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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1908.

FRANK BARKER V. STATE OF NEBRASKA.

FILED JANUARY 8, 1908. No. 15,546.

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

Francis G. Hamer and *T. F. Hamer,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

PER CURIAM.

It appearing from the record affirmatively that the judge of the district court for Lancaster county has proceeded in all things in accordance with the statute providing for the investigation as to the sanity of a convict under sentence of death, the order entered and the proceeding of said judge therein are in all things

AFFIRMED.

MARSHALL WEBB, APPELLEE, V. ROSINA WHEELER, APPELLANT.

FILED JANUARY 8, 1908. No. 14,811.

1. **Covenants:** BREACH. A covenant in a deed that "I hold said premises by good and perfect title," if untrue, is broken when made, and right of action at once accrues thereon.
2. ———: ———: RECOVERY FOR IMPROVEMENTS. When the plaintiff is in possession of the premises and can recover the value of his improvements under the "occupying claimant's act," he cannot recover the value thereof in such action for damages.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

Stull & Hawrby and *H. A. Lambert*, for appellant.

Neal & Quackenbush, contra.

SEDGWICK, C. J.

Three important questions are presented in this case. Two of them have been very much discussed by the courts of the country generally, and the authorities are somewhat at variance thereon. In the decisions of this court there appears to be a diversity of expression at least, and perhaps it may be said a conflict in principle. The real estate in controversy was conveyed to this defendant by a deed with general covenants of warranty executed jointly by one Emma Carse, widow of Henry Carse, deceased, and her daughter, Alice V. McCandless, the husband of Mrs. McCandless joining also in the deed. Henry Carse in his lifetime was the owner of the premises and had good title thereto. The said deed to this defendant recited that the grantors were the heirs of Henry Carse. The defendant conveyed the land to this plaintiff, the deed of conveyance containing covenants of title and warranty. Afterwards the plaintiff discovered that Mrs. Carse and her daughter were not the only heirs of Henry Carse; that an adopted

child was an equal heir with Mrs. McCandless, and so the title conveyed to the defendant, and by her conveyed to this plaintiff, was an undivided one-half interest in the land, together with the widow's dower estate. Upon discovering this defect in the title the plaintiff brought this action. The plaintiff took possession of the land under his deed and had not been disturbed in his possession when this action was begun. The two important questions above referred to which arise upon these facts are: First, can an action be maintained for damages for breach of covenant of title to real estate before eviction, and in such case what is the measure of damages? A further question also arises in the case in determining the measure of damages from a consideration of the following facts. The defendant made lasting improvements upon the property in good faith while she held, as she supposed, full title to the property, and also the plaintiff, after he received his warranty deed from the defendant and went into possession of the property, made lasting and valuable improvements thereon. Should the value of these improvements, both those made by the plaintiff and by the defendant, be taken into consideration in determining the amount of plaintiff's damages?

1. The decisions of this court are not as clear and satisfactory as might be wished upon the first question above suggested. It seems to be conceded in the briefs that all of the courts of this country, including the supreme court of the United States, but excepting the courts of Ohio, Wisconsin and Nebraska, hold that a covenant in a deed that the grantor has perfect title is broken when made if the title is not perfect, and that an action at once accrues thereon for damages. In Ohio it is held "that a seizin in fact of the grantor at the time the deed was executed is a sufficient compliance with the covenant of seizin in the deed." In this holding it would appear that the word "seizin" is construed to mean a claim of title accompanied with possession, and therefore in Ohio under a covenant of seizin an action cannot be maintained for damages on

account of failure of title if the grantee is in undisputed possession of the premises. In *Scott v. Twiss*, 4 Neb. 133, Mr. Justice MAXWELL adopted this principle and declared it to be the law of this state. It is plain that in this opinion the word seizin was understood as in the Ohio case. A covenant for seizin, then, only meant that the covenantor was in peaceable possession of the premises under a claim of right and covenanted that the same estate was transferred to the grantee. Of course, the covenant that the grantee should have peaceable possession under a claim of right was not broken until that possession was terminated, and under such a covenant it does not seem to have been necessary to have discussed the common law rules of conveyance, except so far as it was necessary to determine the meaning of the word seizin, and of the covenant in which that word was used. Perhaps the real difference between the Ohio court and the supreme court of the United States and other courts of this country is in the force and effect given by construction to the various covenants considered. It would seem reasonable to say that the spirit of our law which deals with the substantial rights of parties, rather than with antiquated forms, would require the courts to inquire as to the real meaning of the covenant involved and being construed. What did the grantor agree to do? Has he broken that agreement? If he has, what actual damage has he caused to the grantee by so doing? A satisfactory answer to these questions ought to dispose of the case. If in framing his covenants the grantor sees fit to use the word seizin or other technical terms, it is reasonable to suppose that he intended that the recognized technical meaning of such expressions should be given them in construing his contract, and so in *Scott v. Twiss, supra*, the grantor having agreed to protect the grantee in his seizin of the premises, the court assumed that his covenant was not broken as long as the grantee obtained that which it is there agreed for him to have, to wit, the seizin (possession with claim of right) of the premises. Perhaps all courts do not agree

in this definition of the word seizin, but when the word is so defined, as it appears to have been in *Scott v. Twiss*, then the conclusion reached upon this point in that case is unavoidable. In *Cheney v. Straube*, 35 Neb. 521, the rule was announced in this language: "A cause of action on a covenant of warranty, or for a quiet enjoyment, does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title." The language of the covenant sued upon in this case was: "And I covenant to warrant and defend the said premises against lawful claims of all persons whomsoever." And the court said: "This covenant is considered to be tantamount to that for quiet enjoyment, and what will amount to a breach of the latter is also a breach of the former." With this construction of the meaning of the covenant there can be no doubt of the correctness of the conclusion. If the agreement of the grantor with the grantee was that the grantee should remain in quiet enjoyment of the premises, that agreement would not be broken until the grantee was deprived of possession. In *Hampton v. Webster*, 56 Neb. 628, the second paragraph of the syllabus is as follows: "In an action to recover damages for breach of covenants of warranty of title it is essential to allege in the petition that plaintiff has been evicted by title paramount." Substantially the same language is used in *Troxell v. Stevens*, 57 Neb. 329. The language of the covenant involved is not stated in either of these opinions; but, as *Real v. Hollister*, 20 Neb. 112, is cited as authority in both of these cases, it is presumed that the covenant was in the language discussed in that case. The covenant there discussed was: "They do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever." And the court said that this is equivalent to a covenant for quiet enjoyment. The distinction may, perhaps, be a little fine, and yet it will be noticed that the covenant is to defend the title against the claims of other people, and not that the grantor had a good and perfect title at the time that he made the conveyance. Under a

covenant to defend it may well be urged that the covenantor was entitled to an opportunity to defend before he should be called upon to respond in damages. The court, however, upon the point under discussion in the case last named, quoted the following language from Mr. Greenleaf: "The covenant for *quiet enjoyment* goes to the possession, and not to the title; and, therefore, to prove a breach, it is ordinarily necessary to give evidence of an entry upon the grantee, or of expulsion from, or some actual disturbance in the possession; and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired." 2 Greenleaf, Evidence (16th ed.), sec. 243. He also quoted from Mr. Chancellor Kent as follows: "But the covenant of warranty and the covenant for quiet enjoyment are prospective, and an actual ouster or eviction is necessary to constitute a breach of them." 4 Kent, Commentaries, p. *471. From this last quotation it appears that formerly, when the word "warranty" was used without other qualification, it had a prospective meaning; that is, it was construed to mean that the grantor agreed to defend the rights of the grantee in the property conveyed, and should only be called upon to respond in damages when he had failed to make good such defense. In 8 Am. & Eng. Ency. Law, p. 90, note 1, it is said: "In Nebraska the Ohio doctrine was followed in *Scott v. Twiss,* 4 Neb. 133, but discarded, without notice of that case, in *Real v. Hollister,* 20 Neb. 112." This statement seems to be hardly warranted from a careful comparison of the two decisions, if the distinction between a covenant for quiet enjoyment and a covenant that the grantor then has perfect title and right to convey is considered.

In the case at bar, the covenant contained four express promises: "That I hold said premises by good and perfect title; that I have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever; and I covenant to warrant and defend the said premises against the lawful

claims of all persons whomsoever." The last promise is undoubtedly the form of covenant considered in the cases of *Real v. Hollister, Hampton v. Webster,* and *Troxell v. Stevens, supra.* Such a covenant is not broken until the covenantor fails to defend the premises against the lawful claims of other persons, and there is some reason for saying, as was said by Judge COBB in *Real v. Hollister, supra,* that such a covenant is construed to be a covenant for quiet enjoyment. But there appears to be no reason whatever for so construing the covenant "that I hold such premises by good and perfect title." If this covenant is not broken when it is made, in case the title is not good and perfect, then it cannot be broken by dispossessing the covenantee. We see no reason to resort to the technicalities of the rules of common law conveyancing to ascertain the meaning of a contract couched in ordinary, simple language, as is this covenant. No technical words are used, and the rule of the code that common words are to be used in their ordinary sense is applicable. Very many of the cases from which it is commonly supposed that there is an irreconcilable conflict of authorities upon this question involved the construction of contracts to convey. When the contract is to execute a conveyance with the usual covenants of warranty, or with the usual covenants of seizin, or like expressions, and contains no other language from which it can be determined in what sense these expressions are used, it becomes necessary to consider the technical meaning of such expressions, and the courts of different jurisdictions have under such circumstances declared the general expression "with usual covenants of seizin," or "with usual covenants of warranty," to be generally understood in the locality where they are used as having a certain specified meaning, and it is not surprising that under such circumstances varying meanings should be given in different jurisdictions to the same form of words. But, when the contract to convey or the deed that has been executed in pursuance thereof contains covenants in such plain language as to leave no doubt of their

meaning, there can be no necessity for a resort to conflicting authorities. The petition in this case alleged all of these four covenants and alleged the breach thereof. The proof failed to show that the covenant "to warrant and defend the premises against the lawful claims of all persons whomsoever," that is, the covenant for peaceable possession and quiet enjoyment, had been broken. The plaintiff was still in undisturbed possession of the land. But the proof showed beyond question that the covenant that the grantor held "said premises by good and perfect title" was broken when made. The grantor did not then have a good and perfect title, and there can be no reason for refusing the plaintiff his action to recover his damages caused by the breach of this covenant as soon as he ascertained the facts.

2. The second question as to the measure of damages in such case has also been much discussed and presents some difficulty. More than a century and a quarter ago the courts of England established the principle that upon a contract for the purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the purchaser is not entitled to any compensation for the loss of his bargain. *Flureau v. Thornhill,* 2 Wm. Bl. (Eng.) *1078. This case appears to have been generally followed in England since that time, and the questions discussed in regard to it have been as to exceptions to the rule. A discussion of this matter may be found in a somewhat extensive note to *Kirkpatrick v. Downing,* 17 Am. Rep. 678 (58 Mo. 32). In the principal case the Missouri court discusses the matter somewhat at length, and referring to the authorities in this country and after quoting from the opinion of the supreme court of the United States in *Hopkins v. Lee,* 6 Wheat. *109, which it appears to follow, the Missouri court said: "The rule (of the United States court) commends itself for its intrinsic justice. It conforms to the varying circumstances of each particular case, and is equitable and just. The arbitrary and unbending rule that the purchase money and interest shall in all

cases be taken as the criterion of damages will, in the majority of instances, do injustice either to the seller or purchaser. No reason is perceived why it should be adhered to and enforced, when one more consistent with equity is found, and which is easily administered. The rule for which we contend is just to both parties. It gives to the purchaser precisely what he has lost in consequence of the breach of contract committed by his vendor, and it makes the latter responsible for the violation of his agreement in the full amount to which he has occasioned injury." In *Beck v. Staats,* p. 482, *post,* the law is said to be in this state: "The measure of damages for the breach by the vendor of an executory contract for the conveyance of real estate, where the breach is caused either from the refusal or the inability of the vendor acting in good faith, is the difference between the value of the land at the time of the breach and the price he contracted to receive, and in addition thereto the vendee may recover the amount advanced upon the purchase price." The opinion in the case was carefully prepared by Mr. Commissioner EPPERSON, and we feel satisfied with the conclusion reached. It is shown in that opinion that this court is thoroughly committed to the doctrine there announced by a long line of decisions. We cannot perceive any basis for a different rule as to the measure of damages upon a breach of covenant that the grantor has good title and the measure of damages upon a breach of a contract to convey and give such title. The court of errors and appeals of New Jersey in *Gerbert v. Trustees,* 59 N. J. Law, 160, 59 Am. St. Rep. 578, speaking of this question, said: "The injury in both cases is the same—the loss of the property, the loss of such profit as would have been incident to increased value. The loss in both cases arises from the breach of the vendor's covenant on account of the defect in his title. There can, therefore, be no solid basis for diversity in the rule of damages applicable to the two conditions, and the rule should be unified if there is no serious obstacle in the way." And it is equally clear that,

while there is some diversity in the language used in the various opinions, this court is thoroughly committed to the rule of damages that is announced in *Beck v. Staats, supra,* in the cases arising upon contracts to convey real estate.

We think that whether we are bound by the earlier decisions of this court to observe a different rule in the case of breach of a similar covenant in a deed of conveyance it is unnecessary now to discuss, further than to illustrate the rule that should be applied to a case like the one at bar. In this case there was not an entire failure of title. The plaintiff contended, and the trial court appears to have held, as stated in 11 Cyc. 1163, that, "where the breach is only as to an aliquot and undivided part of the land attempted to be conveyed, the damages are in proportion to the whole consideration paid as that aliquot part of the land is to the whole thereof." We think that, in any view of the proper measure of damages in ordinary cases of the breach of such covenants, the rule above quoted, if correct (which we do not decide), has not been properly applied in this case. After the defendant had obtained her title from Mrs. Carse she put valuable and lasting improvements upon the land, and this plaintiff has also made valuable improvements as before stated. Under our occupying claimant's act this plaintiff could not be deprived of the land without payment for the improvements made both by himself and by his grantor who held under the same title. What, then, could the adopted child of Mr. Carse, whose interest in the land has not been conveyed, claim in this land? The failure of title which this plaintiff obtained through his deed is only as to the interest of this adopted child. It is true that, in an action like this for damages for a breach of covenant of title, difficulties and uncertainties are involved as to the real value of the interest in the land not conveyed to this plaintiff in his deed. These difficulties and uncertainties the plaintiff himself has brought to the court, by not first bringing an action to determine and have adjudicated the

interest involved in the outstanding title; and he should not be allowed in this action to recover the value, or any part of the value, of those improvements that were placed upon these premises by himself or his grantor, since he cannot be deprived of those improvements through this outstanding title, and therefore has not lost the value thereof through this defect in his title. The measure of his damages in this case, then, is the value of the outstanding title at the time that the plaintiff obtained his deed—that interest in the land of which he might be deprived through this outstanding title.

The plaintiff insists that this issue is not presented in the pleadings, but we think that this objection is not well taken. The plaintiff in his petition alleged: "That after the purchase of said premises from said defendant, and prior to plaintiff's knowledge of said defect in the title and the interest of said Avis Darleen Carse in and to said premises, the plaintiff had expended in permanent improvements and betterments on said premises the sum of $350." The answer was a general denial. The court allowed the plaintiff to recover one-half of the improvements placed thereon by himself. This he was not entitled to on any theory of the rule of measure of damages in such case. The plaintiff, being still in possession of the land and in use of these improvements, has not lost the value thereof through the defect in his title.

The judgment of the district court is therefore reversed and the cause remanded.

REVERSED.

GEORGE W. HOLMES, APPELLANT, V. NANCY E. MASON ET AL., APPELLEES.*

FILED JANUARY 8, 1908. No. 15,060.

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

2. **Limitation of Actions: SALE OF HOMESTEAD: SUIT BY HEIR.** The provisions of section 117, ch. 23, Comp. St. 1907, apply to irregular administrative sales, but not to sales that are absolutely void; and an action by an heir to quiet his title to the homestead of his ancestor may be maintained at any time within ten years after his right of action accrues, or the attainment of his majority.

3. **Constitutional Law: HOMESTEAD ACT.** Section 17 of the act of February 26, 1879 (laws 1879, p. 61), commonly called the "homestead law," does not conflict with the provisions of the constitution, and the act as a whole is a valid exercise of legislative power.

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

Field, Ricketts & Ricketts, for appellant.

J. G. Thompson, contra.

BARNES, J.

The plaintiff commenced this action in the district court for Harlan county to quiet his title to the northwest quarter of section 17, town 2, range 18, situated in said county. The defendant Nancy E. Mason answered by way of cross-petition, claiming a life estate therein, and prayed for an accounting of the rents and profits, and for possession during the remainder of her natural life. The other defendants filed cross-petitions, alleging ownership in fee,

* Rehearing denied. See opinion, p. 454, *post.*

subject to the life estate of their codefendant, and prayed for a decree quieting their title. The trial resulted in a judgment by which the plaintiff was given the life estate of the first-named defendant. The other defendants were adjudged to be the owners of the fee. Their title was quieted, and they were awarded possession after the extinguishment of the life estate. The plaintiff appealed, and presents, as we shall presently see, two main questions for our determination.

The facts established by the record, and which are not in dispute, may be briefly stated as follows: On or about the 29th day of October, 1881, William B. Mason died intestate in Harlan county. At that time he owned the premises above described in fee, subject to a mortgage of $300, together with other lands situated in said county. For many years prior to his death he, together with his wife and children (the defendants herein), had occupied the land in question as their homestead, and were so occupying it at that time. Shortly after his death the widow, the defendant Nancy E. Mason, was appointed administratrix of his estate; and in September, 1882, she applied to the district court for Harlan county for a license to sell all of the real estate of her intestate for the payment of his debts. License was granted, and in pursuance thereto, on or about the 14th day of April, 1883, she sold it all subject to the mortgages thereon, and took a bond from the purchasers conditioned for their payment. The sale was confirmed on the 11th day of June, 1883, and deeds were made to the purchasers. The land in controversy, the homestead above mentioned, was sold to one S. B. Turner, who took possession of it; and the plaintiff, George W. Holmes, now claims and holds the same by mesne conveyances. From the 11th day of June, 1883, until the 8th day of January, 1906, when this action was commenced, the plaintiff and his grantors held the open, notorious and undisputed possession of the premises under claim of title. At the time the license was granted and the sale made to

Turner, the homestead was worth less than $2,000. When this action was commenced, three of the defendants, Ida E. Rowley, Henry L. Mason and Effie I. Harroun, were more than ten years past their majority, while the other defendants, when their cross-petitions were filed, were a little less than ten years past that age.

The first question presented for our consideration is the effect of the statute of limitations as applied to the cross-actions of the defendants. Under this head, the plaintiff's first contention is that the bar of the statute was complete as to those defendants who were more than ten years past their majority when this action was commenced. Section 57, ch. 73, Comp. St. 1907, provides: "That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." By section 59 it is provided: "Any person or persons having an interest in remainder or reversion in real estate shall be entitled to all the rights and benefits of this act." The trial court having held that the plaintiff was the owner of the life estate of the defendant Nancy E. Mason, and no complaint having been made as to the correctness of that part of the decree, it follows that as against him a possessory action cannot now be maintained, and defendants were compelled to proceed, if at all, under the provisions of section 59 to have their remainder established and their title thereto quieted; and such is the form of their cross-actions. It is provided by section 6 of the code: "An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued."

The statute of limitations as to each of the several defendants commenced to run when he arrived at his majority. So as to the defendants who were more than ten

years past their majority at the time this action was commenced the bar of the statute of limitations was complete. Therefore so much of the decree of the trial court as granted any relief to those defendants was erroneous. As to them the action should have been dismissed, and the title to three-fifths of the land in controversy should have been quieted in the plaintiff. *Foree v. Stubbs,* 41 Neb. 271; *Hall v. Hooper,* 47 Neb. 111; *First Nat. Bank v. Pilger,* 78 Neb. 162; *Lyons v. Carr,* 77 Neb. 883; *Hobson v. Huxtable,* 79 Neb. 334.

As to the other defendants, plaintiff contends that as they were more than five years past their majority when they filed their cross-petitions their cross-actions were also barred by the provisions of section 117, ch. 23, Comp. St. 1907, which reads in part as follows: "No action for the recovery of any estate sold by an executor or administrator, under the provisions of this subdivision, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within five years next after the sale." In view of our former decisions the plaintiff's contention on this point cannot be sustained. In *Brandon v. Jensen,* 74 Neb. 569, after an exhaustive review of the authorities, it was held: "The provisions of section 117, ch. 23, Comp. St. 1903, apply to irregular administrative sales, but not to sales that are absolutely void." We are satisfied with the reasoning of that case, and the rule there announced has since been followed and affirmed, in substance, in *First Nat. Bank v. Pilger* and *Lyon v. Carr, supra.* Plaintiff insists, however, that the sale in this case was not void, and attacks our former decisions on that question. He argues that the court was not without jurisdiction of the subject matter, and therefore the order granting the license to sell the homestead was not void, but was voidable only. In some of our former decisions it is said: "The order granting the license to sell the homestead was void for want of jurisdiction." This statement is vigorously assailed, and perhaps a more accurate expression should

have been used. It is true that the district court has jurisdiction of an action or application by an administrator to sell the lands of his intestate for the payment of his debts. But it is equally true that the sale of the homestead of a deceased person for that purpose is positively inhibited by statute; and so, while the court has jurisdiction of the subject matter, it has no jurisdiction over the homestead, and therefore it has no power to order its sale for that purpose, and such a sale is therefore absolutely void. *Tindall v. Peterson,* 71 Neb. 160; *Bixby v. Jewell,* 72 Neb. 755; *Hall v. Cooper, First Nat. Bank v. Pilger, Lyons v. Carr,* and *Brandon v. Jensen, supra.* It follows that the sale of the land in question by the administratrix was void.

By the terms of section 17 of the homestead act (laws 1879, p. 61) the land in question descended in fee, on the death of the intestate, to his children, subject to a life estate in his widow; and their right of action was not barred until the expiration of ten years from the attainment of their majority. So the decree of the trial court in favor of the defendants Henry L. Mason and Lester H. Mason, quieting their title to two-fifths of the land in question, was right and should be affirmed.

Finally, plaintiff insists that the judgment below should be reversed as to all of the defendants, except Nancy E. Mason, because section 17 of the homestead law is unconstitutional. His contentions are, in substance, first, that the provisions of that section relate to a subject wholly different from the one considered in the rest of the act, and are not clearly expressed in the title; second, that its provisions operate as an amendment to sections 30 and 67, ch. 23, Comp. St. 1905, and do not contain a repeal of the sections so amended; third, that the act is class legislation and is therefore unconstitutional.

The argument on the first proposition is that the first 16 sections of the homestead act relate to defining, transferring, selecting and preserving homesteads for heads of families, and defining who are such; that section 17 re-

lates exclusively to the descent of homesteads, and is in conflict with the provisions of section 30, ch. 23, Comp. St. 1905, in that it exempts them from liability for the debts of the decedent, while his other property is subject to their payment. These questions will be disposed of in the order above stated. The title to the act of February 26, 1879, commonly called the "homestead act," is as follows: "To provide for the selection and disposition of homesteads, and to exempt the same from judgment liens, and from attachment, levy, or sale, upon execution or other process." Laws 1879, p. 57. This in itself is a complete answer to the plaintiff's argument. It is the *disposition* of the homestead upon the death of the owner that the plaintiff complains of in this case, and it is apparent that the title to the act is broad enough to cover that subject.

Plaintiff's second contention on this point must also fail. The act in question is a special statute covering the whole subject of homestead, and is complete in itself. It takes that special subject out of the provisions of the general statute of descent without amending that statute, and according to our former decisions on this point is not unconstitutional.

