. *Byron Reed Co. v. Klabunde* 801

Venue. See CORPORATIONS, 5, 6.

Waters.
1. In the absence of negligent construction of its roadbed across a natural watercourse, a railroad company is not liable for injury to crops by reason of an unprecedented flood. *Chicago, R. I. & P. R. Co. v. Buel*..... 420

2. Where water is diverted from its natural channel by means of a canal constructed to supply power for a mill, mandamus will lie to compel the mill owner to erect bridges wherever the canal crosses a public road. *Nuckolls County v. Guthrie & Co.* 464

Wills.
1. A decedent's estate is chargeable with attorney's fees for services rendered in defending the will. *St. James Orphan Asylum v. McDonald* 625

2. A decedent's estate is not ordinarily liable to an attorney for services rendered for and at the request of a legatee under a will in a contest thereof. *St. James Orphan Asylum v. McDonald* 630

3. An alleged oral contract to adopt a child and to make a testamentary bequest to him, or to make him an heir, must be established by clear and satisfactory evidence. *Peterson v. Estate of Bauer*..... 652

4. The county court has original jurisdiction in the probate of a will, and its decree is conclusive unless reversed by a direct proceeding. *Byron Reed Co. v. Klabunde*..... 801

5. Where a testator, being unable to write, requested the draftsman of his will, in the presence of two witnesses, to sign his name, *held* to authorize the draftsman to sign it. *Isaac v. Halderman* 823

6. Evidence *held* insufficient to show either mental incapacity, or undue influence. *Isaac v. Halderman* 823

7. In a suit to set aside the probate of a will on account of

Wills—*Concluded.*

fraud, the burden of proof rests on the applicant to show fraud prejudicial to the applicant. *Willms v. Plambeck*.... 195

8. Evidence *held* insufficient to support petition. *Willms v. Plambeck* 195

Witnesses.

1. Where accused testifies in his own behalf, he may be impeached as any other witness. *Haddix v. State* 369
2. One who has a direct legal interest as one of several joint heirs in an action against a representative of a decedent, *held* not incompetent to testify to transactions between deceased and an adverse party in whose demand the witness has no interest. *Hageman v. Estate of Powell*..... 514
3. An administrator's wife *held* competent to testify, in an action between him and his successor, to any transaction or conversation had with deceased. *Foster v. Murphy*..... 576
4. A husband is a competent witness for his wife in a suit to establish ownership to property claimed by her and held in trust by the administrator of his mother's estate. *Adams v. Dennis* 682
5. Cross-examination should be confined to the subject matter of the examination in chief. *Emley v. Citizens State Bank*, 794