Lastly, the act in question is not class legislation. It operates upon persons uniformly throughout the state, and therefore is not unconstitutional. The act exempts homesteads from forced sale to pay the debts of the head of the family, and is "a beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband." It is designed to protect citizens and their families from the miseries and dangers of destitution. It is an enlightened policy, looking to the general welfare, as well as to that of the individual citizen. It is a statutory right purely, created for the benefit of the debtor and his family. The levy and sale of a debtor's land and tenements have always been regulated by statute. At the common law the creditor had no right to sell the debtor's land. He could only sequester its rents and profits for the payment

of his judgment. Hence, it is clearly within the power of the legislature to exempt a reasonable portion of the debtor's lands from levy and sale upon execution, attachment or other process, for the protection of his family; and such legislation does not conflict with our constitution. Indeed, such legislation has been upheld and commended by the courts of last resort in all of the states of the Union having constitutional provisions like our own. And so we are of opinion that the act in question as a whole is valid, and is a proper exercise of legislative power. Again, the homestead act has been in force in this state for nearly 30 years. All of its provisions have been frequently upheld by our courts, whose numerous decisions have become a rule of property, and we see no reason to depart from them at this time.

For the foregoing reasons, so much of the judgment of the trial court as granted any relief to the defendants, Ida E. Rowley, Henry L. Mason and Effie I. Harroun, is reversed. In all other things it is affirmed; and the case is remanded to the district court, with directions to enter a decree in accordance with this opinion.

JUDGMENT ACCORDINGLY.

The following opinion on motion for rehearing was filed March 19, 1908. *Rehearing denied:*

PER CURIAM.

In the opinion it is said: "While the court has jurisdiction of the subject matter, it has no jurisdiction over the homestead, and therefore it has no power to order its sale for that purpose, and such a sale is therefore absolutely void." The main point made in the argument on motion for rehearing is that "a judgment cannot be attacked collaterally where the court has jurisdiction of the parties and the subject matter." A number of authorities from this court are cited to sustain this proposition. The language of the opinion quoted is hardly correct. The court has jurisdiction of the subject of administrator's

sales of real estate to pay debts; but, strictly speaking, it has no jurisdiction of the subject matter, that is, the matter or thing which it is desired to reach by legal proceedings, *i. e.*, the homestead. The subject matter is defined by Black as "the thing in controversy." The language used in the opinion as to this point is not strictly accurate, but the reasons given for the conclusion seem to be satisfactory and the result is correct.

The motion for rehearing is therefore

OVERRULED.

NETTIE M. DIKE, APPELLANT, V. JOHN ANDREWS ET AL., APPELLEES.

FILED JANUARY 8, 1908. No. 15,022.

Interest on Judgment. Where judgment has been entered on a penal bond given to secure the payment of money in monthly instalments, a part of which were not due at the date of the entry of the judgment, interest should not be computed on the full amount of the judgment, but only on such instalments as are not paid at maturity, and then from the date of their maturity up to the time of their payment.

APPEAL from the district court for Saline county: LESLIE G. HURD, JUDGE. *Affirmed.*

W. G. Hastings, for appellant.

J. H. Grimm, contra.

DUFFIE, C.

December 15, 1900, defendants became sureties upon a bond given in a bastardy proceeding, the penalty of the bond being $500. The order in the bastardy proceeding required the defendant in that case to pay the plaintiff thereon the sum of $6 a month for a term of 12 years. Default was made in the payment of these monthly instalments, whereupon suit was brought upon the bond and

judgment entered against the defendants herein for $500, the full amount of the penalty. At different dates since the entry of said judgment defendants had made payments, amounting in the aggregate to $521.10. In June, 1906, plaintiff obtained an order directed to the defendants to show cause why execution should not issue against them on this judgment. Defendants appeared, and insisted that the judgment had been fully paid, and that the order should be discharged. The court entered an order finding that the judgment had been paid in full, and dismissing the rule. Plaintiff has appealed.

It will be noticed that by the terms of the judgment in the bastardy proceeding the defendant in that case was required to pay the plaintiff $6 a month for a term of 12 years. The bond upon which the defendants became sureties was executed for the purpose of securing such monthly payments. The question in issue between the parties is the interest which should be computed upon said judgment; the defendants insisting that interest should be computed upon such monthly instalments as they failed to pay at maturity, while plaintiff insists that interest should be computed upon the full amount of the judgment up to the date of the first payment made thereon, and upon the balance remaining due upon the judgment after each of the several partial payments which the record shows was made. If interest should be computed only on the monthly instalments after they fell due up to the time of their payment, defendants have paid the full amouunt due upon the judgment, and the order appealed from should be affirmed; but, if interest is to be computed upon the full amount of the judgment, giving the defendants credit for the partial payments made at the several dates of such payment, then there is a remainder of something more than $80 still unpaid upon the judgment. The judgment entry in the suit upon the bond is in the following words: "On this 15th day of December, A. D. 1900, this being the 12th day of this term of court, this cause came on for hearing on plaintiff's motion for a judgment on the pleadings, and the same was argued and submitted

to the court, and, the court being fully advised in the premises, the motion was sustained, and the court finds for the plaintiff for the penalty on the bond set forth in plaintiff's petition the sum of $500; due on said penalty on November 24, 1900, the sum of $132, for which execution is awarded. Defendant excepts to the finding of the court. It is therefore considered and adjudged by the court that the plaintiff have and recover of and from the defendants the penalty of the bond, being $500, of which amount the sum of $132 was due November 24, 1900, for which amount execution is awarded." No question is raised as to the form of the judgment entered, and the plaintiff does not contend that it could be collected otherwise than as the monthly instalments of $6 matured.

The sole question then is: How should interest be computed on this judgment? Our statute provides that interest on all decrees and judgments for payment of money shall be from the date of rendition thereof at the rate of $7 on each $100 annually until the same shall be paid. Ann. St., sec. 6727. We think this statute has reference to judgments and decrees which may be immediately collected. The language is "interest on all decrees and judgments for the payment of money," indicating that the money is immediately due and collectible, and that its nonpayment by the defendant is a breach of duty on his part. The cases cited by plaintiff in support of his claim that interest should be computed upon the full face of the judgment do not, in our opinion, bear out his contention. *People v. Birdsall,* 20 Johns. (N. Y.) *297, is not in point. It appears from the facts stated by the reporter that judgment had first to be obtained against a sheriff for default in his office before suit could be maintained on his official bond and his sureties made liable. The reporter in that case refers to the statute in the following words: "By the *sixth* section of the act, it is declared that in case of any recovery by any party aggrieved against any sheriff for any default, etc., it shall be lawful for the judges of this court, upon motion in open court, to order the bond given

by the sheriff to be put in suit against him and his sureties; and, when judgment is obtained, the court shall, on motion in open court, direct so much to be levied thereon as shall be sufficient to pay to the party aggrieved his debt, etc. And that if, after judgment obtained upon such bond, any other party aggrieved, and who shall have recovered any debt or damages against such sheriff for any default, etc., shall apply to the court for relief, the court shall, upon motion in open court, direct such further sum to be levied on such judgment, etc., as shall be sufficient to pay the debt, etc., to such party aggrieved." One Jackson obtained leave to issue execution on a judgment theretofore obtained on the official bond of the sheriff at the suit of Meeker and King, and a motion to set aside this order was made on behalf of the sheriff's sureties upon two grounds: First, that no notice of the motion was served upon them; and, second, that the order for execution allowed the collection of interest on Jackson's judgment against the sheriff. The motion was sustained on the first ground, the court holding that the sureties were entitled to notice before the order was granted, but was overruled as to the second ground, the court holding that Jackson was entitled to interest on his judgment if the judgment was one that would carry interest. This is far from holding that the judgment on the official bond carried interest from its entry on such sums as were not then due, but which might be collected on it in the future. *Winslow v. Assignees of Ancrum*, 1 McCord Eq. (S. Car.) *100, also cited by the plaintiff as a case in point, does not uphold plaintiff's contention. The court, after stating that a judgment on a simple contract drew interest, added: "But the rule holds good also on judgments on penal bonds, if in fact the amount of the penalty be actually due and owing for principal and interest at the time of the judgment rendered." In other words, the holding was that, if there was due the plaintiff, when judgment on the penal bond was entered, the full amount of the penalty on the bond, interest could then be computed upon the

judgment. The court presumed that the penalty in the bond for which judgment was given was not greater than the amount actually due the plaintiff and which the bond was given to secure, and interest on the judgment was allowed. The only case we have found where the question was discussed is *State v. Sarratt,* 14 Rich. (S. Car.) 29. The following is taken from the syllabus: "Under proceedings for bastardy commenced before the child has attained the age of 12 years, the father, upon conviction, may be required to enter into recognizance to pay $25 a year, counting from the birth of the child, until its attainment of 12 years of age. The statute of limitations does not bar the prosecution, in cases of bastardy, for the annual penalties that had accrued before the proceedings were commenced. As interest is not chargeable upon the annual penalties, the jury, in allowing credit for advances made for the maintenance of the child, need not ascertain the time when the advances were made." It is true the opinion makes no reference to any statutory allowance of interest upon judgments or decrees of court, but the presumption must obtain that such a statute exists in every state where interest upon money due by contract is allowed.

After a somewhat extended search, we have been unable to find a case allowing interest on a judgment entered on a penal bond for such sums as the judgment may secure, but which are not immediately due and payable. Our examination has convinced us that interest on judgments of the character of the one in question should be computed only on such instalments as matured, from the date of their maturity until paid. This being the rule adopted by the district court, we recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

CITY OF PLATTSMOUTH, APPELLANT, V. NEBRASKA TELEPHONE COMPANY, APPELLEE.

FILED JANUARY 9, 1908. No. 15,025.

1. Cities: TELEPHONE FRANCHISE: USE OF STREETS. A city ordinance extending to a telephone company the right to use the streets, alleys and public grounds of the city in the construction, operation and maintenance of its plant or system, and which does not, in any of its provisions, indicate an attempt to exclude other like corporations or companies from a like privilege, is not the grant of an exclusive right or privilege.

2. ———: ———: ———. The authorities of a city or incorporated town or village may grant to a telephone company the use of the streets, alleys and public grounds of the municipality for constructing and maintaining a telephone system therein, such use of the streets, alleys and public grounds being for a public purpose.

3. ———: ———: ADDED BURDENS. When an ordinance of a city has invited investments and expenditures, which are made in good faith and in reliance upon it, the city authorities, if the use be a public one, cannot arbitrarily impose by subsequent regulations, without necessity or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power.

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

H. D. Travis, for appellant.

W. W. Morsman and *Matthew Gering, contra.*

DUFFIE, C.

The plaintiff brought this action in equity for a mandatory injunction, in which alternative relief is prayed. The material allegations of the petition are the following: (1) That the city of Plattsmouth has never granted defendant any lawful or sufficient franchise, nor any franchise to occupy the streets and alleys of the city; (2) that defendant has been occupying the streets and alleys of the city for more than 15 years without right or authority;

(3) that defendant has erected its poles and wires in Main street, along the south side, from First to Eighth streets, and has continued the same since the year 1888; that such poles and wires are dangerous to pedestrians and to property, are old and rotten, were used by the public as hitching posts for horses, and that thereby a nuisance was created; that the poles and wires interfere with the firemen in case of fire, and that the poles are unsightly; that in November, 1899, the city, by ordinance, required the defendant to place its wires underground in Main street, and that it failed and refused to comply with said ordinance; that in 1904 the city passed an ordinance requiring defendant to move its poles and wires from Main street to the alleys adjoining. The prayer is for an injunction against the use of the streets, alleys and public grounds of the city of Plattsmouth by the defendant, and that it be enjoined from operating its telephone system in the city; and, alternatively, if the court should find that the defendant had been granted a franchise for the use of the streets, that it then be required to remove its poles and wires from Main street between First and Eighth streets to the alleys north and south of Main street.

The answer admits that defendant has occupied the streets of the city and carried on its business therein, as alleged, for more than 15 years; that it has continuously maintained its poles and wires in and along the south side of Main street since the year 1888; that the city passed an ordinance in 1904, as alleged in the petition, requiring the defendant to remove its poles and wires to the alleys north and south of Main street, and which, defendant alleges, affirmatively repealed all prior conflicting ordinances. For a second defense it is alleged that defendant has maintained its poles and wires in Main street in the same place for more than 15 years with the knowledge and consent of the city; that in October, 1898, the city, by ordinance, granted defendant the right to occupy all the streets of the city without restriction, reserving to itself the free use of such poles for its own fire alarm wires;

that immediately after the passage of said ordinance defendant expended large sums of money in reconstructing its poles and wires in Main street; that its central office is in Main street and on the south side thereof; that Main street is 100 feet in width; that the sidewalks on each side are 20 feet wide; that defendant's poles are set at the curb line, 20 feet from the front walls of the buildings, and 160 feet apart; that there has never been on the south side of the street any building more than two stories high; that there never has been, and there is no prospect of, any congestion of the business in said street with which the poles of defendant will interfere in any degree whatever; that the alleys north and south of Main street are only 13 feet wide; that, if defendant's poles are set therein, they must be set 2½ feet from the line to avoid projecting the cross-arms over private property; that the change will cost $1,500, which is more than the net income from the defendant's system in said city in five years; that the ordinance passed in 1904 was not passed in the interests of the public and was an abuse of municipal power; that the ordinance is unreasonable, as the removal of defendant's poles and wires will serve no public interests, and its enforcement will impair the obligation of the contract between the city and the defendant.

On the trial the district court found generally for the defendant and dismissed the plaintiff's petition. The plaintiff has appealed.

The evidence shows that in each alley north and south of Main street there is a telephone line belonging to another company on one side of such alley and an electric light line belonging to the city on the other side. It is conceded that prior to October, 1898, defendant had no franchise granted by the city, the general statute relating to cities and villages of the class to which Plattsmouth belonged being deemed sufficient; but on that date the city passed an ordinance granting certain rights and privileges to the Nebraska Telephone Company, its successors and assigns, and regulating the erection of poles and wires and pro-

tecting the same. The ordinance, No. 91, so far as material to an examination of the questions involved, is as follows: "Section 1. That the Nebraska Telephone Company, its successors and assigns, be and are hereby granted right of way for the erection and maintenance of poles and wires and all appurtenances thereto for the purpose of transacting a general telephone and telegraph business through, upon and over the streets, alleys, and public grounds of the city of Plattsmouth, Nebraska; provided, that said company shall at all times when requested by the proper authorities permit their poles and fixtures to be used for the purpose of placing and maintaining thereon, free of charge, any wires which may be necessary for the use of the police or fire departments of the city of Plattsmouth, Nebraska; and further provided, that such poles and wires shall be erected so as not to interfere with ordinary traffic through such streets and alleys, and under the supervision of the committee on streets, alleys and bridges." Section 2 provides for stringing the wires 20 feet above the ground, and for the temporary removal of the poles and wires in case they obstructed any vehicle or structure being moved along or across any street or alley. Section 3 fixes the maximum rate allowed to be charged by the company, and section 4 makes it an offense to injure any poles, wires or instruments of the company. Soon after having completed the rebuilding of its system, the city passed another ordinance, of date November 27, 1899, declaring it unlawful to erect or maintain poles and overhead wires in Main street, and requiring all such wires to be placed in underground conduits; and on June 27, 1904, the city passed an ordinance requiring all poles and overhead wires to be removed from Main street between First and Eighth streets to the alleys adjacent thereto, said removal to take place by January 1, 1905, and repealing all ordinances in conflict therewith.

The defendant asserts that, having accepted the provisions of ordinance No. 91 and having expended large sums of money in reconstructing its lines in the city of

Plattsmouth under the permission granted by that ordinance, it has acquired a right in the streets of the city which cannot be taken away, except upon some ground of public necessity or convenience; while, on the other hand, the city asserts that the ordinance is void. The argument upon which it attempts to maintain the invalidity of the statute is as follows: Section 15, art. III of our constitution, prohibits the legislature from passing local or special laws granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever; and it is said that the legislature cannot delegate to a municipality a power which it cannot itself exercise. It is claimed that the ordinance in question is an attempt to grant to the defendant a special privilege or franchise, and that this is beyond the power of the municipal authorities. If we should concede (which we do not) that a general law, granting to cities and towns the powers which are usually found in their charters, did not confer upon such municipalities the power to pass and enforce special ordinances suited to their local conditions, still the ordinance in question is not subject to the criticism made upon it. A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right. *Guthrie Daily Leader v. Cameron*, 3 Okla. 677, 41 Pac. 635. In *City of Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577, it was held that the act of congress of March 2, 1867, providing that the legislative assemblies of the several territories shall not grant any special privileges, refers to the granting of monopolies such as ferries, trade-marks, or the exclusive right to manufacture certain articles or to carry on a certain business in a particular locality, to the exclusion of others, and does not include the granting of a public charter to a municipal corporation. Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corpora-

tions the same privileges awarded to the defendant. The contention, therefore, that ordinance No. 91 is void and confers no right upon the defendant cannot be sustained.

Subdivision XII, sec. 69 of plaintiff's charter (Comp. St. 1905, ch. 14, art. I) is in the following words: "To make all such ordinances, by-laws, rules, regulations, resolutions, not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this chapter granted, maintaining the peace, good government, and welfare of the corporation, and its trade, commerce, and manufactories." Subdivision 24 of said section authorizes the city authorities to regulate the streets, "lamp-posts, awning posts, and all other structures projecting upon or over and adjoining, and all other excavations through and under the sidewalks in the said city or village." Subdivision 28 empowers the city or village "to open, create, widen, or extend any street, avenue, alley, or lane, or annul, vacate, or discontinue the same whenever deemed expedient for the public good." The use of the telegraph and telephone is so far a public convenience and necessity that in some states property may be condemned therefor under the power of eminent domain. *State v. American & European News Co.*, 43 N. J. Law, 381; *Pierce v. Drew*, 136 Mass. 75; *Pensacola T. Co. v. Western Union T. Co.*, 96 U. S. 1. It is therefore evident that the use of streets for telephone or telegraph purposes is a use for public purposes against which no objection can be made. As said in *Hobbs v. Long Distance T. & T. Co.*, 147 Ala. 393, 7 L. R. A. (n. s.) 87: "Since the days of the Cæsars, public highways have received the careful attention of all governments, not only for the purpose of providing ways by which armies could be moved and the people travel, but for the purpose of opening up avenues of communication by which reports could be speedily brought to the capital, and the interchange of commerce promoted. The laws of congress have provided for post roads, etc., before the telephone was known, provided for the same privileges for telegraph com-

panies, as were given to railways in using the public lands, and, in later days, it has developed the exceedingly valuable system of 'post routes' and free mail delivery along the public roads of the country, so that not the least important function of the public roads of the country is the transmission of messages from place to place." The people of the city of Plattsmouth are not alone interested in the telephone system of that city, but every other community in the state with which communication is made is equally interested, and the state itself has recognized the utility and necessity of this method of communicating news by granting a right of way for the building of such lines over the public highways of the state. Comp. St. 1905, ch. 89*a*, sec. 14. Under the general power given to the plaintiff by its charter and the general control which it exercises over the streets and public grounds of the city, its right to extend to the defendant the privilege of occupying its streets and public grounds cannot be questioned. *Nebraska T. Co. v. City of Fremont,* 72 Neb. 25.

The only question remaining is whether the public necessity or convenience requires that its wires in Main street should be placed in underground conduits or removed to the alleys north and south of said street between First and Eighth streets. That the rights of the defendant in the streets of the city must yield to public necessity or convenience is beyond question or dispute; but, having acquired a right in the streets, and having made expenditures on the strength of the grant extended by the city, the authorities are quite uniform that this right cannot be taken away in an arbitrary manner and without reasonable cause. In *Northwestern T. E. Co. v. City of Minneapolis,* 81 Minn. 140, it is said: "When such an ordinance has invited investments and expenditures made in good faith and in reliance upon it, the city authorities cannot arbitrarily impose by subsequent regulations, without necessity, or the demands of public convenience, additional burdens upon the company which are clearly beyond the reasonable exercise of the police power." In the body of

the opinion it is said: "An ordinance of a municipality, surrendering a part of its powers to a corporation to secure and encourage works of improvement, which requires the outlay of money and labor, to subserve the public interests of its citizens, when accepted and acted upon, becomes a contract between the city and the corporation which relied upon it, and the grantee cannot be arbitrarily deprived of the rights thus secured." In support of this principle authorities from the states of Ohio, Louisiana, Iowa, Massachusetts, Wisconsin, and numerous federal decisions are cited. That the city council may make reasonable regulations relating to the maintenance and repair of defendant's plant is not open to argument; but such regulation is not to be exercised at mere whim and caprice. It must be proportionate to, and commensurate with, the public necessity for the protection and promotion of the public health, safety, necessity or convenience. *City of Burlington v. Burlington Street R. Co.*, 49 Ia. 144. The application of the police power cannot be extended by the authority which is entrusted with such application to an arbitrary misuse of private rights. That the city may order the removal of poles which endanger the citizens because of a rotten condition, and protect its inhabitants against any conduct of the business which endangers the public health or safety, is not a question open to dispute; but nothing of the kind appears in the record before us. As before stated, Main street is 100 feet in width. There is no evidence of a congested condition of the street or of any necessity from other causes for removing the defendant's poles.

So far as the record discloses, the action of the city council is arbitrary in its nature and wholly unsupported by any reasonable cause. Such being the case, we think the district court was right in refusing the injunction, and we recommend an affirmance of its judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

JOHN W. WHIFFIN, APPELLEE, V. CHARLES E. HIGGINBOTHAM ET AL., APPELLANTS.

FILED JANUARY 8, 1908. No. 15,034.

Tax Sales: RIGHTS OF PURCHASERS. Section 242 of the revenue act of 1903 (Comp. St., ch. 77, art. I) saves to the parties purchasing land at tax sales held prior to the passage of that act all rights, vested or otherwise, extended to them by the statute in force when the purchase was made.

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

J. W. James, for appellants.

Tibbets, Morey & Fuller, contra.

DUFFIE, C.

November 7, 1900, John W. Whiffin, the plaintiff and appelleee, purchased at public tax sale lots 16 and 17, in block 16, in the city of Hastings, Nebraska, for delinquent taxes then due, amounting to $191.15. He has paid subsequent taxes as they accrued from year to year, including the taxes for 1905, and on April, 1906, he commenced this action to foreclose said tax sale certificate. Objection, both by demurrer and answer, raised his right to foreclose; the defendant Farrell insisting that the action was barred by statute. Judgment went in favor of the plaintiff, and defendant Farrell has brought the case to this court on appeal.

Under the law in force in 1900, when the property was bid in at tax sale, the purchaser had five years from the date on which the action accrued—that is, from the date of the expiration of time of redemption by the owner—to commence his action to enforce his lien against the land for the purchase price of his certificates, and for subsequent taxes paid by him, thus giving him seven years from the date of sale to commence such action. *Stevens*

v. Paulsen, 64 Neb. 488. April 4, 1903, what is known as our new revenue law was passed and approved. Sections 232 and 233 of that act (Comp. St., ch. 77, art. I) limit the time within which an action to foreclose a tax lien may be commenced to three years from the expiration of the right of redemption, or five years from the date of the sale. The limitation provided by the legislature for commencing an action relates to the remedy, and the authorities are uniform that the legislature may, by amendment, shorten the time previously given for commencing an action, if the new statute provides a reasonable time to institute actions which have accrued before the amended law goes into effect. As a general rule, parties who have entered into a contract, taken part in any transaction, or acquired any right of property, have no vested rights in the existing statute of limitations. *Pearsall v. Kenan,* 79 N. Car. 472. Such statutes have been uniformly construed as affecting merely the remedy, and may operate retroactively. *Watts v. Everett,* 47 Ia. 269. In *Terry v. Anderson,* 95 U. S. 628, Chief Justice Waite said: "It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for a commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain." This rule has been recognized and enforced by this court in *Horbach v. Miller,* 4 Neb. 31, and *O'Brien v. Gaslin,* 20 Neb. 347.

Defendant Farrell insists that this rule should be applied in this case; while plaintiff relies upon section 242 of the new revenue act (Comp. St., ch. 77, art. I) to take the case out of this general rule. That section is in the

following language: "Nothing in this act shall be construed to release, discharge, or in any way affect the validity or the collection of any tax heretofore assessed and levied under the revenue laws in force prior to the taking effect of this act, nor shall the same affect pending actions founded thereon or causes of action which may have accrued; but all rights in relation to such taxes and the collection thereof and all rights that may have accrued to persons under the revenue laws of this state are hereby saved and reserved." Defendant argues that this section saves to the defendant nothing but vested rights, and that it does not cover or include the remedy for enforcing such rights or the time within which an action to enforce his remedy should be brought. The law has been well settled that the legislature cannot take away or affect vested rights, and this has been so long and well established that we cannot presume the legislature attempted by this section to reserve to a tax sale purchaser a right of which it had no power to deprive him. If the section is construed to mean that it saves to the plaintiff or others having like claims only such rights as have become vested in consequence of his purchase, then the section would be meaningless and could have no effect whatever. We cannot presume that the legislature passed a meaningless statute, and the only force which this section can have is to save to the plaintiff and others in his position every right given him by the old revenue law, whether it related to his cause of action, or to the means of enforcing it and the time within which he should apply to the courts for his remedy. It may be questioned, also, whether the seven years given him by the old act was not a vested right. Under it his lien against the land purchased existed for seven years from the date of the sale. The new act preserves the lien of a tax sale purchaser for five years only. In *Alexander v. Shaffer*, 38 Neb. 812, it was held: "When land has been sold for taxes and a suit to foreclose the lien therefor is not instituted within five years from the expiration of the time to redeem, the lien is extinguished and ceases to be

a charge upon the land. The statute in that respect does not merely operate to defeat the remedy, but limits the duration of the lien itself." This case was followed in *Osgood v. Westover,* 2 Neb. (Unof.) 668. It will be seen, therefore, that our new revenue act not only shortens the time within which an action to enforce a lien may be commenced, but it also shortens the life of the lien itself. We are quite clear that the plaintiff's rights are to be measured by the provisions of the old revenue law under which his purchase was made, and not by the act of 1903.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

ANNIE MANNING, APPELLANT, V. CHARLES W. OAKES ET AL., APPELLEES.

FILED JANUARY 9, 1908. No. 15,042.

Tax Deed: VALIDITY. A tax deed issued to a former tenant of the premises cannot be avoided or set aside on the ground that such former tenant was indebted to the fee owner for rent which accrued during the tenancy.

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

J. C. McNerney, for appellant.

Shepherd & Ripley and *I. H. Hatfield, contra.*

DUFFIE, C.

This suit brings in question the title to a part of lot 6, in block 5, Avondale addition to the city of Lincoln. The plaintiff, Mrs. Manning, holds a deed from the prior

owner of the fee. The defendant, Lydia L. Newcomb, claims under a judicial sale for taxes. Some time in 1900 Mrs. Newcomb rented the premises of one Edward Hughes, acting as agent for Mrs. Manning, the fee owner. The lot had previously been sold for taxes to one Oakes, who had commenced an action to foreclose his tax lien and had taken a decree in May, 1899. Some negotiations were had, pending the foreclosure proceedings, between Oakes' attorney and Mr. Hughes relating to a redemption from the tax sale, and Hughes had, from time to time, paid small amounts, and even after the entry of decree had made one or two small payments, but no valid agreement not to sell under the decree has been shown. In the meantime Mrs. Newcomb and her husband were in possession of the lot as tenants of Mrs. Manning, and in 1903 she purchased the premises at tax sale, and is still the owner of the tax sale certificate. Some time in 1904, after the death of her husband, she vacated the premises, and in 1905 took an assignment of the decree in favor of Oakes, had an order of sale issued, the lot sold, and a deed issued under which she now claims title. The tax sale certificate issued to her in 1903 has never been foreclosed, and her title rests upon the sale made under the foreclosure in the Oakes case.

Mrs. Manning brought this action to redeem from the sale for taxes, and she insists that the Oakes judgment was paid in full prior to the assignment to Mrs. Newcomb, and that the deed ought to be held void for that reason. She further invokes the well-known rule that a tenant, while in possession, cannot acquire title adverse to the landlord, and that a purchase by the tenant under a judicial or tax sale is presumed to be for the protection of the tenant's possession, and not with the purpose of asserting a title adverse to the landlord. In this case Mrs. Newcomb is not asserting any title under the tax sale certificate acquired in 1903 while she was in possession as tenant of Mrs. Manning, and her right under such certificate need not be considered. When she took an assignment of the Oakes foreclosure decree, she had surrendered possession of the

premises, and was living in the state of Kansas. She had ceased to be a tenant of Mrs. Manning, and had the same right to purchase the Oakes decree as had any other party. The fact that she may have been indebted for rent, which accrued during her possession of the premises as tenant of Mrs. Manning, could not affect her right to purchase this decree. If that decree had not been paid in full, a sale thereunder conveys good title. A careful reading of the bill of exceptions convinces us that the trial court was right in holding that the Oakes decree had not been fully paid and satisfied. Plaintiff had every opportunity to redeem from that foreclosure. It stood from 1899 until 1905, when assigned to Mrs. Newcomb. We can discover no fraud on Mrs. Newcomb's part in taking an assignment of that decree, or insisting that her title acquired from a sale made thereunder is valid.

We think the decree appealed from was the only one which the evidence warrants, and recommend its affirmance.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

AUGUST WAGNER, APPELLANT, V. LINCOLN COUNTY ET AL., APPELLEES.

FILED JANUARY 8, 1908. No. 15,053.

1. **Judgment**: VALIDITY: CONSTRUCTIVE SERVICE. A judgment rendered on service by publication against a resident of this state, on whom personal service might have been had, is absolutely void.

2. **Tax Forclosure**: SALE: REDEMPTION. A decree foreclosing a tax lien on real property was entered against the owner, a resident of the state, on service by publication. In an action to redeem from a sale made under said decree, the plaintiff was required to pay the costs of the foreclosure suit and of the sale made thereunder. *Held*, Error.

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

August Wagner, A. Muldoon and *I. L. Albert,* for appellant.

L. E. Roach and *Wilcox & Halligan, contra.*

DUFFIE, C.

In November, 1901, the county of Lincoln commenced an action to foreclose its lien for taxes which were then delinquent and unpaid on the land in controversy herein. A decree in favor of the plaintiff was entered, and the land was sold under said decree to the defendant William Horner, to whom the deed was made. At the time of commencing said action, and when the decree was entered, one Johanna Dineen was the owner of the fee title and a *bona fide* resident of the state. Service was had by publication only, and the fee owner had no notice or knowledge of the pendency of the action. By several mesne conveyances the fee title became vested in the plaintiff prior to the commencement of this action, and he seeks to have his title quieted as against the tax lien foreclosure, offering in his petition to pay all taxes due on the land with interest. The court entered a decree quieting plaintiff's title, but requiring him to pay, in addition to the taxes and interest, the cost of the foreclosure proceeding and the sale had thereunder, amounting to about $60. Plaintiff has appealed from so much of the decree as requires him to pay these costs.

A decree against a *bona fide* resident of the state based upon service by publication is absolutely void. *Eayrs v. Nason,* 54 Neb. 143; *German Nat. Bank v. Kautter,* 55 Neb. 103; *Payne v. Anderson, ante,* p. 216. The tax foreclosure and the sale thereunder being void, we can discover no reason for requiring the plaintiff to pay the cost of such void proceedings. We therefore recommend that the decree be modified, and that plaintiff's title be quieted upon

his paying to the defendant Horner the amount required to redeem from the tax sale, and that the cause be remanded to the district court, with directions to enter such a decree.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree is modified, and the plaintiff's title quieted upon his paying to the defendant Horner the amount of the foreclosure decree, with interest on the same at 7 per cent. per annum from the date therof, and all subsequent taxes paid by the defendant Horner, with interest at 10 per cent. per annum, and the cause is remanded to the district court, with directions to enter such a decree.

JUDGMENT ACCORDINGLY.

JAMES N. BROWN ET AL., APPELLANTS, V. CARY B. JAMES ET AL., APPELLEES.

FILED JANUARY 8, 1908. No. 14,952.

1. **Note: PLEDGEE: EQUITIES.** A note pledged before maturity as security for a loan made to the payee or owner is good in the hands of the transferee, who had no notice of equities between the original parties.

2. **Pledge of Notes: DEBTS SECURED.** Negotiable instruments may be pledged to secure liabilities arising in the future; but to ascertain what debts are secured resort must be had to the contract of the parties.

3. ———: ———. A contract of pledge, which provided that certain notes were to be held as security for a certain debt, and "any other liability or liabilities due or to become due or which may hereafter be contracted," *held*, under the circumstances of this case, not to secure the payment of moneys afterwards collected for the pledgee by the pledgor as agent and unlawfully converted by the latter.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed as modified.*

Samuel Rinaker, Robert S. Bibb and *Horace Comfort,* for appellants.

A. D. McCandless and *W. S. Glass, contra.*

EPPERSON, C.

James N. Brown and Frank L. Brown, partners doing business as James N. Brown & Co., appeal from a decree of the district court for Gage county awarding them foreclosure of a mortgage in the sum of $2,174.93; the sole complaint here being that the decree is inadequate in amount to adjust the equities of the parties and should have been for a much larger sum, to wit, $12,046.93.

It appears that on May 1, 1895, defendant James and wife executed and delivered to defendant J. C. Burch a mortgage upon the land in controversy to secure the payment of $7,000, evidenced by two promissory notes, due May 1, 1896. About the 1st of September, 1895, the notes were sent by the bank of Wymore to the plaintiffs herein. Just what the purpose was is not made clear by the evidence, nor do we consider it important. They were either delivered to the plaintiffs for the purpose of sale, or as a pledge to secure a loan which the defendant, the bank of Wymore, contemplated securing from the plaintiffs later on. At that time the bank was not indebted to plaintiffs, Brown & Co., but the latter retained possession of the notes and mortgage. Afterwards, in pursuance of an understanding between plaintiffs and the bank, the notes and mortgage were held as collateral security from and subsequent to December 31, 1895, for an indebtedness of $5,000 (evidenced by a promissory note) contracted on that date. In addition to the $5,000 indebtedness, plaintiffs contend that they are entitled to hold the security for other indebtedness due from the bank. The $5,000 note of December 31, 1895, is a stock collateral note containing provisions

whereby the bank pledged to plaintiffs certain notes to secure the said indebtedness and any other liability or liabilities of the bank to the plaintiffs, which provisions will hereinafter be specifically referred to. On September 25, 1895, the mortgagor James and wife conveyed the land in controversy by warranty deed to Benjamin Burch in consideration of the payment of the mortgage indebtedness and certain other obligations due from James to the bank of Wymore. Burch immediately conveyed the land to the bank, which held title until several years later, when the bank conveyed it to the defendants Taylor and Pisar. The deeds, however, from James to Burch and from Burch to the bank were not recorded until August 26, 1896, on which date the bank failed. Benjamin Burch and J. C. Burch were president and cashier, respectively of the defendant, the bank of Wymore, and it appears that in taking the mortgage and deed from James they were acting as the agents or trustees of the bank.

Some controversy exists as to when plaintiffs learned that the bank had procured title to the James land. We are convinced that they learned of this fact when the bank failed, and not before, and that the officers of the bank purposely withheld knowledge of such fact from the plaintiffs until that time. Soon after the failure of the bank J. C. Burch was appointed receiver and as such remained in possession of the bank's affairs for several months, during which time he issued to plaintiffs herein receiver's certificates Nos. 1 and 2, representing indebtedness due from the bank to plaintiffs aggregating $3,770.11. Of this amount, $2,425.46 was money collected by the bank for plaintiffs upon mortgages belonging to the plaintiffs. $1,354.65 was owing to depositors at the time of the bank's failure and subsequently purchased by plaintiffs herein. Later, under the provisions of the banking law, the receiver was discharged and the bank took control of its own affairs and resumed banking business. Some time prior to July 12, 1901, the bank collected for plaintiffs the sum of $636 on what is known as the Bauhman mort-

gage. We are left entirely in the dark as to the time when this collection was made. In July, 1901, J. C. Burch, cashier of the bank, went to New York city for the purpose of negotiating a settlement with plaintiffs, who were then threatening to institute actions to foreclose the mortgages which the bank had collected and failed to account for. While there he executed a contract in the name of the bank purporting to convey to plaintiffs the James notes and mortgage and certain land, and to give authority to plaintiffs to sell the same, and pledged the proceeds thereof to the payment of the receiver's certificates and the Bauhman collection above described. Other items of indebtedness also were included in this contract, but plaintiffs no longer contend that they should be included in their decree of foreclosure.

Plaintiffs now ask to foreclose the James mortgage for the purpose of satisfying the items of indebtedness above described, together with a remainder due upon the $5,000 note given by the bank on December 31, 1895. The district court found that there was due upon the $5,000 note the sum of $2,015.38, with interest at 5 per cent. per annum from the institution of the suit, together with the sum of $159.10 for taxes paid by plaintiffs upon the mortgaged property, and found against plaintiffs as to the other items of indebtedness relied upon. The stock collateral note is in part as follows: "$5,000. New York, December 31, 1895. On demand, without grace, for value received, we promise to pay to James N. Brown & Co. or order, five thousand dollars, at their office in New York city, in United States gold coin or its equivalent, with interest at the rate of — per cent. per annum from date hereof, having with said bank as collateral security for payment of this or any other liability or liabilities of ours to said firm due or to become due, or which may be hereafter contracted, the following property, viz., collateral to the amount of $13,913.86, as listed upon attached memorandum, marked J. C. B., Cashier." The James $7,000 notes were included in the memorandum referred to in the

above stock collateral note. By reason of the provision pledging the security "for payment * * * of any other liability or liabilities of ours to said firm due or to become due, or which may be hereafter contracted," plaintiffs contend that the James notes are chargeable as security for the several items represented in the receiver's certificates and the Bauhman collection.

It is argued that the sums subsequently converted by the bank to its own use constituted indebtedness arising by virtue of an implied contract which the law imposes in such cases upon the tort-feasor to repay to the owner the value of the property converted. There can be no doubt that such liability exists, and that the law implies a contract in such cases, but it cannot be said that at the time of the making of the contract in the stock collateral note the parties contemplated the illegal converting of the money and funds due plaintiffs, nor that they intended that the security pledged should be used for such purposes. The agreement of the parties must determine what debt or debts are secured, and such agreement must be ascertained from the writing by which the securities were pledged. A fair interpretation of the agreement made in this case demands that it be construed to secure such indebtedness only as might be contracted by the parties in the legitimate transaction of business. If the contract, standing alone, was not susceptible of such construction, we think it is rendered so when read in connection with an instrument executed by the bank July 14, 1896, and accepted by the plaintiffs. This is an additional or substituted pledge of several notes, including the James notes, and provides: "The following is a list of collateral notes held by James N. Brown & Co. for note dated Dec. 31, 1895, originally made for $5,000, and of which there is now due $3,440, and one demand note for $3,000, dated July 14, 1896. It is expressly understood and agreed that any part or all these collateral notes shall be applicable as security in the discretion of James N. Brown & Co. on either or both notes." These agreements should be con-

sidered together in determining what indebtedness the collateral notes secured. And it is apparent that after July 14, 1896, the collateral described in the instrument of that date was not intended by the agreement of the parties as security for any indebtedness other than the two notes described. The $3,000 note therein mentioned was subsequently paid and has nothing to do with the present controversy.

For the same reasons plaintiffs cannot in this action enforce collection of receiver's certificates Nos. 3 and 199, which represent the debts plaintiffs bought of the bank's depositors. Intimate business relations had existed between plaintiffs and the bank since 1890. James N. Brown at one time purchased one-half the capital stock of the bank for himself and friends, which, however, was disposed of before the bank's failure. Frank L. Brown owned 20 shares of the capital stock of the bank when it failed. Each of the plaintiffs, at different times, held positions —director and vice-president—in the bank of Wymore. We are convinced that plaintiffs, or one of them at least, purchased the depositors' claims against the bank as a speculation, probably believing at the time that the bank would pay out in full; and, having bought these claims, they cannot expand their previous contract for collateral so as to cover such indebtedness. Neither is the Bauhman collection secured by the pledge. The evidence does not disclose when this liability was incurred, but the reasons above given for rejecting the other obligations apply to this. The contract of July 12, 1901, gave no rights to plaintiffs as against the equities of Taylor and Pisar, who had previously paid full value for the land, for the reason that it was executed after the vesting of their interests, and the plaintiffs do not now rely upon this subsequent contract as against Taylor and Pisar.

Computing the amount of recovery upon the $5,000 note, the court found that there was due thereon September 22, 1896, $3,568.37, upon which $1,900.49 had been paid, leaving a remainder of $1,667.88 due January 1, 1900. The

evidence does not show the accuracy of the court's computation. Instead, we find that there was due, August 26, 1896, $3,644.37, which had, on January 1, 1900, been reduced to $1,743.88. The trial court allowed interest at 5 per cent. upon the amount it found due, and then only from the commencement of this action. Evidently the court considered the rate of interest allowed by the laws of New York in such cases to be 5 per cent. We find no evidence to support this conclusion. Instead, the evidence is that the debt drew interest at 6 per cent. (the legal rate in New York according to the testimony of one of the plaintiffs), which we think should be considered as the contract rate. Plaintiffs are also entitled to interest from January 1, 1900. It follows that the amount due on the date of the decree was $2,576.22 instead of $2,174.93.

Plaintiffs argue that defendant's evidence as to the payment of the $1,900.49 was incompetent, because the witness J. C. Burch, who was the only witness called by defendants to prove this fact, testified from a memorandum which was copied from the bank's books. This testimony was given by deposition, and we are unable to find where the objection made to this evidence was ruled on by the trial court, or an exception entered to its admission. Correspondence between the bank's officers and plaintiffs shows that funds were available for the bank's creditors, and, further, that some of the bank's books were lost. In view of these facts, we give weight to the evidence of payments, rather than the testimony of one of plaintiffs' witnesses, who stated that nothing had been paid on this note. The James notes were specifically pledged for the security of this debt. There was no intention of merger when the bank acquired fee title from James. When the defendants Taylor and Pisar purchased the land, the public records disclosed the existence of the James mortgage, and an assignment thereof to the plaintiffs, who had possession of the notes. Defendant Taylor, at least, had actual knowledge that the mortgage was not

fully paid. Plaintiffs are *bona fide* holders of the James notes to the extent of their interest herein determined.

Defendants contend that the evidence does not justify a recovery by plaintiffs in any amount, and in their brief ask the court to dismiss the plaintiff's action. The record shows that the defendants did not appeal, and, moreover, paid the amount found against them to the clerk of the district court, and for this reason are in no position to now question the judgment of the trial court.

The evidence clearly indicates that plaintiffs are entitled to recover the amount due on the $5,000 note, and we recommend that the decree be modified so as to fix the amount of recovery at $2,576.22, and that the decree, as modified, be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified so that plaintiffs shall recover $2,576.22, and, as so modified, is affirmed.

JUDGMENT ACCORDINGLY.

DORA BECK, APPELLEE, V. GEORGE F. STAATS, APPELLANT.

FILED JANUARY 8, 1908. No. 14,972.

1. **Vendor and Purchaser:** EXECUTORY CONTRACT: BREACH: DAMAGES. The measure of damages for the breach by the vendor of an executory contract for the conveyance of real estate, where the breach is caused either from the refusal or the inability of the vendor acting in good faith, is the difference between the value of the land at the time of the breach and the price he contracted to receive, and in addition thereto the vendee may recover the amount advanced upon the purchase price.

2. **Case Overruled.** The third paragraph of the syllabus to *Reed v. Beardsley*, 6 Neb. 493, overruled.

3. **Vendor and Purchaser:** IMPROVEMENTS BY TENANT: REMOVAL. Upon an issue between the vendor and vendee of real estate, whose

contract fails to specify improvements made by a tenant in possession, but recognizes the existence of such and the right of the tenant to remove the same, the presumption is that such improvements were removed at the expiration of the lease.

4. **Trial**: VIEW OF PROPERTY BY JURY. Under section 284 of the code, providing for a view by the jury of property which is the subject of litigation, or the place where any material fact occurred, whenever in the opinion of the court it is proper, the court may in his discretion require the jury to view any such property within this state.

5. **Appeal**: DISCRETION OF COURT. Unless an abuse of discretion is shown, this court will not reverse a judgment of the district court, because of the refusal of the court to permit the jury to view the premises.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

F. Dolezal, for appellant.

Grant G. Martin, contra.

EPPERSON, C.

In July, 1905, the parties hereto entered into a written contract wherein the defendant agreed to convey to plaintiff 80 acres of land in Saunders county on the 1st day of March, 1906. Plaintiff paid $100 in cash and agreed to assume $2,000 of an incumbrance and to pay a remainder of $2,460 upon maturity of the contract. When the contract was made, defendant owned but an undivided one-half interest in the land in controversy. He and one Harmon owned in equal shares this land and 80 acres adjoining it. In February, 1906, defendant sold and conveyed all of his interest in the land to Harmon. This action was brought to recover damages for the loss of plaintiff's bargain. She obtained judgment in the court below for $1,105.90, and defendant appeals.

Defendant contends that before the contract was executed he had his co-owner's verbal promise to convey his interest to defendant; that the contract was made upon the condition that Harmon would convey, but thereafter he re-

fused, though defendant in good faith importuned him so to do. Evidence was introduced in support of this contention. In conflict therewith, plaintiff's evidence is to the effect that defendant represented to her that he had procured Harmon's interest in the land. It is the defendant's theory that the rule for the recovery of damages against a vendor acting in good faith is that nominal damages only may be recovered, together with the amount deposited, with interest. He asked for and was refused an instruction submitting this theory to the jury. We are met at the threshold of this investigation with a conflict in the decisions of this court. In *Reed v. Beardsley,* 6 Neb. 493, it was held: "On an agreement to exchange lands, if one of the parties performs the contract on his part by conveying, and the other neglects to do so, and finally puts it out of his power to perform, the true measure of damages is the value of the property conveyed." The measure of damages there was the value of the consideration given by the vendee, and not the value of the property he contracted to purchase. To the same effect is *McPherson v. Wiswell,* 19 Neb. 117. And in *Eaton v. Redick,* 1 Neb. 305, the vendee, upon rescission by his vendor, was permitted to recover the amount advanced by him upon the purchase price, although himself in default. These cases have never been expressly overruled; but, in view of the decisions following the contrary rule, they cannot be said to establish the law in this jurisdiction. In *Wasson v. Palmer,* 13 Neb. 376, it was said: "The proper measure of damages was the difference between the contract price and the actual value of the property at the time the contract was broken." There the question of good faith on the part of the grantor was no part of the case and was not considered by the court. The same rule prevailed in *Carver v. Taylor,* 35 Neb. 429; *Seaver v. Hall,* 50 Neb. 878; *Nolde v. Gray,* 73 Neb. 373. In *Seaver v. Hall, supra,* after reviewing the former decisions of this court, it is said by Mr. Commissioner IRVINE: "It would appear that this court has thereby placed itself on both sides of the much

disputed question as to whether, when the vendor cannot make title, only nominal damages can be recovered, or whether the vendee is entitled to the benefit of his bargain. Some cases hold that the former rule applies where the vendor acted in good faith (*Conger v. Weaver,* 20 N. Y. 140), and that the latter applies when the vendor was guilty of fraud (*Pumpelly v. Phelps,* 40 N. Y. 59). * * * It may well be doubted, however, whether, in a state where exemplary damages are not permitted, the measure of recovery should depend on the good faith of the vendor. The object of the law is to afford compensation, and not to punish, in civil cases, and the actual damage is the same regardless of the motive of the vendor." In *Violet v. Rose,* 39 Neb. 661, it was held that a vendee was entitled to recover damages caused by delay of his vendor in making the conveyance, and the measure of damages was the difference between the value of the property when it should have been conveyed and its value at the time of the delayed conveyance. For a wilful refusal to convey, a vendor, in *McMurtry v. Blake,* 45 Neb. 213, was held liable to the full extent of his vendee's lost opportunity to sell to advantage.

Defendant relies upon *Flureau v. Thornhill,* 2 Wm. Bl. (Eng.) *1078, and the decisions of the American courts in accord therewith. It was there held that, on a contract for the purchase of real estate, if the title proves bad, and the vendor is without fraud unable to make a good one, the purchaser is not entitled to damages for the loss of his bargain. Relative to the contract, Blackstone, J., said: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." In *Hopkins v. Grazebrook,* 6 B. & C. (Eng.) *31, the vendor, at the time he contracted to sell, had substantially no estate, and the conditions of sale provided for a good title. It was held that the vendee could recover for the loss of his bargain. Such recovery was allowed also in *Robinson v. Harman,* 1 Exch. (Eng.) *850, wherein it appears that the defendant had agreed

to grant a valid lease, when he well knew that he had no power to do so. In *Engel v. Fitch,* 3 L. R. Q. B. (Eng.) 314, s. c. 4 L. R. Q. B. (Eng.) 659, damages were allowed because the defendant failed to take the necessary steps, which he could have taken, to put his vendee in possession. In *Bain v. Fothergill,* 7 H. L. Rep. (Eng.) 158 (see Sedgwick, Leading Cases on Measure of Damages, 45), *Flureau v. Thornhill* was adhered to and subsequent cases reviewed. It was there said that *Flureau v. Thornhill,* must be taken to be without exception. The value of the English rule, however, is weakened somewhat by the language of Mr. Baron Pollock in *Bain v. Fothergill, supra.* He there adheres to the rule of *Flureau v. Thornhill,* but indicates that the doctrine of *stare decisis* should govern such contracts. He says: "All that has been hitherto said leads to the conclusion that the case of *Flureau v. Thornhill* was rightly decided, at the time it was decided, on sufficient legal principles, but if it was a decision to which at the time I could not have acceded, I should, nevertheless, think that a contract of purchase and sale of real property made at this day must be construed to be made on the footing of that decision being correct. All persons who prepare such contracts know of that decision, and that it has been acquiesced in and acted on for a hundred years. The contracts which such persons prepare are, therefore, made with the understanding that, upon failure to make out a satisfactory title, the rule as to damages enunciated in that case will be applied. Then such rule is by intention and understanding of the parties a part of the contract."

The great weight of authority in this country is less liberal to the grantor, and holds him liable, not for mere nominal damages, but for his grantee's loss of profits, or, as commonly stated, his loss of the bargain. "In some jurisdictions there is no deviation from this rule on account of good faith and inability to perform resulting from an unsuspected defect in the vendor's title; there the symmetry of the law relating to sales is preserved." 2 Sutherland, Damages (3d ed.), sec. 579. Good faith on

the part of the vendor was held in *Matheny v. Stewart,* 108 Mo. 73, not to excuse or protect him. In *Hammond v. Hannin,* 21 Mich. 374, it was said: "If a party enters into a contract to sell, knowing that he cannot make a title, he is remitted to his general liability, and the exception introduced by *Flureau v. Thornhill* does not apply. So if a person undertakes that a third party shall convey, and is unable to fulfil his contract, the authorities are that he shall pay full damages. * * * The cases before referred to, in which a party undertook to sell that which he did not own, and knew he could not control, may also, when the other party is not informed of the defect, be considered as involving a degree of bad faith, and have generally been so regarded by the courts." In *Pumpelly v. Phelps,* 40 N. Y. 59, it is said: "The rule that a vendor, who contracts to sell and convey real property in good faith, *believing that he has a good title,* and on discovering it to be defective, for that reason, refuses or is unable to fulfil his contract, is, in an action against him by the vendee for the breach, liable for only nominal damages, should not be in any degree extended, but strictly limited to those cases coming wholly and exactly within it. And where a vendor contracts to sell lands, in which *he knows, at the time, he has not title or the power of conveyance,* he is bound to make good to the vendee the loss of the bargain through his default. Nor, in such case, does it excuse the vendor that he acted in good faith, and believed, when he entered into the contract, that he should be able to *procure* a good title for his purchaser." In *Doherty v. Dolan,* 65 Me. 87, it was held: "This rule of damages is not to be varied, because the defendant, through unanticipated causes which he could not control, although acting in good faith, was unable to convey." 2 Sutherland, Damages (3d ed.), sec. 581. See, also, *Vallentyne v. Immigration Land Co.,* 95 Minn. 195; *Arentsen v. Moreland,* 122 Wis. 167, 65 L. R. A. 973; *Fleeten v. Spicer,* 63 Minn. 454; 2 Warvelle, Vendors (2d ed.), sec. 936.

Where it is possible, and the wronged party demands

it, equity will require a performance of the contract. And where a party by his contract undertakes to convey property and is rendered unable, or refuses to do so, the law will require him to respond in full compensatory damages, and it makes no difference whether he wilfully disregards his contract, or is prevented through no fault of his own from conveying the title called for by his contract. His liability is created by the contract. He agrees to convey. The contract is necessarily reciprocal. Is there any reason in law or in equity for relieving a grantor because he is disappointed in not obtaining title, any more than there could be for relieving a grantee because he had failed, through no fault of his own, in obtaining the purchase price at the appointed time? It was the duty of the defendant and his privilege to provide in his contract against obstacles, and, if he undertakes without this precaution to convey title belonging to another, he does so at his peril. Any other rule would permit one to speculate in reference to the property of another without incurring any liability on his own part, but at the same time bind his grantee irrevocably. The real issue of fact in the case at bar is whether the parties hereto made their contract contingent upon defendant's obtaining the outstanding title. This issue was submitted to the jury under proper instructions. Defendant's theory was not sound in law, nor supported by competent evidence, and the court properly overruled his request for the instruction.

The contract provided for the conveyance of the land with all the improvements placed thereon prior to the making of a certain lease. Plaintiff's evidence of value was given with reference to the land as it stood at the maturity of the contract. Defendant assigns error in the admission of this evidence, because it failed to exclude the improvements made by the tenant. The contract failed to specify the improvements not conveyed. By his answer, defendant alleged that there were certain improvements made by the tenant, who was authorized to remove the same. The evidence discloses that this tenant had re-

moved prior to the maturity of plaintiff's contract. Presumably the improvements had been removed and were not considered by the witnesses who testified as to the value. If such was not the case, it was the duty of the defendant to prove the continued presence of the improvements. In this he failed, but met the issue tendered, and himself introduced evidence as to value without reference to the excepted improvements.

Defendant requested the court to order the jury to view the premises. This the court refused to do, for reasons expressed in his own words as follows: "The court doubts somewhat the matter of sending the jury out of the county and judicial district. For this reason, it being a discretionary matter with the court, the request will be refused." Section 284 of the code provides for a view by the jury of property which is the subject of litigation, or of the place in which any material fact occurred, whenever in the opinion of the court it is proper. There is a conflict of authorities upon this question. Some courts hold that a jury may not be sent beyond the territorial jurisdiction of the court, unless expressly authorized by statute. *Rockford, R. I. & St. L. R. Co. v. Coppinger,* 66 Ill. 510. But a fair interpretation of our statute convinces us that a different rule should obtain here, and that a trial court in its discretion may send the jury to view any property within the state. Section 1119 of the California penal code authorizes the superior court, in the exercise of a sound discretion, to cause a view to be taken by the jury of the place where the offense was charged to have been committed, or in which any other material fact occurred. This was held, in *People v. Busle,* 71 Cal. 602, to authorize a view in any county in the state. Section 7283 of the Ohio Rev. St. has provisions identical with our own, and it was held in *Jones v. State,* 51 Ohio St. 331, that a jury may be sent to any place where a material fact occurred, if within the jurisdiction of the state. We are of the opinion that the court had the power to send the jury to view the premises in controversy, but it does not

necessarily follow that his refusal to do so was error. The granting of such an order is by statute made discretionary, and it is only where an abuse of such discretion appears that this court will reverse a judgment. The only reason for such an order would be to enable the jury the better to understand the evidence; and in the case at bar, where the issue of fact is confined to the value of the land, we cannot see wherein the jury would have been enlightened by a view of the premises.

For the reasons given above, we recommend that *Reed v. Beardsley,* 6 Neb. 493, so far as it relates to the measure of damages, and those cases following the same rule, be overruled, and that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

METTE KRUGER, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.

FILED JANUARY 8, 1908. No. 14,890.

1. **Carriers: INJURY: DUTY OF EMPLOYEES.** When a passenger, a girl under 14 years of age, unaccustomed to riding upon street cars, becomes frightened and frenzied by the negligence of the defendant's servants in carrying such passenger past her known destination, and the conductor knows, or by the exercise of due care and diligence under the circumstances should know, of such passenger's frightened and frenzied condition, and that she is about to leave the moving car, it is his duty to exercise the highest degree of care possible under the circumstances to prevent such passenger from alighting from the moving car. *Chicago, B. & Q. R. Co. v. Martelle,* 65 Neb. 540, examined and distinguished.

2. ———: ———: ———. In such a case, if the conductor fails to exercise the degree of care required of him, and the passenger

in consequence of such failure receives injuries while alighting from the moving car, the street railway company is liable in damages for the resulting injuries.

3. ———: ———: INSTRUCTIONS. In such a case, it is erroneous to instruct the jury that the plaintiff may recover, even though she was negligent in acting as she did.

4. Instructions examined, and *held* prejudicial.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

John L. Webster and *W. J. Connell,* for appellant.

Arthur C. Pancoast, contra.

GOOD, C.

Mette Kruger, a minor, by her next friend, instituted this action against the Omaha & Council Bluffs Street Railway Company in the district court for Douglas county to recover damages for injuries alleged to have been sustained while alighting from one of defendant's street cars. There was a trial to a jury, which resulted in a verdict and judgment for the plaintiff. The defendant appeals.

Two acts of negligence are complained of by the plaintiff: First, that defendant, although informed of and knowing plaintiff's destination, carelessly and negligently failed to stop its car, and carried plaintiff past her known destination; secondly, having caused plaintiff to become frightened and frenzied from fear at being carried past her known destination, that defendant failed to exercise that degree of care required of it to prevent plaintiff from alighting from the moving car. Defendant answered, admitting that plaintiff was a passenger, denied any negligence on its part, and alleged contributory negligence on the part of plaintiff. From the record it appears that Mette Kruger was a girl 13 years and 9 months of age at the time of the injuries complained of; that about 7 o'clock in the evening of the 26th day of October, 1904, she and a girl companion of about the same age were passengers

on one of defendant's street cars going westward on Q street in South Omaha. The destination of the two girls was Thirty-First street. Plaintiff claims that, when the conductor took up their fares at about Twenty-Sixth street, they informed him of their desire to alight at Thirty-First street. The car in which they were riding was one in which the seats ran lengthwise along the side of the car. The two girls sat on the south side of the car near the rear, and were looking out of the car windows to the south. At that time in the evening it was dark. The car failed to stop at Thirty-First street, and the plaintiff observed the lights in a neighboring store, recognized the place, and realized that she and her companion were being carried past their destination. She became alarmed and frightened, hurriedly arose and passed out upon the rear platform of the car, where the conductor was standing, and stepped from the car while in motion, fell to the pavement, and received severe injuries. The conductor observed the plaintiff as she came out upon the platform and stepped from the moving car. Plaintiff contends that she was so alarmed and frightened and in such a frenzied condition that she did not know or realize her danger in alighting from the moving car, and that the conductor was negligent in failing to warn her of her danger and prevent her from leaving the car under the circumstances. Plaintiff's evidence tends to support her contention. The defendant denied that the conductor had been previously informed of the destination of the girls, and denied that he had any knowledge that plaintiff was frightened and alarmed, and alleged that he did warn her against stepping off, by calling to her to wait, that he would stop the car, and that, seeing that she did not heed his warning, he attempted to grab her and prevent her from leaving the car. The evidence as to whether the conductor warned the plaintiff, or that he knew of her destination and her excited condition, or that he attempted to prevent her from leaving the car, is in conflict.

The defendant contends that it was under no obligation

to prevent plaintiff from leaving the moving car, that it owed no duty of preventing passengers from alighting from its moving cars, and that, as a matter of law, it was not liable for the injuries received by the plaintiff, and that the court should have so instructed the jury. We are cited to several cases from other jurisdictions, some of which apparently hold to this doctrine. But the rule in this state is different. *Chicago, B. & Q. R. Co. v. Landauer,* 36 Neb. 642; *St. Joseph & G. I. R. Co. v. Hedge,* 44 Neb. 448; *Chicago, B. & Q. R. Co. v. Hyatt,* 48 Neb. 161; *Fremont, E. & M. V. R. Co. v. French,* 48 Neb. 638. It is generally held that whether or not one is guilty of such negligence in alighting from a moving car or train as will prevent a recovery for injuries received therefrom is ordinarily a question of fact to be determined by the jury. *Hemmingway v. Chicago, M. & St. P. R. Co.,* 72 Wis. 42. Under some circumstances, jumping or alighting from a moving train has been held such negligence as will defeat a recovery. *Chicago, B. & Q. R. Co. v. Martelle,* 65 Neb. 540. In that case, however, the plaintiff was a man of mature years, and deliberately jumped from the moving train. It did not appear that he was frightened, or that he had lost his self control, but that he deliberated upon the matter and, after deliberation, voluntarily jumped from the moving train. It was held that he was guilty of such negligence and deliberate recklessness as to prevent a recovery. But the case at bar is different. The plaintiff was little accustomed to riding upon street cars, and according to her contention, which finds support in the evidence, she was carried past her destination by the fault of the defendant. It was after dark, and she was frightened and excited, and had no realization of what she was doing or of the danger incident to the alighting from the moving car. It is inferable from the evidence that the conductor was aware of her excited and frenzied condition, and might, by the exercise of that degree of care required of common carriers, have prevented her from leaving the moving car, and thus have avoided the injuries. We think

there is a clear distinction between the duty owed by a common carrier to an infant of tender years and that owed to an adult, and between the duty owed to a passenger who has lost control of his mental faculties, of which the carrier is aware, and that owed to one in full possession of his faculties. When street car companies carry passengers of tender years and passengers whom they know to be of unsound mind, it is only proper that they should be required to exercise a higher degree of care toward them than they would toward passengers of mature years and in possession of their full faculties; and if, by acts of their own negligence, they have caused passengers to become frightened and excited and to be in a measure deprived of their faculties, they cannot consistently and reasonably claim that the passenger is negligent in not exercising the prudence and foresight that they ordinarily would, except for their frightened and excited condition. We think the record in this case clearly makes out such a state of facts as required the submission of the case to the jury; and this court cannot say, as a matter of law, that the defendant was not negligent, or that such negligence did not produce the injuries complained of. The case was one for the determination of the jury under proper instructions.

Defendant also complains of numerous instructions given by the court upon its own motion, and of the refusal of the court to instruct the jury as requested by the defendant. We have carefully examined all the instructions given and refused that are complained of, and find no error except in two instructions given, which we now proceed to consider. By the sixth instruction the court informed the jury that, if the conductor was aware that plaintiff was about to jump from the moving car in time for him to have prevented it, and if he failed to exercise the decree of care required of him in that respect, and if such failure of the conductor was the proximate cause of plaintiff's injuries, the plaintiff might recover, even though they should find "that the plaintiff was guilty of negli-

gence in acting as she did." This instruction, as well as the ninth instruction given by the court, indicates quite clearly that the trial court was applying the doctrine of the "last clear chance," and proceeded upon the theory that, notwithstanding contributory negligence upon the part of the plaintiff, the defendant would still be liable if it could have prevented the injuries to the plaintiff. The doctrine of the "last clear chance" simply means that, notwithstanding the previous negligence of the plaintiff, if at the time the injury was done it might have been avoided by the exercise of reasonable care on the part of the defendant, the defendant will be liable for the failure to exercise such care. *Styles v. Receivers of Richmond & D. R. Co.*, 118 N. Car. 1084, 24 S. E. 740. We think an analysis of the situation in which the parties in the instant case were placed will show that the doctrine of the "last clear chance" can have no application. If the plaintiff was negligent at all, it was because she knew and realized the danger in alighting from the moving car, and the only negligent act of the plaintiff was in stepping from the car. It is evident that no act of the defendant after the plaintiff had been guilty of negligence could have prevented the injuries. To make the doctrine of the "last clear chance" apply, the situation must be such that the plaintiff might avoid the injuries after the plaintiff had by her own act placed herself in a position of peril that was, or should have been, apparent to the defendant. If the plaintiff in this case was guilty of negligence at all, it was in stepping from the moving car with the knowledge and realization of the danger in so doing. If she possessed this knowledge and realization, then the proximate cause of her injuries was her own negligence, and she would not be entitled to recover. As applied to the situation in this case, the only theory upon which the plaintiff can recover is that she did not know and realize the danger in stepping from the moving car. Therefore it follows that her right to recover depends upon the absence of contributory negligence upon her part. The instruction above mentioned

misstated the law, and permitted the jury to find for the plaintiff upon a state of facts which in law will not sustain a recovery. The ninth instruction states the same proposition of law in a negative manner, and is bad for the same reason.

There are other errors assigned and discussed in the brief of the appellant; but as they are not necessary to a determination of this case, and do not appear likely to arise upon a new trial, we refrain from discussing them. Because of errors in the court's instructions to the jury, we recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

DUFFIE and EPPERSON, CC., concur.

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

REVERSED.

CORA C. KEIL, APPELLEE, V. JOHN L. KEIL, APPELLANT.

FILED JANUARY 9, 1908. No. 15,018.

Divorce: JURISDICTION. The record in a divorce case disclosing that neither of the parties to the action had resided in this state either continuously since the marriage or continuously for six months immediately preceding the filing of the petition, *held*, that the district court was without jurisdiction to grant a divorce.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

J. C. Cook, for appellant.

W. C. Walton and *F. Dolezal, contra.*

GOOD, C.

This was a suit for a divorce, in which the plaintiff was awarded a divorce and the custody of the minor children of the parties. The defendant appeals.

Among other defenses urged was that the court was without jurisdiction; the defendant averring that at the commencement of the action both parties were residents of the state of Iowa. The parties were married in Nebraska in 1891, and continued to reside in this state until the spring of 1905. The defendant was a minister at the time of the marriage, and exercised his calling at different places in Nebraska for some time after the marriage. The parties finally moved to Blair, where, after preaching for one year, the defendant drifted into other occupations, and for a number of years did not officiate regularly as the pastor of any church. In February, 1905, the parties had some misunderstanding and some personal controversies. The plaintiff claims that the defendant assaulted her and otherwise mistreated her at that time, but they did not separate, but continued to live together as husband and wife. The defendant in April, 1905, received a call from a church in Iowa. It appears that both parties went there when he preached his trial sermon, and defendant was accepted as pastor of the church. They came back to Blair, and made arrangements to move from there to Iowa. They packed up practically all of their household goods and effects; the defendant claimed all, but the plaintiff claimed that some things were left in their home in Blair. The defendant moved to his new pastorate, while the plaintiff visited a few weeks with relatives in Nebraska. About the first of June she, with her children, went to the defendant in Iowa, and there lived with him in their new home until the 23d day of August. During the time that the plaintiff was visiting with her relatives in Nebraska, and while the defendant was preparing a home for them in Iowa, she wrote him a number of letters, which are in the record. These letters do not evince any unkindly feeling between the parties, but, on the contrary, abound in caressing and endearing terms. Without attempting to quote the evidence, suffice it to say that the record discloses to our satisfaction that it was the intention of the

parties to establish a home in Iowa, and that they did so establish it. In August the plaintiff represented to the defendant that she had received a letter informing her that her mother was seriously ill, and asking her to go at once to her mother. The defendant consenting to her going, took the plaintiff and their children to the railway station, provided her with funds, and parted with them at the station in an affectionate manner. The plaintiff confessed that she never received such a letter, and that it was merely an invention of her own and used as a ruse to get her children away from the defendant and to return to her people in Nebraska. She did not attempt to reestablish her home at Blair, but went immediately to the home of her parents in Dodge county, and within three days brought this action for a divorce.

At the outset of the action she filed an affidavit alleging that the defendant was a nonresident, as a basis for constructive service. It is true that upon the trial of the case she testified that she only went to Iowa temporarily, alleging that the defendant had agreed to treat her in a more kindly manner, and that, relying upon this promise, she agreed to go to him. She claims that he violated his promise, and further illtreated her. The evidence, however, does not disclose any serious fault of the husband after she went to him in Iowa. We are convinced from the record that the plaintiff and defendant both established a home in Iowa in good faith, and intended to make it their future permanent residence. It follows, then, that she could not regain a residence in Nebraska to entitle her to maintain an action for divorce until she had been here for a period of six months. She began the action within three days of her return to Nebraska. It follows that the court was without jurisdiction to grant a divorce to plaintiff in this case, and that the judgment of the district court was wrong, and should be reversed.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with directions to dismiss the action.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with directions to dismiss the action.

REVERSED AND DISMISSED.

ELLIOTT LOWE ET AL., APPELLANTS, V. ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLEE.

FILED JANUARY 8, 1908. No. 15,036.

Insurance: CONTRACT: LIABILITY. Where a written application for insurance is made upon a blank form which provides that no liability will attach until the application is accepted and approved at the home office of the company, and the application, together with the premium, is delivered to a soliciting agent of the company who has no authority to make a contract on behalf of the company, and a loss occurs before the application has been received at the home office or by the general agents of the company, and the general agents, having knowledge of the loss, refuse for that reason alone to issue a policy, *held*, that no contract of insurance was created and the insurance company was not liable for the loss.

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

John Everson and *Flansburg & Williams*, for appellants.

W. P. Hall and *Greene, Breckenridge & Matters, contra.*

GOOD, C.

Appellants brought this action against the appellee to recover upon an alleged contract of insurance against loss by hail storms to growing wheat in the fields. The defendant answered, denying the making of any contract of insurance. At the conclusion of plaintiffs' testimony the district court directed a verdict for the plaintiffs in the

sum of $66, representing the amount of the premium paid by the plaintiffs to the defendant, and in effect directing a verdict against the plaintiffs upon the alleged contract of insurance. Plaintiffs appeal.

The record discloses that one O. H. Johnson was the local agent of the defendant at Huntley, Nebraska; that he was a recording agent for the purposes of fire insurance, but was not authorized to issue policies for hail insurance; that as respects hail insurance he was simply a soliciting agent, and had no other authority than to take the applications of persons desiring hail insurance and transmit such applications to the general agents of the defendant, Cowgill & Lyle, at Holdrege, and to collect the premiums and remit them to the general agents. On the 13th of June, 1905, Johnson took plaintiffs' application for $1,000 of insurance, and received from the plaintiffs the premium of $60. At that time he informed them that the application must be sent to Holdrege, and that plaintiffs would receive their policy on the following day. The application and premium, less Johnson's commission, were duly forwarded by mail to the general agents. By some error in the United States mail service the letter containing the remittance and the application was sent to Bertrand instead of Holdrege, and was returned thence to Holdrege, and did not reach the general agents until the morning of the 17th of June. On the 15th of June plaintiffs' wheat, that was to have been covered by the policy of insurance, was partially destroyed by hail. Plaintiffs called upon Johnson for their policy, and informed him of their loss. Johnson informed the plaintiffs that he had not yet received the policy from the general agents, and immediately called up by telephone the general agents, at Holdrege, informed them of the loss, and inquired about the policy. The general agents informed Mr. Johnson that no application from the plaintiffs had been received. Two days later, when the application was received, the general agents, being informed of the loss, declined to issue a policy, and directed a return of the draft which had been

forwarded with the application to the plaintiffs. It appears, however, that the premium paid by the plaintiffs was never in fact returned to them. Plaintiffs were informed that the defendant would not issue the policy on account of the fact that a loss had occurred previous to the receipt of the application by the general agents. The application for insurance, signed by the plaintiffs, is in part as follows: "I, Arnold & Lowe, * * * hereby make application to the St. Paul Fire and Marine Insurance Company for insurance upon growing grain against damage by hail only for the season of 1905, to the amount of $1,000, from the day this application is accepted and approved at the home office of the company at St. Paul, Minn., at 12 o'clock, noon, until September 15, 1905, noon. * * * That I know this application does not bind the company until received and approved at the home office in St. Paul, Minn." It is admitted, however, that the application was to have been acted upon by the general agents at Holdrege, instead of at the home office. The application is identical in form with that involved in the case of *St. Paul F. & M. Ins. Co. v. Kelley,* 2 Neb. (Unof.) 720, and the holding in that case, we think, must be decisive of this. It is apparent from the record that Johnson had no authority to enter into any contract on behalf of the defendant for hail insurance. He was not authorized to make any contract binding upon the defendant. It follows, then, that all that transpired between Johnson and the plaintiffs did not make a contract of insurance that was binding upon the defendant in the instant case until the application was accepted and approved by the general agents at Holdrege. They never accepted and approved the application. They declined to issue the policy prior to the receipt of the application. Neither the general agents at Holdrege, nor any one else authorized to act for the defendant, made or attempted to make any contract of insurance with the plaintiffs, and in law no contract of insurance ever existed between the plaintiffs and the defendant.

Plaintiffs contend that the risk was a proper one, that they paid the full premium demanded by the defendant's agent, and complied with all the demands necessary upon their part to effect a contract of insurance on the growing wheat against loss by hail, and that but for the failure of the postal authorities to promptly deliver the mail the application would have been received by the general agents and the policy would have been issued by them on the 14th of June, and that it is unjust to visit upon the plaintiffs this loss because of the neglect of the postal authorities in delivering the application in time. It may seem to be a hardship to the plaintiffs to bear the loss, but a sufficient answer thereto is that the defendant cannot be held for loss, except upon a contract, and that no contract of insurance existed. The failure to deliver the application on time was not the fault of the defendant, and it could not be compelled to pay for a loss against which it never contracted, simply because it would have contracted to pay the loss but for the failure of the postal authorities to promptly deliver the application.

While the plaintiffs did not ask for judgment, and could not have asked for a judgment, for the return of the premium that they had paid, still the action of the lower court in directing the verdict and entering judgment for the plaintiffs for the amount of the premium, with interest, was not prejudicial to them. It follows that the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

TAMME R. ZIMMERMAN, APPELLANT, V. A. J. TRUDE, SHERIFF, ET AL., APPELLEES.

FILED JANUARY 8, 1908. No. 15,046.

1. **Constitutional Law**: CLERK OF COUNTY COURT: APPOINTMENT. Chapter 34, laws 1897, entitled "An act to authorize the county judge in counties where said judge has been previously authorized by the board of county commissioners to employ one or more clerks, to designate and appoint, in writing, one of said clerks to be the clerk of the county court, and prescribing the duties and compensation of the clerk of the county court," examined, and *held* not in conflict with section 11, art. III of the constitution, providing that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed."

2. **Judgment**: INJUNCTION: PLEADING. In an action to enjoin the collection of a judgment of the county court on the ground that the judgment is void, it is necessary, in order to state a cause of action, that the averments of the petition should affirmatively state facts which show that the judgment was void.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

W. H. Ashby, for appellant.

A. H. Kidd, contra.

GOOD, C.

Plaintiff brought this action in the district court against Trude, as sheriff, and Loverin & Brown Company. The object of the action was to enjoin the defendant from levying an execution upon the property of the plaintiff upon the ground that the judgment, upon which the execution was issued, was void. The judgment in question was rendered originally in the county court for more than $200, and a transcript thereof was filed in the district court, whence the execution issued. The judgment was alleged to be void for two reasons: First, because the summons was neither issued nor signed by the county judge, but was issued by one F. E. Bourne, an assistant in the

office of the county judge; second, because the defendant was not sued in his full Christian name, but was sued by the name of "T. Zimmerman," and the summons was not personally served upon him, but was served by leaving a copy thereof at the usual place of residence. A copy of the summons is attached to and made a part of the petition. A temporary restraining order was issued and served upon the sheriff. Loverin & Brown Company is a nonresident corporation, and no service was had upon it, and no appearance was made by it in the action. The sheriff appeared in this action, and moved to dissolve the temporary restraining order upon the grounds, first, that the petition did not state facts sufficient to authorize the issuing of the same; and, second, that the facts set forth in the petition were untrue. This motion was heard upon affidavits previous to the return day of the summons, and the court sustained the motion, dissolved the restraining order, and entered a judgment dismissing the petition. From this judgment the plaintiff appeals.

No answer or demurrer had been filed to the petition by the defendant Trude, and the record itself does not disclose that the cause was submitted to the court for determination, except upon the motion. On the oral argument in this court, however, it was conceded by both parties that the whole case was submitted to the trial court for decision upon the record. We are unable to determine from the record whether or not it was the intention of the parties, in submitting the case to the district court, that the evidence offered by way of affidavits upon the hearing of the motion to dissolve the restraining order should be considered as evidence upon the trial of the principal cause. We are inclined to the view, however, that it is immaterial what their understanding was in that respect, because of the fact that no answer or demurrer was filed to the petition, and all the facts well pleaded in the petition must be taken as true. It therefore becomes necessary to determine whether or not the petition states a cause of action.

In the action in the county court, wherein the judgment was rendered against the plaintiff, the summons was signed, "H. E. Spafford, County Judge, by F. E. Bourne, Clerk," and was attested by the seal of the county court. Plaintiff contends that chapter 34, laws 1897, which is entitled "An act to authorize the county judge in counties where said judge has been previously authorized by the board of county commissioners to employ one or more clerks, to designate and appoint, in writing, one of said clerks to be the clerk of the county court, and prescribing the duties and compensation of the clerk of the county court," is unconstitutional, and that there was, therefore, no authority for any one to act as clerk of the county court, or to issue the process of said court, except the judge thereof. Plaintiff contends that said act is in violation of that portion of section 11, art. III of the constitution, providing that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." Plaintiff claims that the act is an attempt to amend sections 8 and 20, ch. 20, Comp. St. 1895. A portion of section 8 is as follows: "In all cases commenced in said courts wherein the sum exceeds the jurisdiction of a justice of the peace, it shall be the duty of the county judge to issue a summons." Section 20 is as follows: "All writs, citations, and all process in civil actions issuing out of any probate court, shall be under the seal thereof, and be signed by the probate judge." It is clear that by the sections above quoted it was made the duty of the county judge, as the law then existed, to issue and sign the summons, but by section 1, ch. 34, laws 1897, it was provided that in counties where the county judge had been previously authorized by the board of county commissioners to employ one or more clerks, such county judge might designate one of said clerks to be the clerk of the county court, and by section 3 of said act such clerk of the county court was authorized to sign and seal all processes issued out of the county court, and to do all other acts to be done

by the county judge, except judicial acts. There is apparently a conflict between sections 8 and 20, ch. 20, Comp. St. 1895, and the provisions of chapter 34, laws 1897. By an examination of chapter 34 it will be observed that it does not purport to be an amendatory act, but is an act complete in itself, and its object is clearly expressed in the title, to authorize the appointment of a clerk of the county court in certain instances, and prescribing their duties and compensations.

Where an act is complete in itself, and does not purport to be an amendatory act, although the provisions of the act may be in conflict with other provisions of the statutes, this court has held that the act is not in conflict with that clause of the constitution above referred to. In *State v. Cornell,* 50 Neb. 526, it was held that an act complete in itself is not inimical to the constitutional requirement that no law shall be amended unless the new act contains the section or sections so amended, although such complete act may be repugnant to or in conflict with a prior law not referred to nor in express terms repealed by the latter act. Other cases that hold substantially to the same doctrine are *Canham v. Bruegman,* 77 Neb. 436; *State v. Omaha Elevator Co.,* 75 Neb. 637, and *State v. Drexel,* 74 Neb. 776.

In the latter case it was held that the repealing clause of an act of the legislature, repealing "all acts and p .rts of acts in conflict herewith," only repeals such acts of the existing statutes as are so repugnant to the act last passed as that both cannot stand. Prior statutes are repealed *pro tanto,* and to the extent only that they conflict with the act last passed. Section 5, ch. 34, laws 1897, above referred to, is as follows: "All acts or parts of acts in conflict with this act be and hereby are repealed." Applying the doctrine laid down in the case last above cited, it would follow that the passage of chapter 34, laws 1897, would have the effect of repealing or modifying sections 8 and 20, ch. 20, Comp. St. 1895, to the extent that they required the personal act of the county judge in issuing or

signing the processes of the county court. We conclude, therefore, that chapter 34, *supra,* is valid, and authorizes the clerk of the county court to issue and sign the summons.

The summons issued from the county court commanded the officer to summon "T. Zimmerman, whose first name is unknown to the plaintiff," and the return to this summons shows that it was served by leaving a copy at the usual place of residence of the appellant. Plaintiff contends that the summons was issued pursuant to the provisions of section 148 of the code, which reads as follows: "When the plaintiff shall be ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown,' and a copy thereof must be served personally upon the defendant." It is urged that, under the decision in the case of *Enewold v. Olsen,* 39 Neb. 59, personal service was required in order to give the court jurisdiction, and that the summons, showing that it was left at the usual place of residence, was sufficient to show that the court did not acquire jurisdiction. This contention could have no application, however, where the action was brought upon a written instrument, where the parties thereto had executed the same by signing the initial letter or letters or some contraction of the Christian name. Section 23 of the code provides that, in such a case, it shall be sufficient to designate such person by the name, initial letter or letters, or contraction of the full name or names, instead of the Christian, or first, name or names in full. It must be borne in mind that this was an action in the county court for more than $200, and was a term case, and that in such cases the county court is a court of record, and all presumptions are to be indulged in favor of the regularity of its proceedings and judgments.

The summons discloses that the action was for money due and unpaid upon a certain guaranty, and the presumption would be, in the absence of a showing to the contrary, that the action was based upon a written instrument, and that the defendant in that case was properly sued by the initial, because he had signed the written instrument in that manner. We think it would be incumbent upon the plaintiff to allege facts sufficient to show, not only that the county court might not have had jurisdiction, but to allege facts sufficient to show to a certainty that the court did not have jurisdiction, and, in the absence of the averments to the contrary, the presumption would be in favor of the jurisdiction of the county court.

Plaintiff's petition was defective in another particular. He does not allege anywhere in his petition that no appearance was made by him in the case in the county court, and, for aught that appears in his petition, he may have appeared and made a defense in the action in the county court. The presumption being in favor of the regularity of the proceedings and judgment of the county court, the plaintiff in this case must fail, unless he avers facts sufficient to show affirmatively that the court was without jurisdiction. This he has not done.

It follows that the judgment of the district court was right and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

HEENAN & FINLEN, APPELLEES, V. THOMAS E. PARMELE ET AL., APPELLANTS.*

FILED JANUARY 8, 1908. No. 15,088.

1. **Specific Performance: PARTIES.** A contract for the sale of real estate, executed by and between T. E. P. and C. C. P., as vendors, and H., as vendee, will not sustain an action for specific performance by H. & F., a copartnership, against the vendors as trustees of an expired corporation, when the contract does not disclose that the vendors were acting in any other capacity than as individuals.
2. **Vendor and Purchaser: DESCRIPTION.** A contract for the sale of real estate that does not describe the land or refer to it in such a way as to render it possible to ascertain the exact description is void for uncertainty.

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

Byron Clark, for appellants.

J. R. Dean and *Hainer & Smith*, *contra*.

GOOD, C.

This is an action to enforce specific performance of a contract for the conveyance of lands in Custer county, Nebraska, and is before this court a second time. The former opinion, entitled *Parmele v. Heenan & Finlen*, appears in 75 Neb. 535. After the cause was remanded upon the former hearing in this court to the district court, an amended petition was filed, alleging, among other things, that since the former trial the copartnership of Heenan & Finlen had been dissolved, and that Daniel H. Heenan had succeeded to all rights of the copartnership, and making Heenan in his individual capacity a joint plaintiff with the copartnership of Heenan & Finlen. The amended petition also averred that the existence of the defendant Plattsmouth Live Stock Company had expired on the

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

first of January, 1900, in accordance with the limitation contained in its articles of incorporation, and that the defendants, Thomas E. Parmele and Charles C. Parmele, had complete charge and direction of the affairs and business of said corporation on the date of its expiration, and that they were the persons acting last before the expiration of its charter as its officers and managers, and that by operation of law they became trustees for the corporation with full powers and authority to sell and dispose of the property of the corporation. After objections to the jurisdiction of the court were filed on behalf of the defendants and overruled, the defendants answered, and trial was had, resulting in a decree for the plaintiffs. The defendants appeal.

At the outset it may be remarked that numerous assignments of error are made that are ably and exhaustively presented in the arguments and briefs on either side, but the view we have adopted will render a consideration of the most of them unnecessary. The contract relied upon is evidenced by a series of letters passing between Daniel Heenan on one side and Thomas E. Parmele and Charles C. Parmele on the other. The substance of most of these letters is set out in the former opinion in this case. The evidence discloses that the record title to the land was in the name of the Plattsmouth Live Stock Company, and that Thomas E. Parmele and Charles C. Parmele were the last acting managers of the corporation prior to the expiration of its charter, and they became the trustees of the corporation under the provisions of section 62, ch. 16, Comp. St. 1905. The evidence also discloses that at least two other parties than the two defendant Parmeles were holders of stock in the corporation and beneficially interested in the land; that the plaintiff Heenan & Finlen was a copartnership conducting a ranch business in Custer county, and owned a large quantity of land; that the land in controversy, together with some other land of the defendants, lay within the Heenan & Finlen ranch, and almost entirely surrounded by the land of Heenan & Finlen.

The first negotiations looking to a purchase of the land was in a personal interview between Heenan and Thomas Parmele in the fall of 1900. Nothing came of this conversation, except, perhaps, to identify as between the parties the land that was being negotiated for. The next step was the writing of a letter by Thomas E. Parmele to Heenan, stating that the land had not been sold and fixing a price thereon. April 3, 1901, Heenan sent the following answer: "Yours of the 1st inst. to hand, and note that you have not sold the land. I think your price is too high, but if you will accept $1,000, cash, I will try and raise the money and buy them. This is the price that it was offered to my brother some time ago. If you will accept would like to know at once. Very truly, D. Heenan." April 6, 1901, Thomas Parmele answered this letter, as follows: "Mr. D. Heenan, Streator, Ill. Dear Sir: Replying to your letter, I will take $1,000 for the land as per your offer. Let me hear from you. Yours very truly, Thomas E. Parmele." Heenan answered this letter, but the letter has been lost, and oral evidence of its contents is given; Heenan and his confidential clerk, upon the one hand, testifying that Heenan directed a deed to be made to Daniel H. Heenan and Thomas W. Finlen, who were the persons composing the copartnership of Heenan and Finlen, and directed Parmele to send the deed and abstract to the National Bank of the Republic at Chicago, where the consideration would be paid. The next letter in the record is dated May 25, 1901, written by Charles C. Parmele, as follows: "Mr. Dan Heenan, Streator, Ill. Dear Sir: I have made draft on you for $1,000 and sent to the National Bank of Republic at Chicago, attached to abstract and deed to half section of land in Custer county. The title to this land is all right with the exception of a tax deed issued on a quarter of the land for the 1893 and 1894 taxes, amounting to $21.50 and interest. I will get a quitclaim deed from the party that holds this land, and will guarantee you that we will straighten this up. The abstract shows two unreleased mortgages from Samuel

Pollock and wife to the Iowa Mortgage Company. Also mortgage from Chas. W. Nix and wife to S. H. Atwood. These mortgages were both paid off several years ago. We obtained releases, but never have filed them. I have forwarded releases today to register of deeds of Custer county, for record. You please notify the bank to pay draft and we will guarantee title. Very truly yours, Chas. C. Parmele." Thereafter, at the solicitation of Parmele, the deed and abstract and draft were returned to him by the National Bank of the Republic. By an examination of these letters, it will be observed that nowhere in the letters is there any reference to the fact that Mr. Heenan was acting for the copartnership, unless it might be inferred from the letter which Heenan claims was written directing the deed to be made to the individual members of the copartnership. The Parmeles deny that any such direction was contained in the letter. It will also be observed, by reference to the letters, that nowhere is there anything to indicate that the title to the land was in the name of the Plattsmouth Live Stock Company, or that either of the Parmeles was acting as trustee for the expired corporation. The action was instituted in behalf of the copartnership, and recovery is sought against the Parmeles in their capacity as trustees. The contract does not purport to be made by the partnership on the one hand and the trustees of the expired corporation on the other. In *Morgan v. Bergen,* 3 Neb. 209, it is said: "Such a contract, to be obligatory upon the *principal* when made by the agent, must be made in the name of the *principal;* if the agent contract in *his own name,* or describes himself as agent for the principal, the *contract is the contract of the agent,* and not of the principal." In *Persons v. McDonald,* 60 Neb. 452, it is said: "A contract, to be binding upon a principal when executed by another person, must be made in the name of the principal. If one contract, in his own name, describing himself as attorney for his principal, the contract is the obligation of the attorney, and not of the principal." Applying this rule, it would follow that this

contract is the contract between Heenan individually and the Parmeles as individuals.

By reference to the letters constituting the alleged contract, it will be observed that nowhere in them is there contained a description of the land to be conveyed. The only statement relating to the location of the land is that it is in Custer county. It is no doubt true that both Heenan and the Parmeles knew and understood what land was referred to, but the contract itself does not disclose it, nor is there anything in the contract from which the land could be identified. A complete contract, binding under the statute of frauds, may be executed by means of letters passing between the parties, but such a contract, or memorandum thereof, to be valid and convey land, must either describe the land or refer to it in such a manner that, by the aid of the contract, or memorandum, one not a party to it can, by resorting to parol testimony, definitely ascertain the land intended to be conveyed. It is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless. The terms may be abstract and of a general nature, but they must be sufficient to fix and comprehend the property which is the subject of the transaction, so that with the assistance of external evidence the description, without being contradicted or added to, can be connected with and applied to the very property intended to be conveyed and to the exclusion of all other property. *Ryan v. United States,* 136 U. S. 68. Where a sufficient description is given in the contract, parol evidence may be resorted to in order to fit the description to the thing, but where an insufficient description is given, or where there is no description, such evidence is inadmissible. *Ferguson v. Blackwell,* 8 Okla. 489, 58 Pac. 647; *Halsell v. Renfrow,* 14 Okla. 674, 78 Pac. 118. It has been held, in *Ruzicka v. Hotovy,* 72 Neb. 589, that a memorandum of a contract of sale which fails to specify which quarter of a named section of land is intended, and states

the number of the range without specifying whether it is east or west, is not void under the statute of frauds for uncertainty in description, if the description is otherwise specific and the land intended to be conveyed can be identified from the description with the aid of parol testimony. Under the rule of law above quoted, we think the description in the contract is too indefinite and uncertain to be susceptible of enforcement.

For the reasons given, we recommend that the judgment of the district court be reversed and the cause remanded.

DUFFIE and EPPERSON, CC., concur.

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

REVERSED.

The following opinion on rehearing was filed November 6, 1908. *Former judgment of reversal vacated and judgment of district court affirmed:*

1. **Partnership:** DISSOLUTION: PARTIES: SUBSTITUTION. After the dissolution of a partnership, the partner to whom is assigned a right of action of the partnership and the right to the property which is the subject of the action may be substituted or admitted to become a party plaintiff for the purpose of carrying on the suit.

2. **Corporations:** DISSOLUTION: ACTION: PROCESS. Under section 4112, Ann. St. 1907, a dissolved corporation may be sued in the corporate name and service made upon the trustee or person in charge of the assets.

3. **Pleading:** AMENDMENT: CAUSE OF ACTION. Where the original action is brought against a corporation in its corporate name and certain persons alleged to be its officers, for the specific performance of a contract to convey real estate made by the alleged officers for the corporation, an amendment to the petition, pleading that at the time the contract was made the corporation was dissolved and some of the defendants were the trustees thereof, does not change the cause of action.

4. **Statute of Frauds:** SALE OF LAND: MEMORANDUM. If a contract for the sale and purchase of real estate can be ascertained from the entire correspondence between the parties, together with an ab-

stract of title containing the description of the premises transmitted for inspection to the vendee and referred to in the correspondence, this will be a sufficient memorandum in writing to satisfy the statute of frauds.

5. Corporations: DISSOLUTION: SALE OF LAND. Under the facts set forth in the opinion, *held*, that one C. was the last acting manager of a dissolved corporation, and was therefore sole trustee and competent to sell and convey the real estate of the corporation.

BARNES, C. J.

The facts in this case are set forth in the former opinions, *Parmele v. Heenan & Finlen*, 75 Neb. 535, and *Heenan & Finlen v. Parmele, ante*, p. 509. At the second trial amended pleadings were filed and additional evidence offered to supply the deficiencies pointed out in the first opinion.

1. The first point made in the appellants' brief is that a partnership cannot maintain an action for specific performance of a sale of real estate, and it is contended that this action is brought by the partnership. The title of the case in the petition is "Heenan & Finlen, a copartnership, v. Thomas E. Parmele, Charles C. Parmele, Samuel H. Atwood, Guy Seivers, and the Plattsmouth Live Stock Company," and in the body of the petition it is alleged that Heenan & Finlen is a partnership composed of Daniel H. Heenan and Thomas W. Finlen, organized for the purpose of doing business in Nebraska. With the pleading in this form there can be no question but that the action is brought by the partnership under the statutory permission. The additional evidence produced at this trial satisfied the district court, as it does this court, that the negotiations for the land were carried on by Mr. Heenan for and in behalf of the copartnership. Whether the deed was directed to be made to the individual copartners, as he and his clerk testify, or to Heenan individually, as seems to be implied by the testimony on behalf of the defendant, is under the peculiar circumstances of this case immaterial. It seems clear that the title was to be taken for the benefit of and in behalf of the copartner-

ship. It is the real party in interest, and it has the right to maintain an action for the specific performance of a contract to convey the land. If there be a defect in the title of the partnership to the property after the conveyance is made, as is urged by the defendants, it can neither help nor harm them, and they cannot be heard to say that for this reason the partnership may not maintain this action.

2. After this case was remanded to the district court, Daniel H. Heenan was made a party to the suit upon a showing that he had succeeded by assignment to all the rights of the copartnership, and an amended petition was filed making him a party. It is now objected that this amended petition changes the parties and the cause of action, and that no summons was served upon the amended petition. Separate special appearances were made by the defendants, objecting to the jurisdiction of the court on that account, which were each overruled. It is contended that the original action was by the copartnership against the live stock company, while the amended petition seeks to recover the individual rights of Heenan as against the Parmeles and Atwood in their capacity as trustees of the live stock company, its charter having expired by limitation upon January 1, 1900. While under section 45 of the code the action after the dissolution of the partnership might have been continued in the same name, yet it was entirely proper for the fact of the change of interest to be shown, and the pleadings made to correspond to the actual facts by making Heenan a party in his capacity as successor to or assignee of the rights of the copartnership. No right is claimed on the part of Heenan not derived by his succession to the interests of the partnership, hence, there is no change in the cause of action on that point.

As to the objection to the amendment seeking to charge the individual defendants as trustees of the Plattsmouth Live Stock Company, it had come to light since the former hearing that the corporate powers of the company had expired by limitation at the time the contract was made.

The statute, section 4112, Ann. St. 1907, expressly provides that a dissolved corporation may be sued in the corporate name and service made upon the trustees or persons in charge of the assets. The liability of the individual defendants as to the branch of the case seeking specific performance could only be predicated upon the liability of the corporation. In the original petition it was only sought to charge the Parmeles in this respect as officers of the corporation, and this is all that is sought to be done by the amended petition. We think there is no substantial change either in the parties or in the cause of action, and that no new summons was necessary to be served upon any of the defendants.

3. Further consideration of the evidence contained in the record convinces us that our former holding that the description of the land in the contract is too indefinite and uncertain to be susceptible of enforcement is erroneous. The evidence is clear that the oral negotiations leading up to the written correspondence referred specifically to the land in controversy which was situated within the Heenan & Finlen pasture, and that this was the identical tract which was in the minds of the parties throughout the correspondence. Accompanying one of the letters was a warranty deed and an abstract of title to the land for the vendees' inspection. The deed was returned to Parmele apparently without having been inspected by Mr. Heenan or any one for him, but the evidence shows that the abstract was forwarded to Streator, Ill., where he resided, seen by the witness Berry, and examined by a firm of lawyers at that place for Mr. Heenan. An abstract is in the record, which is said in the plaintiff's brief to be this abstract, but we find no proof of this fact, except certain marks which might imply this to be the fact. Berry testifies that the description of the land in the abstract sent was the same as that of the land in controversy. The testimony of both Thomas E. Parmele and Charles C. Parmele, the writers of the letters, is positive that the land described in the petition is the land referred to in the

correspondence. We think that the entire correspondence, including the accompanying papers referred to therein, must be construed together, and that the description of the land in the abstract, when considered in connection with the letters, supplies the definiteness of description required by the statute. The case may be distinguished from *Wier v. Batdorf*, 24 Neb. 83, and is similar to *Thayer v. Luce*, 22 Ohio St. 62, in this, that, while in that case the deed, in this case the abstract containing the description, was sent with a letter and submitted to the grantee for his inspection. This satisfies the statutory requirement. *Collyer v. Davis*, 72 Neb. 887.

4. The point in the case which has given us the most concern is as to the power and authority of the Parmeles, or either of them, to act for the Plattsmouth Live Stock Company. The district court found that Charles C. Parmele "is and was the sole trustee of said Plattsmouth Live Stock Company." The correctness of this finding is vigorously assailed. The evidence shows that the last election of officers of the corporation took place in 1892, at which time Charles E. Parmele was elected secretary. At that time five directors were elected, one of whom was Samuel H. Atwood, one of the original defendants in this case. Before the death of Charles H. Parmele, the father of Thomas E. and Charles C., who died in 1897, he had acquired by purchase all of the stock of the corporation, except a few shares purchased from him by Atwood, which were pledged to him as security for the purchase money. No certificates of stock had ever been issued. Some time previous to the 1st of January, 1900, the date of dissolution, all the personal property of the company had been disposed of, and its only remaining assets consisted of real estate. Apparently the last act of management or control exercised over the real estate before the sale was by Charles C. Parmele, in 1898 or 1899, when he agreed that Heenan & Finlen might use the land in controversy if they paid for the use of it. Charles H. Parmele left as his children and heirs, Thomas E. Parmele,

Charles C. Parmele, Mrs. Atwood, the wife of defendant Atwood, and Mrs. Agnew. With respect to the relation of Mr. Atwood to the corporation, Charles C. Parmele testifies: "The facts are these: My father, Charles H. Parmele, president and a stockholder in the Plattsmouth Live Stock Company, died in 1897. Mr. Atwood, my brother Thomas E. and myself were the administrators of his estate. At the time of my father's death Mr. Atwood owed my father for his entire interest in the Plattsmouth Live Stock Company, which was represented by note or notes, and the Atwood stock was pinned as collateral to the note. Shortly after father's death we made an arrangement among the heirs, by which the estate took the Atwood stock and canceled his note. Mr. Atwood, however, being administrator, acted on behalf of the estate and is still so acting. The stock, however, was taken out of the estate and settled by the heirs among themselves, and this settlement among the heirs was prior to 1901." Thomas E. Parmele testified that he heard the testimony of his brother as to the ownership of stock and transaction of the business of the Plattsmouth Live Stock Company, and that his brother stated the facts as he understood them; that, at the time of the negotiations with Mr. Heenan, he and his brother Charles owned all the stock and interest in the Plattsmouth Live Stock Company, except the interest which their mother had in the stock formerly held by his father. He further testifies: "Q. You do not know of Mr. Atwood acting for the company in any way since his individual shares were turned over to the estate? A. No, sir." He further testifies that shortly after his father's death an adjustment was reached among all the heirs of his father, by which the shares of stock in the company were set off to the heirs individually. He further testifies: "Q. Is it not true that, after this time when you made this arrangement with the heirs, you and your brother Charles C. Parmele, who has just testified, were given charge by the others of your family interested in your father's estate and that you transacted all of the

business connected with the Plattsmouth Live Stock Company? A. Yes, sir." On redirect examination Charles C. Parmele further testified: "Q. Mr. Parmele, you and your brother Thomas E. have had charge of the affairs of the Plattsmouth Live Stock Company for several years, and since about 1900, exclusively, have you not? A. Yes, sir." It is true that other evidence given by the Parmeles tends to contradict these statements, but we think the trial judge was justified in believing the statements made against their own interest. As to this and some other matters the evidence of the Parmeles is confusing and contradictory, and, while Mr. Atwood testifies that he has never resigned or refused to act as a director or trustee, we think the evidence shows that with the surrender of his stock he actually surrendered his directorship and neither considered himself nor was considered by the stockholders a director thereafter; that he took no further part in the affairs of the corporation and that Charles C. Parmele was the "last acting manager." After the stock was "taken out of the estate," as the witnesses express it, the Parmele family owned the entire interest, and the two brothers controlled the affairs of the corporation; Charles C. Parmele being the sole trustee and the only person legally authorized to bind the corporation. That this was his own idea is shown by the fact that in none of the transactions did he consult Mr. Atwood, and that he procured to be executed a warranty deed of the corporation without Atwood's knowledge or cooperation, which he sent with his letter to Chicago.

We conclude that the finding of the district court as to the facts is sustained by the evidence, and it will not be disturbed.

The former judgment of the court is vacated and set aside, and the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

CHARLES R. HANNAN, APPELLEE, V. CATHERINE RIHNER ET AL., APPELLANTS.

FILED JANUARY 8, 1908. No. 15,041.

Mortgages: FORECLOSURE: ESTOPPEL. When, in an action to set aside a conveyance of land as having been fraudulently procured, the plaintiff obtains a decree in his favor by means of a compromise and settlement, in which he agrees to pay and discharge a mortgage upon the premises executed by his fraudulent grantee, he is not entitled to object, in a subsequent action to foreclose that mortgage, that the same is for a sum in excess of the just indebtedness of the mortgagor to the mortgagee, or that prior to the settlement the mortgagee might have obtained a partial satisfaction from a source other than the land.

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

Charles Battelle and *J. J. Hess,* for appellants.

Will H. Thompson, contra.

AMES, C.

In October, 1904, one Peter B. Jacobs obtained from one Samuel Rihner a conveyance of a tract of land in Sarpy county in this state, upon which he afterwards executed a mortgage as security for an indebtedness to the plaintiff in this action for the sum of $2,100 represented by a note given by Jacobs to the plaintiff for that amount. Still subsequently, the heirs at law of Rihner, in an action begun by him, procured a decree setting aside the conveyance as having been fraudulently obtained and quieting the title in themselves. To that proceeding the plaintiff in this action, which is for the foreclosure of that mortgage, was not a party, but the decree above mentioned was entered upon a compromise and settlement by which the plaintiffs therein promised to assume and pay the mortgage indebtedness now in suit. It is now contended that the instruments in suit were given in whole or in part in consideration of a

former indebtedness on account of which Jacobs did not obtain credits, aggregating $40, to which he was entitled, and that prior to the entry of said decree the plaintiff had a lien on a fund belonging to Jacobs, and amounting to $236.50, which he was entitled to appropriate toward the payment of the debt now in suit, but that he negligently or wrongfully omitted to make such appropriation. The trial court declined to allow these items, or any of them, as credits upon or in reduction of the mortgage debt, and rendered a decree of foreclosure for the full amount of the latter with interest. The defendants appealed.

We think the trial court did not err. The compromise and settlement of the former litigation, resulting in a decree quieting the title of the plaintiffs (defendants herein), was a sufficient consideration for their promise to pay the obligation now in suit, and whether that obligation is just as against Jacobs, or whether the payment then made will be in whole or in part for his use or benefit, is a matter in which they have no concern. Neither the one case nor the other would absolve them from their own agreement, which was, in effect, to discharge the lien of the mortgage according to its terms.

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

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

JENNIE BOCK ET AL., APPELLANTS, V. AVIS S. PORTERFIELD, APPELLEE.

FILED JANUARY 8, 1908. No. 14,999.

1. **Boundaries.** Fixed monuments and boundaries actually marked upon the ground by the government surveyors, when established, control the distances stated in the notes of such survey.
2. ———: EVIDENCE. It is a general rule that only a preponderance of evidence is required to establish an issue in civil actions; and boundary disputes furnish no exception to this rule.

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

H. M. Sinclair and *J. M. Easterling,* for appellants.

John N. Dryden, contra.

CALKINS, C.

The plaintiffs were the owners of the south half of the northeast quarter of section 8, in town 8, range 16 west, while the defendant was the proprietor of the land adjoining this tract on the south. The plaintiffs claimed that the defendant had encroached upon their premises, and brought this action in ejectment to recover possession of a strip across the north side of the land in possession of the defendant 4.24 chains wide at the east end. It appeared from a survey made by the county surveyor according to the field notes of the government survey that the southeast corner of the plaintiffs' said land should have been located at the southeast corner of the strip in controversy; but the defendant claimed that the original government stake had been set at the northeast corner of the said strip, and that the north line of the same was the true boundary between the adjoining proprietors. A jury was waived and a trial had to the court, who found for the defendant. From a judgment rendered upon this finding, the plaintiffs appeal.

1. This court is fully committed to the doctrine that fixed monuments and known corners govern both courses and distances. *Johnson v. Preston,* 9 Neb. 474; *Minkler v. State,* 14 Neb. 181; *Thompson v. Harris,* 40 Neb. 230; *Clark v. Thornburg,* 66 Neb. 717; *Bridenbaugh v. Bryant,* 79 Neb. 329. The only question, therefore, that is presented by this appeal is whether the evidence tending to establish the original government corner at the northeast corner of the disputed strip was sufficient to sustain the finding of the district judge. The land was surveyed in 1877, and Mr. Lantz, who took a homestead on the southwest quarter of the same section in 1878, and lived there for 8 years, was called as a witness. He testified that when he settled on this section the government monuments at the corners were fresh and plain; that he became well acquainted with the corner in dispute soon after his settlement, and continued to be familiar with its location during his residence upon the section. He identifies the monument at the northeast corner of the strip in dispute as marking the location of the original government stake. He testifies to breaking out land near this line in 1880, at which time a house was located in the vicinity of this corner; and he verifies the location at the time of the trial by marks showing where the house stood. Before Mr. Lantz removed from his homestead, and in 1884, Elizabeth Karn established a residence on the adjoining quarter, where she remained until 1897; and she identifies the corner as claimed by the defendant as then existing in its present location. She is corroborated by her husband, who testifies to practically the same facts. In addition to this, it appears that the owners of the adjoining lands recognized this corner. The testimony of these witnesses is in no way contradicted; but the plaintiff urges that the testimony of the Karns should be disregarded, because they describe the monument as having four pits, instead of two. It must be remembered that the Karns did not become acquainted with the monument until 7 years after it was installed, and that the identification of the location

of the original monument depends on the testimony of Mr. Lantz, while that of the Karns shows that the monument claimed by the defendant to mark the site of the original stake continued to exist in the same place during their occupancy.

2. The plaintiffs contend that the field notes are to be accepted as presumptively correct, and can only be overcome by the most clear and satisfactory evidence; and, in support of this proposition, cite the case of *Hanson v. Township of Red Rock*, 4 S. Dak. 358, 57 N. W. 11. Under the rule adopted by this court and above stated, the real question is where the boundaries were marked upon the ground by the original surveyors, and not where they should have been located. To establish the fact that such boundary was originally marked at a certain point, the testimony of witnesses who saw the original monuments when new, and the circumstance of the recognition of boundaries by early settlers when such boundaries were easily distinguishable, should be weighed and considered. If it appears from the field notes that the boundary should have been placed differently, that fact must also be considered and given the weight to which it is, according to the general experience of mankind, entitled; and, from a preponderance of all the evidence, the jury, or, when the case is tried to the court, the judge, should determine where the boundary was originally marked upon the ground. It is a settled rule in this state that only a preponderance of evidence is required to establish an issue in civil actions, and cases of this kind are no exception to the rule. In this case, however, we are not only satisfied that the finding of the district court is supported by sufficient evidence, but that it was the only conclusion at which it could have properly arrived.

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

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

AFFIRMED.

JOSHUA M. GRAY, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.

FILED JANUARY 8, 1908. No. 15,010.

1. **Cities:** IMPLIED POWERS: SIDEWALKS. Where there is no express power granted to a city to license or regulate the business of constructing artificial stone, asphalt or other composite walks, it cannot be implied from the grant of authority to construct and repair walks of such material and in such manner as the mayor and council may deem necessary.

2. ———: ORDINANCES: VALIDITY. The provisions of an ordinance to license and regulate the business of constructing artificial stone, asphalt and other composite walks examined, and found unreasonable and void.

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

H. E. Burnam, I. J. Dunn and *John A. Rine,* for appellants.

Nelson C. Pratt, contra.

CALKINS, C.

An ordinance of the city of Omaha made it unlawful for any person to construct artificial stone, asphalt or other composite walks without a license therefor. Section 2 of this ordinance, which contained its material provisions, was as follows: "Any person, firm or corporation desiring to engage in the construction of artificial stone, asphalt or other composite sidewalks in the city, shall be required to apply for a license to the mayor and city council; such license to expire on December 31st of each year. The condition of the issuance of such license to be the payment of ten dollars to the city treasurer and the filing with the city clerk of a surety bond to the city of Omaha, in the sum of $2,000, to be approved by the mayor and city council, guaranteeing the construction of all such walks in conformity with approved specifications of the

city, and their maintenance for five years in continuous good condition; said bond shall also indemnify the city against all damages arising by virtue of neglect to comply with the provisions of ordinances and to take and provide for necessary precautions against damages by virtue of such construction. All such walks to be constructed under permits and in full accordance with provisions of ordinances." The plaintiff, who had not complied with the provisions of this ordinance, was employed by the owner of a lot in said city to lay a cement sidewalk in front of such lot; and, while engaged in the construction of the same according to the specifications of the city for the laying of walks of that character, he was arrested under a complaint charging him with engaging in the business of laying cement sidewalks without a license, in violation of the ordinance in question. The plaintiff brought this action to restrain the city, its officers and agents, from attempting to enforce said ordinance against him, on the ground that the ordinance was unreasonable and void, and unauthorized by the charter of the city. The defendants demurred to the petition, which demurrer was overruled, and, the defendants not desiring to answer, a judgment for the plaintiff was rendered, from which the defendants bring this appeal.

The power to pass a city ordinance must be vested in the governing body by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purpose of the corporation; not simply convenient, but indispensable. 1 Dillon, Municipal Corporations (4th ed.), sec. 89; *Anderson v. City of Wellington,* 40 Kan. 173. Powers encroaching upon the rights of the public or of individuals must be plainly and literally conferred by the charter. *Breninger v. Belvidere,* 44 N. J. Law, 350. The power to license must be plainly conferred, or it will not be held to exist. 1 Dillon, Municipal Corporations (4th ed.), sec. 361; *Dunham v. Trustees of Rochester,* 5 Cow. (N. Y.) 462; *Commonwealth v. Stodder,* 2 Cush.

(Mass.) 562; *Mays v. City of Cincinnati*, 1 Ohio St. 268; *City of St. Paul v. Traeger*, 25 Minn. 248.

It is conceded that no express power is given to license and regulate the vocation mentioned in the ordinance; but it is argued that the power is necessarily implied from the right of the city to designate the material and manner of construction of the walks to be laid in its streets. In considering this question, it should be borne in mind that the legislature in imposing upon the lot owner the burden of maintaining walks in front of his premises reserved to him the privilege of himself constructing the same. Section 121 of the charter of the city of Omaha (Comp. St. 1905, ch. 12*a*) provides: "Before any sidewalk shall be constructed or repaired by the city the owner or owners of the lots or lands to be assessed shall be given notice to construct or repair such sidewalk and shall have 20 days after the giving of such notice within which to construct or repair the same." And that "in case the owner or owners shall fail to construct or repair such sidewalk as directed the city may construct or repair said walk and assess the cost thereof upon the abutting property." It appears that, so far as the owner was concerned, he was acting within the right given by law to construct the walk in front of his premises, and the only question involved is the right of the city to compel the plaintiff to comply with the requirements of the ordinance as a condition of following his vocation. We think the restrictions imposed by the ordinance are not only unreasonably oppressive, but unnecessary to the exercise of the power to designate the material and manner of construction of such walks. Its provisions must prove onerous to the individual of slender means engaged in the vocation sought to be regulated. He is required to pay a fee of $10 for each year or fraction of a year, a not inconsiderable tax upon a small business. In addition to this, he is required to give annually a bond, upon which his sureties will be liable for a period of five years, so that if he continues in business for that period of time he will be compelled to furnish five

distinct bonds, representing an aggregate liability of $10,000, which is obviously impracticable, unless the applicant be of substantial means and established credit. While not creating a monopoly, the ordinance is monopolistic in its tendency, and would incline to lessen competition; and, for this reason, it should not be sustained, unless vitally necessary to the exercise by the city of the power to designate the material and manner of construction of its walks. No adequate reason why it is essential to the exercise of this power is pointed out in the argument of the defendant, and we have been unable to conceive one. The power of the city to prescribe the material and manner of construction of its walks may be enforced by its refusal to accept any walk not constructed according to its requirements. It was argued on the hearing that, if a walk were constructed by an unlicensed contractor, there might exist some latent defect which would cause its disintegration. Since the lot owner must rebuild and repair, this would be his loss, and not that of the city; and the power of the city cannot be sustained on the theory that it is necessary to protect the lot owner from the consequences of employing a dishonest or incompetent contractor. He has the stimulus of his own personal interest. He knows that he must rebuild or repair at his own cost if he allows inferior work to be done. This incentive always has been, and probably always will be, more effectual than the sense of duty as ordinarily developed in public officials. There is no alchemy in license fees and bonds to make a workman honest. Reliable work can only be secured by unremitting vigilance, and this vigilance will only be practiced by the individual whose financial interest is direct.

2. It was suggested that the power to enact this ordinance might be implied from the general welfare clause of the charter, or from the general power of supervision over streets. We are cited to no case which sustains the exercise of the power assumed, and in our own examination of the

authorities we have discovered no instance in which there has been an attempt to license or regulate the vocation in question. It was not contended in defendants' brief, nor upon the argument, that the ordinance was intended to require indemnity to the city against the liability it might incur for injuries to individuals caused by the negligence of the builder of such walks in the work of construction, and we do not determine the question whether the city has, under its general grant of power, authority to enact an ordinance requiring the owner of a lot, or a contractor engaged in constructing walks for owners, to give a reasonable indemnity against such injuries as a condition of the exercise of the privilege reserved to the owner by section 121, *supra*. It is not suggested that the construction of walks of artificial stone, asphalt or other composite material is attended by any danger to individuals that does not exist in the work of constructing walks of other material; and it is apparent that an ordinance to require indemnity against such risks should not be confined, as is the one under consideration, to persons engaged in the construction of artificial stone, asphalt or other composite walks.

The ordinance as it stands is without authority, unreasonable and void; and we recommend that the judgment of the district court be affirmed.

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

AFFIRMED.

JULES A. BLONDEL, APPELLEE, V. MARIE B. BOLANDER ET AL., APPELLANTS.

FILED JANUARY 8, 1908. No. 15,023.

1. **Specific Performance**: FRAUD OF PLAINTIFF. Where it appears that a plaintiff, who brings a suit in equity to enforce a specific performance of a contract, has obtained such contract by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, or by any other unconscionable means, he will be denied affirmative relief.

2. ———: ———. Where a plaintiff, who, after having entered into a valid contract, has by means of sharp, unconscionable and fraudulent practices, and by a threat to repudiate the contract at a critical period during its execution, secured a change thereof greatly to his own advantage, brings a suit in equity for a specific performance of the contract as changed, he may not, after the court has determined the contract as so changed invalid for such misconduct, still prosecute such suit for the specific performance of the contract as originally made.

3. ———: CROSS-PETITION: ACCOUNTING. Where, in a suit to enforce a contract by a plaintiff who has obtained the same by means of sharp, unconscionable and fraudulent practices, the defendants claim as affirmative relief an accounting for rents received by the plaintiff, the maxim "he who seeks equity must do equity" may be applied, and there may be deducted from the amount otherwise due the defendants for such rents the amount of money expended by the plaintiff in their behalf and the reasonable value of his services performed for their benefit.

4. **Appeal**: EVIDENCE: REVIEW. In a case tried to a court without a jury, the admission of improper evidence is not in itself ground for reversal; and, where this court finds it unnecessary to consider the evidence to which objection is made, it will not review the question raised by the objection to such evidence.

5. ———: ———: ———. In order to predicate error upon the rejection of testimony, the party complaining of its exclusion must have made an offer of what he expected to prove, which would indicate to the trial court the relevancy of the testimony, and, in the absence of such offer, the action of the court in rejecting the testimony will not be reviewed.

6. **Pleading**: AMENDMENT. It is the duty of a trial court to permit an

amendment to a pleading after the close of the testimony, when such amendment is in furtherance of justice and conforms to the proof, and the adverse party is not prejudiced by the delay in making the same.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Reversed with directions.*

William P. Warner and *Milchrist & Scott,* for appellants.

Edwin J. Stason and *R. E. Evans, contra.*

CALKINS, C.

John B. Arteaux died at Sioux City, Iowa, in the month of November, 1894, intestate, and possessed of considerable personal estate in Iowa, as well as two tracts of land situate in Dakota county, in this state, one of 160 acres, near Homer, and the other of 240 acres, near Jackson, sometimes called the "St. John land." The next of kin and heirs at law of Arteaux were his nephews Benoit Grezaud, Leon Grezaud, and Josef Beauvirronois, and his niece Francoise Jeandet, *née* Beauvirronois, all residing in the republic of France, and being of lawful age. The plaintiff, born in Switzerland, and familiar with the French language, resided in Sioux City. He was employed as an amanuensis by one Argo to write the heirs of Arteaux concerning their inheritance; and thereupon opened a correspondence with them on his own account, tendering them his services, and inviting them to his home, should they visit America. Benoit and Leon Grezaud thereafter came to this country, arriving in Sioux City in January, 1895. They went to the plaintiff's home, where they remained as his guests for several weeks, during which time the plaintiff and one Richardson were appointed administrators of Arteaux's estate in Iowa, and William P. Warner of Dakota City was appointed ancillary administrator of the estate in Nebraska. Shortly after the death of Arteaux, one Severson of Dakota county placed on record an instrument purporting to be a quitclaim deed for the

240-acre tract, executed by the deceased during his lifetime to Severson. This deed was believed to be a forgery, and on the 17th day of January, 1895, Benoit and Leon Grezaud, on behalf of themselves and the other heirs, entered into a written agreement in the French language with the plaintiff, the material part of which appears from the translation in the record to be as follows: "Benoit and Leon Grezaud grant to J. A. Blondel the management and administration of the lands located in the state of Nebraska, under the following conditions: J. A. Blondel shall receive during two years, that is to say, until January 1, 1897, the income from these lands. He shall have to stand all taxes and keeping in repair which may be required by the farmer, and he pledges himself to make no new improvements without being authorized to that effect by the heirs. He pledges himself to sell it at a minimum price of $20 an acre, and the one of 240 acres at an undetermined price. In any case, it is agreed upon that they will be sold at the highest possible prices, and that a sale cannot be granted without the written authorization of the brothers and sisters of Grezaud and Beauvirronois, whatever may be the prices which shall be offered. In the case where in the appointed time the lands cannot be sold, the present agreement shall become void and without effect, and the heirs of John Baptiste Arteaux would take back the possession of them and would dispose of them as would seem fit to them. As for the land of 240 acres, concerning which a question of ownership is raised, it is agreed upon that J. A. Blondel will take to his charge all of the expenses of court proceedings and of justice which can be occasioned in order to claim back the ownership of it and free it from all liabilities; J. A. Blondel would be entitled to half part of the price of the sale of this land, and, in case of failure, the heirs of J. B. Arteaux shall have positively nothing to pay. If J. A. Blondel has not done what is necessary in order to reclaim that ownership in the delay of two years, the heirs keep all their rights of this land, and reserve to themselves to make the best

of them, when they wish and when they please. It is agreed upon in case of sale it will take place for cash; that the funds shall be deposited in a permanent bank of Sioux City; that the heirs shall be notified by this bank of the depositing of these funds before they send the titles signed by them, in order to definitely close the sale. In the case where Mr. Warner should have as administrator the income of said lands, the said J. A. Blondel pledges himself to forsake the incomes of these lands during the time of the administration of Mr. Warner."

About the 1st of February, 1905, the brothers Grezaud returned to France, taking with them a formal power of attorney to the plaintiff, to be executed by all the heirs. This instrument, with some alterations, was afterwards executed by the heirs; but, it being conceded that its only office was to affirm and ratify the contract of January 17, it need not be further considered. Immediately after the departure of the brothers Grezaud for France, the plaintiff retained Messrs. Lohr, Gardiner & Lohr, attorneys, to prosecute the suit against Severson and his grantees to quiet the title to the 240-acre tract; and later, and on about the 27th day of February, 1895, entered into a formal agreement with said firm to institute such suit in the circuit court of the United States for the district of Nebraska. They were to receive as compensation for their services, contingent upon the successful termination of the suit, an undivided one-sixth interest in the land, the plaintiff to advance and pay court costs, officers' and witnesses' fees, including the traveling and incidental expenses incurred by the said attorneys in prosecuting said cause. In the event of an appeal to the circuit court of appeals, the attorneys were to receive an undivided one-fifth interest; and, if the case were further carried to the supreme court of the United States, an undivided one-fourth interest in the land.

It seems that the plaintiff undertook to keep the Arteaux heirs advised of the progress of their affairs, and frequently wrote them after the return of Benoit and Leon

Grezaud to France. In the letters purporting to be written for that purpose the plaintiff represented the dangers and difficulties of the case as continuously increasing, until it finally became almost hopeless. In a letter written November 19, 1895, he threatened to abandon his undertaking, unless the heirs would relinquish to him all the rights they had in the 240-acre tract. To this Benoit Grezaud replied, consenting to execute a quitclaim deed to the property, abandoning the land to the plaintiff. The plaintiff forwarded to him a quitclaim deed for execution; but before the same was executed Leon Grezaud died; and shortly after his death, in the latter part of 1897 or early in 1898, Benoit died. The death of the two brothers and other circumstances delayed the signing of the quitclaim deed, and, the heirs becoming dissatisfied, it was never executed. The Severson case was tried in 1897, and a decree rendered in June of that year in favor of the Arteaux heirs, from which decree no appeal was taken.

In 1896 John J. Tracy and another set up a claim to the land in controversy, claiming to have the title by patent, and instituted a suit in the district court for Dakota county against the Arteaux heirs, making Severson and his grantees parties. The plaintiff, through his attorneys Messrs. Lohr, Gardiner & Lohr, defended this suit in the name of the heirs, was defeated in the lower court, appealed to the supreme court, and secured a judgment of reversal. During the year 1899 the Arteaux heirs sent Mr. Arthur Valois, an attorney having offices in Paris and New York, to investigate the affairs of the estate. Mr. Valois employed Mr. Milchrist, one of the attorneys for the defendants in this case, to look after the interests of the heirs and take charge of their property. Meanwhile it appears that Lohr, Gardiner & Lohr had brought an action to recover their compensation, and the surviving heirs settled with them, paying them $1,300 attorneys' fees, and paying Mr. Warner $100. They also settled the Tracy suit, paying them the sum of $500 for the release of their claims.

After this the plaintiff brought this suit to enforce the specific performance of the agreement in the letter of Mr. Benoit Grezaud of December 25, 1895, in which he consented to abandon to the plaintiff all the interest of the heirs in the 240-acre tract. The defendants claim that the contract in question was not ratified by the other heirs, was without consideration, and was obtained by fraud, deceit and concealment; that the plaintiff was not entitled to recover on the original contract of January 17, 1895, because he had not carried out the same; and that he had received a large amount of rents over and above that contemplated by the agreement, for which he should account. The district court found that the contract of January 17 had not been changed, and that, by reason of the manner in which the parties had treated the same, time was not of its essence, and that it remained in full force and effect; that the subsequent correspondence on the part of the plaintiff was deceitful and fraudulent, and that the subsequent contract was without consideration. The court held that the defendants were subrogated to a one-sixth interest in the land by reason of the payments to Lohr, Gardiner & Lohr; and that the plaintiff was entitled to an undivided two-sixths interest under the contract of January 17, incumbered, however, by the amount of money which the defendants had paid to Mr. Warner and the Tracys. In respect to the rents, the district court found the evidence insufficient to enable it to adjust the same, and taxed the costs equally to the plaintiff and defendants. From this judgment the defendants appeal, alleging error in the court's awarding the plaintiff any portion of the land, and in its refusal to charge the plaintiff with rents collected. The plaintiff files a cross-appeal, complaining of the finding of the court that the contract for the whole of the 240-acre tract was obtained by fraud and misrepresentation, and was without consideration; and from so much of the decree as charges the plaintiff with the amount paid to settle the Tracy litigation.

1. It is contended by the defendants that the promise

contained in the letter of Benoit Grezaud of December 25, 1895, in which he acceded to the demand of the plaintiff that the heirs should abandon all their interest in the 240-acre tract, was without legal consideration, and procured by fraud, deceit and in the exercise of bad faith on the part of the plaintiff. It is one of the maxims of equity that he who comes into equity must come with clean hands. This maxim is much more efficient and restrictive in its operation than the maxim, he who seeks equity must do equity. It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him *all* recognition and relief with reference to the subject matter in question. "It says that whenever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine;* the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 397. This maxim is most frequently applied in suits like this, for a specific performance of contracts. A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but, if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, relief should be denied him. *Lewis v. Holdrege,* 56 Neb. 379. "By virtue of this principle, a specific performance should always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, or by any other means which are unconscientious." 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 400. See *Lewis v. Holdrege, supra.* We cannot escape the conviction that the plaintiff's conduct in obtaining this

promise has been unconscientious, inequitable, and characterized by bad faith; that the agreement of December 25 was procured by sharp and unscrupulous practice, by overreaching, by concealment of important facts, and by taking undue advantage of his position.

The transaction between the parties must be considered in respect to their situation; that the defendants were citizens and residents of a foreign country, ignorant of our laws, language, manners and customs; that they had reposed confidence and trust in the plaintiff, and depended upon him to truly advise them of the condition of their affairs in this country; that he was their agent and owned to them a duty which is incumbent upon a person in a fiduciary relation. We do not lose sight of the contention by the plaintiff that he was not the agent of the defendants. Whether the contract of January 17, 1895, created that relation it is not necessary to determine. In the contract with his attorneys he assumed that such a relation existed, and he cannot, after such assumption, deny it to his own advantage. The plaintiff's letters of February 14, April 15, and June 18, 1895, indicate that he either was discouraged with the obstacles encountered in the litigation and had lost all confidence in the integrity of the courts and juries of Nebraska, or that he pretended such discouragement and loss of confidence, and was attempting to deceive the defendants into the belief that they could have little hope of securing justice in this country. On September 5, 1895, the plaintiff wrote to Mr. Benoit Grezaud a letter, which appears from the translation in the record to be as follows: "Sioux City, Sept. 5, 1895. Mr. Benoit Grezaud: The suit concerning the land of Jackson against Severson goes forward smoothly, and, although I have spent already about $400 in the suit, I think this will be my loss. I can assure you of one thing, and that is that, if I had known all I now know, I should never have entered into this suit, for, even if we succeed in reclaiming the land, that will cost me as much as it is worth. Your uncle's title to this land is not good, for there are several

mistakes, and Severson, who had seen it, knew that. It is also the reason why these people of Jackson used to say always that your uncle had no good title, and that this land did not belong to him. Your uncle had bought a tax certificate for $13, and, as this certificate had never been refunded after three years, he had received a title which we call a 'title of tax sale,' and which in most part of the states is as good as any other. In Nebraska, however, these titles are not good for much, unless you occupy the land and cultivate it, a thing which your uncle has not done, and, what is more, the title of your uncle has been badly executed. If we should win the suit against Severson before having a good title, we shall still have one dozen other lawsuits on our hands with other people who claim each of them to be owners of some acres, and to whom I am certain we shall have to pay a certain amount for their claims. I went and saw the land, and I have found that on the corner is located the cemetery of Jackson, occupying about ten acres, and on the south side the Missouri has eaten away a corner, measuring about 20 acres, which leaves about 200 acres in all. From 80 to 100 acres are bottom lands and of good quality, but the remainder can be used only for pasture, and bad pasture, for the hills are too high and too steep. I do not like to allow Severson to have carte blanche, for, if I should give up the lawsuit now, he would prosecute me for malicious prosecution, and obtain judgment against me. I do not like either to spend much more money with so small a chance for return, for, at the best, my expenses will equal what I shall receive, and it will be a long time before we have a good title which will allow us to realize. Would you consent to take the suit into your hands and refund to me what I have already spent, if you should win? I even would be prepared to give you the profit of what I have already spent and allow you to continue the suit, rather than allow Severson to have carte blanche. As for me, however, it would be difficult to continue the action on the conditions we have made, for, at the best, I will have spent as much if

not more than my half will be worth, and I shall have all of my time lost, as well as much anxiety and dangerous enemies to take care of. Thus, if I must take nine chances out of ten, not only to lose my time and money, but to make dangerous enemies (for Severson has already killed two men, and has also poisoned his brother-in-law in order to be able to defraud his own sister), and, at the best, if we succeed, to pay more than the full price for the part which will come to me, I prefer, as I told you above, before incurring larger expenses, to leave the whole matter with you now, giving you the benefit of what I have done up to today. When you were here, I had not seen the land, which I thought to be good, nor the title, which I thought to have been executed as it should have been. I was positive that Severson was a forger of the worst kind, a dangerous man, who should have been hung long ago, and I am still more positive now. That is why, thinking I would save you a loss of money, I offered to take the suit by half. I thought then I would be able to find lawyers who would take charge of it cheap, but it has been impossible for me to arrange in that manner, f every lawyer was expecting to make big fees out of the estate, and then I have begun by paying everything myself. Now I have spent about $400, and have done but very little, for the court of the United States proceeds slowly in these lawsuits, which are numerous, and I see almost no possibility of recovering, or, even if we should win our suit, my expenses will be higher than my profits and all of my time and work will be for nothing. As my means do not allow me to work for justice's sake, I prefer to give up the affair now before incurring higher expenses, and, if you want to go forward with the suit, rather than see that scoundrel Severson keep the land unmolested, I will give you the profit of what I have done already, and, if you should win the suit, you will refund, and, if you lose, it will be my loss, and I will be the wiser another time. It will cost still, at least, from $500 to $800 before it is finished. This, as you see, with what I have already spent,

will amount to more than $1,000. We are obliged to buy our evidence, without which we could do nothing. For instance, a notary who has made the deed of your uncle to Severson will give us his testimony if we pay him $300, but, if not, he will give it in favor of Severson, and we will be lost, for he can say that he has never made that deed; as also he can tell that everything was in good order. The lawsuit is in Omaha, and we will be obliged to have all of our witnesses over there for a few days; to pay their transportation and return; to keep them in a hotel, and also to pay them $3.50 a day for their time. As we have a score of witnesses that is going to cost dearly. Thus you see, dear Mr. Grezaud, the reason which prompts me to give up continuing the suit. If you take the suit to a good end, you will have a full interest. The expenses, I believe it honestly, will amount to $1,500, and the land will not sell for more than $2,000 with the title you will be able to give. In your next letter let me know what you are going to do, for if you go forward yourself it is necessary to take the testimony of the notary, who is waiting now in order to know what to do. You are going, without doubt, to find it strange that a notary can be bought, but Severson has foreseen that, and he used an unscrupulous notary for his transaction, and it is the one who will pay best who will get his testimony. Finally, enough on that subject, but let me know what you want to do."

In this letter the discouragements which the plaintiff had met in the prosecution of the suit to quiet title were grossly exaggerated. Some of the statements of fact—*e. g.*, the allegation that he had at that time spent $400—are proved to have been absolutely false. It was well calculated to dishearten the defendants and make them believe the case much more hopeless than it actually was.

In reply to this letter, Benoit Grezaud on October 24, 1895, wrote a letter, of which the following translation appears in the record: "Pont de Vaux, Oct. 24, 1895. My dear Mr. Blondel: Regarding the farm at Jackson, it is

absolutely impossible for us to take that affair on our own account, as you propose to us. How do you expect that we, being strangers, not knowing the language of your country, might carry it to good end, if you, being there, acquainted with the laws of the country, cannot carry it through? We would prefer to abandon it entirely, rather than running the risk of a suit. It is for that reason that we had offered to give you one-half of the proceeds of that sale of the land, if you would revendicate the property at your own costs, perils, risks, refraining to undertake anything should you think of not being able to succeed, it is what you have accepted by the contract we made together. Inasmuch as the costs will be more considerable than you thought, and that even in case of success the half of the proceeds of this sale would not be sufficient to cover them, we will, if you think having any chances to win, and if consequently you are willing to go on with the suit, give you two-thirds, instead of one-half, but cannot do any better. If you have any doubts of success with prospective expenses as large as you say, perhaps it would be better to abandon the affair altogether, rather than exposing yourself more. We would deplore to see you obliged to pay those costs in pure loss and with much annoyance. We always thought that for you it would be a source of profits, and would not that it be otherwise."

The plaintiff's letter of September 25 had evidently produced the effect which might have been foreseen, and impressed the defendants with the belief that the difficulties were much greater than had been anticipated. The plaintiff was not, however, satisfied with their offer to increase his compensation to a two-thirds interest in the 240-acre tract. Their liberality only made him more rapacious; and on the 19th of November, 1895, he wrote them a letter, which appears from the translation in the record to be as follows:

"Sioux City, November 19, 1895. Monsieur Benoit Grezaud: I understand your judgment regarding the Severson matter, and, although my great desire is to abandon

that affair now, to save you much annoyance and a certain loss of money, also to act loyally with you, must keep at the task, and to bad game show good heart, by paying the expenses, growing right along, up to the time of an answer from you to this letter. The suit, as you understand, although I am paying all the expenses, is brought in your name proper as heirs of the land in question. This was the only way to have a standing in court, for you alone have the rights of revendication. No one here knows that I am paying the expenses out of my own money, and every one wishes to make good fees. I have three law firms at Sioux City and two at Omaha interested in this suit, and up to this time have spared neither time nor money to carry to good end this suit, but the circumstances are difficult to overcome, for the law favors Severson, and we must furnish the proofs. Your uncle is now dead, and Severson has many rogues to help him by false testimonies. I would abandon the suit now, but Severson would immediately begin a civil suit against you for malicious prosecution, and it would be easy for him to recover a judgment against you for a few thousand dollars for damages to his reputation and the harm done him by this suit. As this suit would be at Dakota City it would be easy for him to arrange a jury who would be favorable to him, and would give a judgment for a few thousand dollars. So you will understand immediately why it is impossible to quit, even with a poor assurance to carry to good end this suit, and spending more money than it will bring if we win. My lawyers have notified me last week that your uncle's title to that property is so poor that, if we win this suit, the only thing left for us to do to strengthen our title is to take possession of the place and cultivate it for a period of ten years consecutively, after which time we would have what we call an adverse possession title; that is, if you stay on a piece of land having a poor title for ten years and cultivate it, you are recognized in law as the legitimate owner. Your uncle had possession of it for 18 years, but cultivated it in part

only during the last five years. So, supposing that the land comes back to us, for the next ten years it will be impossible to sell it, for, the title not being good, no one would buy it, as cheap as it may be. With Severson for neighbor, it will be difficult to rent it advantageously, for the farmers are afraid of him and do not want to incur his enmity, being afraid that he may set fire to their home or poison their cattle. Besides this, there will be several other suits with individuals claiming small pieces having been bought while this land was a part of the village of St. John. So you see that what together we thought would be a matter of mutual profits will be, at the best, a source of loss, seeing that there will be other suits to begin, and that, even if I win the game, my money will be tied up in that bad deal for ten years, a thing not very profitable for a person who has but little of it. Then during that time one can die many times, and I would not let as complicated an affair to my wife. Here are then, everything considered, the conclusions to which I come: Either I continue the suit, to lose all, but saving you from the annoyance almost certain of a suit and a judgment against you by Severson for a good amount, or I'll abandon the affair now, saving myself an expense of at least $1,000 with small assurance of success, and leaving Severson in peaceful enjoyment of the product of his theft (which he declares having paid cash and good money), and leave him the privilege to begin a suit against you as above mentioned. The choice is yours, but only under one condition will I follow my first proposition. If you wish me to continue, you will make me a contract by which you as heirs of John B. Arteaux relinquish in my favor all the rights that you have upon that piece of land if I carry to good end the lawsuit. Seeing the large amount of money which I must advance in this matter, the long period of time which I will have to wait before realizing, and the numerous annoyances which I will have and have had, added to the incertitude of return at all, it is only just to me that I should have such guaranty, or else that

I should quit before spending more money. My desire is to abandon the case, even if you accept my proposition, and I may assure you that, were it not for the fear of bad lawsuit to you, it would take me but a couple of minutes for a decision."

The mere reading of this letter, in the light of the facts already stated, shows that it was a gross exaggeration of the dangers and difficulties of the litigation. It was in some parts a misstatement of the facts, as where he states that he had employed three law firms in Sioux City and two in Omaha, and was endeavoring to create the impression that he had a large liability for attorneys' fees, when, in fact, his attorneys had undertaken the case upon a contingent fee, and he had no such number engaged. The statement that he was advised by his attorneys that the heirs would have to take possession and cultivate the land for ten years was untrue; and we cannot believe the plaintiff to have been under the apprehension of danger from a suit by Severson which he represents in this letter. When examined upon the stand in reference to this matter, he admitted that he only feared a suit from Severson in the event that the case was dropped or abandoned.

It was in response to this letter that Benoit Grezaud on December 25, 1895, wrote the following: "Pont de Vaux, December 25, 1895. My dear Mr. Blondel: Regarding the affair, Severson, when we treated with you for the land of St. John, we thought that it would be for you a source of profit, and we had thought to understand that you would easily end that lawsuit to reclaim the title. It is for that reason that we had consented in case of success to give you half of the price of the sale of that land. If we had been able to suppose it was as long and difficult we would have immedately abandoned it to Severson, rather than make you run the chance of this lawsuit and to expose ourselves to the annoyance of which you speak to us. As we do not wish in any manner to intervene in

this affair, we consent to abandon to you the totality of our rights upon that land as you ask it of us. If you think doing by continuing the suit, it is your business, for we will not enter in any cost whatever, neither directly nor indirectly. If you need an abandon (quitclaim deed) in due form, kindly make it and send it to us to sign, being careful to stipulate that you take to your own charge all the costs made, or to be made, and all the claim that Severson could make. You will inclose also a French translation."

This letter is the foundation of the plaintiff's claim, the contract of which he is asking a court of equity to require of the defendants the specific performance. Can it be said of the plaintiff that he stands in conscientious relations toward the defendants, and that his claim under this contract is fair and just? Here we find him, after having entered into a binding contract with the defendants, after having taken possession of their property, after having involved them in litigation, deliberately saying to them: "Give to me the entire subject matter of this litigation, or I will repudiate my contract, I will withdraw from and abandon your suit and your interests, though the consequences of my act will inevitably be the entire loss of the property and a judgment against you for damages." No contract so obtained can be enforced in a suit of equity; and the plaintiff should be denied the relief demanded upon the evidence of his letter of November 19, 1895, alone.

2. It is contended by the plaintiff that he is entitled to a one-half interest in the 240-acre tract under the contract of January 17, 1895, even if it should be held that the contract of December 25 was obtained by fraud or by such unconscientious means as would deprive him of a right to enforce a specific performance thereof in equity. We thus have presented the question whether a plaintiff, who, after having entered into a valid contract, has by means of sharp, unconscionable and fraudulent practices, and by a threat to repudiate the contract at a critical

period during its execution, secured a change thereof greatly to his own advantage, and brings a suit in equity for the specific performance of the contract as so changed, may, after the court has determined the change invalid, still prosecute his suit for the specific performance of the contract as originally made. The maxim that he who comes into a court of equity must come with clean hands means that such court will not enforce, on behalf of a plaintiff whose own conduct in connection with the same matter or transaction has been unconscientious, or unjust, or marked by want of good faith, or who has violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain, a contract so obtained. 1 Pomeroy, Equity Jurisprudence (3d ed.), sec. 398. It is to be observed that the conduct which will deprive the plaintiff of a right to resort to a court of equity for the relief to which he would otherwise be entitled must be in connection with the same matter or transaction. It is said that the maxim considered as a general rule controlling the administration of equitable relief is confined to misconduct in regard to or connected with the matter in litigation, and this is the only limitation of which we are aware. The misconduct of the plaintiff in this case is in connection with the relation of the parties under the contract originally entered into, and it therefore falls within the rule given for the application of the maxim. It is also, we believe, within its spirit. A court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, and it no less stringently demands the same from the litigant parties who come before it as parties or actors in such controversies. To allow a party, who fraudulently secures the alteration of a contract to his own advantage and brings a suit in equity to enforce it as altered, to proceed upon the original contract when the fraudulent character of his alteration is discovered, would be, it seems to us, to place a premium upon such

conduct, and we are satisfied that it should not be permitted.

3. The defendants in their answer demand as affirmative relief an account of the rents received by the plaintiff for the land in question, as well as for the 160-acre tract near Homer. It appears that the plaintiff received rents of the former for the years 1896 to 1900, inclusive, amounting to $1,078, and of the latter from 1895 to 1899, inclusive, amounting to $1,225, a total of $2,300, but the plaintiff expended of the moneys so received by him a considerable amount for the benefit of the defendants in carrying on the litigation, and in payment of expenses, taxes and repairs. To this part of the controversy the maxim that he who seeks equity must do equity may be applied, and we are of the opinion that the defendants should not be given this affirmative relief, unless they are willing as a condition thereof to credit the plaintiff with the expenditures he has made for their benefit. While this willingness is not expressed in the pleadings, the defendants in their brief consent to the plaintiff's being allowed for the expenditures he is shown to have made, and give a qualified consent that he be allowed a reasonable sum for his services. There is a sharp disagreement between the counsel for plaintiff and the defendants as to the amount of money received and paid out by the plaintiff, and we have been compelled to examine the record upon this question. While the evidence is not as clear and satisfactory as could be desired, we think that a finding that the amount paid by the plaintiff, added to the value of his services if he were to be compensated on a *quantum meruit*, would equal, but not exceed, the amount collected by him for rents would be fairly sustained by the evidence. We therefore conclude that, since the amount of the plaintiff's disbursements for, and the value of his services to, the defendants equal the amount of rents collected by him, the defendants are not entitled to recover anything on that account.

4. The plaintiff objected to certain interrogatories propounded to the defendants when their depositions were

taken, on the ground that they were not proper under the rule that cross-examination is limited to an inquiry into the facts and circumstances connected with the matters stated in the direct examination. It is well established in this state that, in a case tried to a court without a jury, the admission of improper evidence is not in itself ground for reversal. *Smith Premier Typewriter Co. v. Mayhew,* 65 Neb. 65. If there is sufficient competent evidence to support the finding of the trial judge, it will be presumed that he did not consider improper evidence found in the record. We have not found it necessary to consider the evidence objected to in making a disposition of the case, and it is not, therefore, required that we determine the question whether this evidence was properly admitted or not.

5. On the trial the plaintiff was interrogated while upon the witness stand as to conversations had with Benoit and Leon Grezaud. This testimony was objected to, on the ground that the questions called for a conversation between the plaintiff and a deceased person, of whom some of the defendants were personal representatives. This objection was sustained, and of this ruling the plaintiff complains. There was no offer by the plaintiff indicating what he expected to prove by the witness in response to the questions propounded and overruled, and we are unable to say whether the same were material or would have in any manner affected the case. It is well settled in this state that, to predicate error upon the rejection of testimony, the party complaining of its exclusion must make an offer of what he expects to prove which will indicate to the court whether the proposed testimony relates to relevant facts; and, in the absence of such offer, the action of the trial court will not be reviewed. *Barr v. City of Omaha,* 42 Neb. 341, and cases there cited.

6. The original answer charged the plaintiff with making the statements contained in the letters quoted in the first paragraph of this opinion; alleged that they were false and fraudulent, and made in bad faith; denied the

making of the contract to give the plaintiff the whole, instead of the half, of the 240-acre tract. After the evidence was in, the defendants asked for and obtained leave to amend their answer so as to admit the writing of the letter of December 25, 1895, by Benoit Grezaud, but alleging that he was induced to write such letter by the false and fraudulent statements of the plaintiff as charged in the original answer. Of the action of the court in allowing this amendment the plaintiff complains. Under section 144 of the code, it becomes the duty of the court in the furtherance of justice, and on such terms as may be proper, to amend any pleading by conforming the same to the facts proved. It is not suggested that the plaintiff was in any way prejudiced by the allowance of this amendment at this time; the case having been litigated between the parties in the same manner as if the answer had been the same at the beginning of the trial as it was after the allowing of the amendment. The answer as amended conforms to the proofs, and the amendment was made in the furtherance of justice.

We therefore recommend that the judgment appealed from be reversed and the cause remanded, with instructions to the district court to enter a judgment. (1) Dismissing the plaintiff's action, with costs, and quieting the title to the 240-acre tract in the defendants; (2) dismissing the defendants' counterclaim for rents.

FAWCETT and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is reversed and the cause remanded to the district court, with instructions to dismiss the plaintiff's action, with costs, quieting the title to the 240-acre tract in the defendants, and dismissing the defendants' counterclaim for rents.

REVERSED.

CANADIAN FISH COMPANY, APPELLEE, V. WILLIAM H. MCSHANE, APPELLANT.

FILED JANUARY 9, 1908. No. 15,048.

1. **Evidence** examined, and found sufficient to sustain the decision of the district court.
2. **Accord and Satisfaction.** Where a debtor remits by mail a sum less than the amount due, but which he in good faith believes to be all that is due or claimed by the creditor, the fact that he marks the check upon the margin "In full to date," or in the account which he renders describes it as "Check to balance in full," does not constitute it a payment made in settlement of a disputed claim, and the acceptance of such check by the creditor is not an accord and satisfaction.

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

T. F. A. Williams, for appellant.

Tibbets & Anderson, contra.

CALKINS, C.

The plaintiff was a dealer in fish at Minneapolis, and the defendant a commission merchant in Lincoln. In February, 1902, the plaintiff's manager, being in Lincoln, made an oral agreement with defendant to handle frozen fish. It is agreed that the fish were to be invoiced at certain stipulated prices; but the defendant insists that they were to be consigned to him upon commission, he to have the difference between the invoice price and the amount for which he should sell the same. The plaintiff contends that the defendant agreed to purchase the same outright, and that it gave to him the privilege of returning any excess of stock he might have on hand at the close of the season. The plaintiff made two shipments of frozen fish, one February 18, and the other on March 3, of about 4,800 pounds, which amounted at the invoice price to the

sum of $276.09. For some time prior to June 5 the plaintiff had been pressing the defendant for a remittance; and on the latter date the defendant wrote a letter in the words and figures following: "Lincoln, Neb. 6-5-02. Canadian Fish Co., Minneapolis, Minn. Gentlemen: Inclosed find my check for $54.47 to cover consignment of fish from you of Feb. 18th and March 3d, as per account sales. This did not prove to be a good investment for either you or myself, as you will notice. I did not get near enough to pay for my freezer, which I had to build for this deal, to say nothing of the expense of handling the goods. In the first place you sent me too much fish the first time, so we could not possibly get rid of it before the fresh stock came on the market and killed the frozen fish trade. The second lot you sent was in bad shape when it arrived, as I told you once before, or we might have gotten rid of more of the trout. At the last, I consigned a good many shipments to get all I possibly could out of them, and in most all of the cases I was out the express charges both ways, as the parties would send them back. I am sorry to be compelled to send in any such report, but will simply state that I did the very best I could with the goods. Kindly acknowledge receipt of the check at once to cover and oblige. Yours truly, W. H. McShane." The account of sales which was inclosed in this letter showed the sale of about 1,084 pounds of fish, amounting to $90.75, from which was deducted for commission and freight the sum of $36.28, leaving a remainder of $54.47. For the latter amount a check was inclosed, which was described as "Check to balance in full." The check was received by plaintiff's bookkeeper, credited to defendant's account, and plaintiff's manager on June 9 wrote, protesting that the fish had been sold outright, and refusing to admit the defendant's construction of the contract. The defendant not replying to this letter, the plaintiff brought this action in the county court, from which it was taken to the district court, where, a jury being waived, it was tried to the court, who found for the plaintiff gen-

erally. From a judgment rendered on this finding for the full amount claimed, the defendant appeals.

1. There was a sharp conflict between the testimony of the plaintiff's manager and the defendant, as to whether the goods shipped were sold to the defendant or consigned to him to be sold upon commission. In the letters of the plaintiff's manager there occur certain expressions which are claimed to corroborate the defendant's theory of the transaction. On the other hand, the defendant's letters in some respects are consistent with the contract as claimed by the plaintiff. But there is nothing in the correspondence which can fairly be said to settle this dispute. After a careful reading of the evidence, we cannot say that the evidence is not sufficient to sustain the findings of the court, and therefore we conclude that his finding upon the facts should not be disturbed.

2. The defendant claims that the acceptance by the plaintiff of the check for $54.47, transmitted in his letter of June 5, was an accord and satisfaction. The check, as offered in evidence, contains the notation in the lower left hand corner: "In full to date." The bookkeeper who received the check testifies that these words were not upon the check when he received it; while the defendant testifies that they were written thereupon before forwarding the check. It is well settled that, where there is nothing more than simple payment and acceptance of a less sum of money in satisfaction of a greater sum due, this will not be sufficient to sustain a plea of accord and satisfaction. *McIntosh v. Johnson,* 51 Neb. 33; *Fitzgerald v. Fitzgerald & Mallory C. Co.,* 44 Neb. 463. To make the receipt of a part of the debt a discharge of the whole there must be a new consideration or a voluntary compromise of a disputable or disputed demand, by which each party yields something, or an accord and satisfaction by which a new contract is susbstituted. In this case there was no new consideration, and the contention of the defendant must be sustained, if at all, upon the theory that it was the compromise of a disputed claim. It is to be observed that there had been

no actual dispute between the parties up to the time of the sending of defendant's letter above quoted. Assuming that the defendant was sincere in his contention, and we must so assume to make the claim a disputable one, and that he was actually mistaken in such claim, and this was found by the district judge upon sufficient evidence, as we have seen, we must conclude that he did not know of any dispute between the plaintiff and himself, but that he inclosed the check for $54.47 in the letter of June 5, not as a compromise or settlement, but as full payment of an undisputed claim. The letter does not reveal any knowledge on the part of the defendant that the plaintiff was claiming the transaction to have been a sale. We have, therefore, presented the question whether, where a debtor remits by mail a sum less than the amount due, but which he in good faith believes to be all that is due or claimed by the creditor, the fact that he marks the check on the margin "In full to date," or in the account which he renders describes it as "che : to balance in full," such payment is made in settlement of a disputed claim. We think the question must be answered in the negative. No intention to offer this payment as a compromise is apparent from the letter and its accompanying inclosure, and the plaintiff was not bound to so consider it. He was justified in treating it as the act of an honest debtor remitting less than was due, under a mistake as to the nature of the contract. In *Treat v. Price,* 47 Neb. 875, it is said: "When money is offered on condition that it be accepted in full satisfaction of a demand, the person receiving it, if he receives it at all, must take it subject to the condition named. His acceptance of the money under such a tender is an acceptance of the condition, notwithstanding any protest that he may afterwards make to the contrary." And in *Chicago, R. I. & P. R. Co. v. Buckstaff,* 65 Neb. 334, it was held that, "where there is a *bona fide* dispute between parties as to the amount due upon an account, and the debtor tenders a less amount than the claim in full settlement, which the creditor accepts, with

knowledge that it was tendered as a full settlement, the dispute will be a sufficient consideration to uphold the settlement, and will bar a recovery upon the remainder of the claim." It is urged by the defendant that these cases sustain the theory for which he is contending. There was no condition in the defendant's letter that the check, if accepted at all, must be accepted in full satisfaction of the plaintiff's demand; and there was no tender of it, as we have seen, in settlement of any dispute. The defendant does not, therefore, bring his case within the rule laid down in either of the above cases.

The judgment of the district court was right, and we recommend that it be affirmed.

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

PETER RUFFING V. STATE OF NEBRASKA.

FILED JANUARY 9, 1908. No. 15,258.

1. Cities: MISDEMEANORS: APPEAL. Where a defendant is prosecuted before a justice of the peace by complaint and warrant for the violation of a village ordinance, and the acts charged are misdemeanors under the laws of the state, such defendant has no right of appeal under section 1006 of the code from a judgment finding him guilty.
2. ———: ———: ———. The right of appeal given by section 324 of the criminal code applies to cases prosecuted for the violation of village ordinances pursuant to the provisions of section 52, art. I, ch. 14, Comp. St. 1907.
3. Indictment: AMENDMENT. Pending an appeal under section 324 of the criminal code from a judgment of a magistrate, the district court may permit the filing of an amended complaint which does not essentially nor materially alter the original charge.

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

R. W. Hobart and *William O'Brien,* for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin, John J. Sullivan and *Louis Lightner, contra.*

CALKINS, C.

In May, 1906, one Muff, marshal of the village of Humphrey, filed a complaint before a justice of the peace residing in Platte county, and having jurisdiction to try and determine offenses against the ordinances of said village, charging that the plaintiff in error, hereafter denominated the defendant, "on the 3d day of May, 1906, in the village of Humphrey, county and state aforesaid, then and there being, did then and there get drunk and disorderly, and also abuse the said marshal on the public streets and in public places, in violation of ordinance number 72 of the said village of Humphrey, Nebraska, in such case made and provided, and against the peace and dignity of the people thereof." A warrant was issued upon this complaint, and the defendant being brought before the justice was tried and found guilty as charged in the complaint. Upon such conviction the justice imposed a fine of $5, and incidentally $10, as it appears, for contempt of court, together with the costs of the action. On the same day the defendant, with one Ternus as his surety, appeared before the justice and gave his recognizance in the sum of $100, conditioned that the defendant should appear on the first day of the next term of the district court, and abide the judgment of the court. A transcript of these proceedings was filed in the district court, and on the 23d day of May, 1906, which appears to have been one of the days of the said next term, the said defendant having failed to appear, an order was made declaring his recognizance forfeited. On the 9th day of the following June the defendant filed a motion for an order setting aside the forfeiture of his recognizance. This motion was supported by affidavit, in which the defendant alleged

that he understood that said recognizance was entered into for the purpose of obtaining a change of venue from the justice before whom the complaint was made, and that he did not know the date of the first day of the said term of court, nor understand that he was required to appear, and in which he stated that he was ready and willing that the said cause should be brought on for trial before the said district court during the then present May, 1906, term, or at the next term of said court. On the 16th day of June this application was heard, and the court made an order setting aside and vacating the forfeiture of the defendant's recognizance. On the 23d day of November, 1906, the defendant moved to strike the transcript, complaint, warrant and recognizance from the files, because they were not properly certified, and ought not to have been filed, and for the reason that there was nothing to show that an appeal was pending in the case. There was nothing in the transcript to show that the defendant desired an appeal, nor that the recognizance was given for that purpose. But this motion was overruled, and the state was permitted to file an amended complaint, in the first count of which it was charged that the defendant on the 3d day of May, 1906, in the village of Humphrey, county and state aforesaid, then and there being, did then and there disturb the peace and good order of the said village of Humphrey, Nebraska, by being intoxicated on the streets and in public places within the limits of the said village to the annoyance of the citizens thereof, and contrary to the village ordinances in such cases made and provided. The second count charged the defendant at the time aforesaid with using profane, obscene, vile, insulting, offensive, indecent and disrespectful language toward and in the presence and hearing of Muff, a peace officer of said village, when and while the said peace officer was in the lawful discharge of his duties as such officer, contrary to the ordinance in such cases made and provided. This amended complaint was attacked on the ground that the offenses charged therein were different from those on

which the defendant was found guilty in the court below, which objection being overruled, the defendant was tried to a jury, and found guilty on both counts. The court, having overruled a motion for a new trial and in arrest of judgment, ordered that the defendant pay a fine of $5 and costs of prosecution, omitting the $10 assessed by the justice of the peace for contempt of court. From this judgment the defendant brings error.

1. Section 52, art. I, ch. 14, Comp. St. 1907, provides that "in counties not under township organization justices of the peace of any precinct in which any village or any part thereof may be situated, and in counties under township organization justices of the peace elected in said village, or from the township in which any village or any part thereof may be situated, shall have jurisdiction to hear, try and determine all offenses against the general ordinances of such village, and for that purpose may issue warrants for the arrest of any alleged offender, upon information under oath as in other cases; and upon the arrest of the defendant by the sheriff or any constable of the county, or marshal of such village, shall proceed thereon in all respects in the same manner and with the same powers as against persons charged with a misdemeanor under the general laws of the state; and the justice by or before whom such proceedings shall be had, and the officers making such arrest, shall be entitled to the same fees and costs, and be collected in the same manner as in cases of prosecution for misdemeanors under the laws of the state." No appeal is provided for by this statute, and the state in its brief concedes that none is expressly given, but urges that, where an act not criminal under the laws of the state is made unlawful by a municipal ordinance, a prosecution for a violation of such ordinance is in the nature of a civil action, and that therefore an appeal is given in such cases by section 1006 of the code, which provides for appeals to the district court from the judgments of justices of the peace in civil cases. In support of the contention that the proceeding is essentially a

civil one, the case of *Peterson v. State*, 79 Neb. 132, and a large number of cases from other states are cited. It may be conceded that, where an act is not criminal under the laws of the state, a municipal ordinance will not make it so, and that an action to recover a penalty prescribed by a municipal ordinance on account of an act not criminal by the general law of the state, but forbidden by such ordinance, is a civil action; but in this case the acts charged in each of the two counts of the amended complaint are offenses against the general law of the state. The first count in the complaint charges the defendant with being intoxicated on the streets and in public places of the village, while section 28, ch. 50, Comp. St. 1907, provides that if any person shall be found in a state of intoxication he shall be deemed guilty of a misdemeanor. The second count of the complaint charges that the defendant used profane, obscene, vile, insulting, etc., language toward and in the presence of the peace officer named. We think this offense is embraced in section 30 of the criminal code, which makes it unlawful for any person to resist or abuse any sheriff, constable or other officer in the execution of his office. We therefore conclude that the provisions of section 1006 of the code do not operate to give the defendant the right of appeal in this case.

2. Section 52, art. I, ch. 14, *supra*, after giving certain justices of the peace jurisdiction to hear, try and determine all offenses against the general ordinances of such village, prescribes the procedure. It is there directed that the prosecution shall be by complaint and warrant, and that upon the arrest of the defendant the justice shall proceed therein in all respects and in the same manner and with the same powers as against persons charged with a misdemeanor under the general laws of the state. Whether a prosecution for a violation of a municipal ordinance is in its essential character civil or criminal, this statute provides that it is to be conducted under the forms and in the manner of a criminal prosecution.

Chapter 29 of the criminal code is entitled "Trial of Minor Offenses before Magistrates," and regulates the proceedings of such officials in the exercise of their jurisdiction in all cases of misdemeanors in which the fine cannot exceed $100 and the imprisonment cannot exceed three months. Section 324 provides that the defendant shall have the right of appeal from any judgment imposing fine or imprisonment to the district court of the county, which appeal shall be taken immediately upon the rendition of such judgment, and shall stay all further proceedings thereon. It provides that no appeal shall be granted or proceedings stayed, unless the appellant shall within 24 hours after the rendition of such judgment enter into a recognizance to the people of the state of Nebraska in a sum not less than $100, and with sureties to be fixed and approved by the magistrate before whom such proceedings were had, conditioned for his appearance at the district court at the next term thereof to answer the complaint against him. The magistrate is required to make a return of the proceedings had before him, certifying the complaint and recognizance to the district court on or before the first day of the next term thereof. All of these proceedings are had before the magistrate and in the exercise of his jurisdiction. By section 52, art. I, ch. 14, Comp. St. 1907, the justice in this case was required to proceed against the defendant in the same manner and with the same powers as are provided by said chapter 29. A literal construction of the same would mean that the defendant in this case, upon the rendition of the judgment by the justice, might immediately take an appeal, and within 24 hours enter into a recognizance with sureties to be fixed and approved by the magistrate, and that the magistrate should, when he had approved such sureties, make a transcript of the proceedings and certify the same with the complaint and warrant to the district court on or before the first day of the next term thereof. In doing so, he would proceed in the same manner and with the same powers as against persons charged with a misdemeanor

under the general laws of the state. Sections 325 and 326 of the criminal code regulate the trial of such appeals in the district court; and, while not specifically included in the language of section 52, *supra,* they are so included by necessary implication, for it cannot be supposed that the legislature intended to authorize the steps essential to an appeal to be taken before the justice, without giving the district court power to hear the same. We are therefore of the opinion that all the provisions of chapter 29 of the criminal code are applicable to proceedings had pursuant to the provisions of section 52, art. I, ch. 14, Comp. St. 1907, and that the defendant had a right of appeal. No steps are required of him, except to give the recognizance prescribed, and this he seems to have done within the time and in the manner contemplated by this statute. This was followed by the filing of the transcript by the justice, and perfected his appeal to the district court.

3. The defendant contends that there was error in permitting the state to file an amended complaint in the district court. The complaint filed before the justice charged that the defendant got drunk and disorderly and abused the marshal on the public streets in violation of the village ordinance. The complaint as filed in the district court elaborated the charge made before the justice, but contained no new substantive matter. The first count charged the defendant with disturbing the peace of the village by being intoxicated in public places thereof, and the second count, with using profane and insulting language toward a peace officer of the village while in the discharge of his duties. The amended complaint is drawn with greater particularity, and charges the offenses more in detail, but does not essentially or materially alter the original charge.

We are therefore of the opinion that there is no error in the record, and recommend that the judgment of the district court be affirmed.

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

LOGAN LAMBERT V. STATE OF NEBRASKA.

FILED JANUARY 23, 1908. No. 15,055.

1. **Assault with Intent to Inflict Great Bodily Injury: QUESTION FOR JURY.** The term "great bodily injury," as used in section 17*b* of the criminal code, implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury.

2. ———: PRESUMPTIONS. No wrong, however serious to the person of another, will alone warrant a conviction for an assault with intent to inflict great bodily injury; but, when the injury proved is a natural and necessary consequence of the deliberate and inexcusable act of the accused, the presumption is that it was the result contemplated by him in the commission of the assault.

3. ———: INTENT: EVIDENCE. It is not essential to a conviction for such offense that the accused should have intended the precise injury which followed. It is sufficient if it be shown, beyond a reasonable doubt, by the circumstances under which it was inflicted, together with its nature and extent, that great bodily injury was contemplated by the defendant when he made the assault.

4. ———: INSTRUCTIONS. In a case where there is competent evidence tending to show that the defendant in making the assault was actuated by motives of hatred, ill will or revenge, it is proper for the court to charge the jury that: "If you should find and believe from all of the evidence, beyond a reasonable doubt, that the defendant assaulted the prosecuting witness, at a time when he had no reasonable apprehension of immediate and impending injury to himself, and to accomplish some unlawful purpose, or from a spirit of retaliation or revenge, then he cannot avail himself of the law of self-defense."

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

T. L. Sloan, E. R. Bevins and *Sullivan & Griffin,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

BARNES, C. J.

Logan Lambert, defendant in the court below, was convicted of the crime of assault with intent to commit great bodily injury upon one Joseph Schell, and from a judgment of the district court for Dakota county sentencing him to imprisonment in the penitentiary for the term of one year he has prosecuted error to this court.

Defendant's first contention is that the verdict and judgment are not sustained by the evidence; and the rule that the words "great bodily injury" imply an injury of a graver and more serious character than an ordinary battery is invoked by him in support of his contention. It appears that the prosecuting witness was a Roman Catholic priest, who had charge, under the authority of the bishop of his diocese, of the Indians at the Winnebago reservation in Thurston county, and was living on the reservation at the time the assault in question was committed; that on the 13th day of April, 1905, the prosecuting witness, who for convenience will be hereafter called the priest, went to Dakota City, Nebraska, in company with an Indian, to attend a trial before the county judge of Dakota county, wherein one Ed Luikhart was being prosecuted for having assaulted an Indian of the name of St. Cyr. Luikhart was a brother-in-law of the defendant. The priest attended the trial, but was not a witness. After the trial was over, and about the hour of 2 o'clock in the afternoon, he went to Easton's livery barn, where he had left his team, and requested the man in charge to hitch it up for him. While waiting, he walked leisurely back and forth in front of the buggies in the barn. Owing to the inclemency of the weather, he had on a heavy fur overcoat and cap. While he was thus waiting, the defend-

ant came into the barn, walked back to where the priest was, and said: "Father Schell, could I see you for a moment privately?" The priest said: "Certainly." The defendant suggested that they step back, and they walked back to the second stall on the north side of the barn, and stepped into that stall. The defendant then asked the priest: "What do you think I should do about that trouble I am in, in Omaha?" While the priest was looking down, thinking what he should say in answer to the question, he was struck by the defendant, and knocked down. When he tried to raise his head, he saw the defendant had something in his hand two or three inches long. At this instant he felt a kick in the face, and became unconscious. When he regained his consciousness, he found that his face was bleeding copiously, and his jaw was broken in three places. He was assisted to a private house, and was then taken to a hospital in Sioux City, where he was treated for several weeks. At the time of the trial he had not recovered from his injury; his face being paralyzed on one side from his jaw to his chin.

It is disclosed by the record that the priest had been looking after the welfare of the Indians, and had been active in trying to prevent the unlawful sale of intoxicating liquors to them. The defendant and several of his associates had been engaged in such unlawful sales, commonly called "bootlegging," and the priest had therefore incurred their bitter enmity. According to the testimony, the defendant was an exsaloon-keeper, and had served a short term in the federal penitentiary at Sioux Falls, South Dakota, for introducing intoxicating liquors on the reservation, and the priest had been somewhat active in assisting the prosecution of such offenses. It appears that the defendant assaulted him without warning; that while he was in an attitude of listening to an inquiry he was knocked down, and rendered unconscious, and while in the act of trying to rise from the ground the defendant kicked him in the face. This clearly shows a disposition on the part of the defendant to inflict on his

victim more than an ordinary battery. In any event, the injury inflicted was a very severe one. The priest's jaw was broken in three places, and as a result thereof he was confined to a hospital for several weeks. It also appears that the injury was of a permanent character; that one side of his face, from the jaw to the chin, was paralyzed. This, in connection with the fact that the defendant's brother-in-law had just been charged with assaulting an Indian, that the priest was attending the trial looking after the interest of his charge, that he had been active in bringing the defendant and others who were introducing intoxicating liquors upon the reservation, to justice, shows the motive which prompted the vicious and carefully planned assault. Evidently the jury took the view that the assault was made for the purpose of chastising the priest for the real or imaginary grievance which the defendant and his friends had against him, and with the intention of inflicting upon him great bodily injury. The evidence of the state as to the nature and manner of the assault, if believed by the jury, and the extent of the injury inflicted thereby, was amply sufficient to show an intent on the part of the defendant to inflict great bodily injury upon his victim. The facts of this case are very similar to those in *Murphey v. State*, 43 Neb. 34, where a verdict finding the defendant guilty of assault with intent to inflict great bodily injury was sustained. There the victim of the assault was an aged man, who was knocked down and kicked by the defendant, and the resulting injury was a broken leg; while in the case at bar the victim of the unlawful assault was a nonresistant, a minister of the gospel, whose mission was to teach the doctrine of "peace on earth, good will to men," and whose only fault seems to have been his zeal in trying to prevent the defendant and others from debauching the Indians, whose temporal and spiritual welfare had been committed to his charge. In *Murphey v. State, supra*, it was said: "But, where the injury proved is the natural and necessary consequence of the deliberate and inexcusable act of the ac-

cused, the inference is that it was the result contemplated by him when the assault was committed, and may be sufficient evidence of the specific intent which is essential to a conviction." That the defendant intended to inflict great bodily injury upon the priest may reasonably be inferred from the facts of this case, and the jury were warranted in finding the defendant guilty of the crime charged against him.

Defendant's second contention is that the court erred in giving paragraph 15 of his instructions. It is said that this instruction has been twice condemned by this court. By it the jury were told, in substance, that, if they should find and believe from all of the evidence, beyond a reasonable doubt, that the defendant assaulted Joseph Schell, at a time when he had no reasonable apprehension of immediate and impending injury to himself, and to accomplish some unlawful purpose, or from a spirit of retaliation or revenge, then the defendant could not avail himself of the law of self-defense. We conclude, from an examination of the record, that this instruction was given because the defendant had testified that, when he knocked the priest down, he thought that he was about to be assaulted by him, and believed that it was necessary for him to strike in self-defense. It is true we condemned a like instruction in *Blair v. State,* 72 Neb. 368; not because the instruction was incorrect as a proposition of law, but because there was no evidence in that case upon which to predicate it. In the case at bar, however, it sufficiently appears from the evidence contained in the record that the defendant might have been actuated in his assault upon the priest by hatred, ill will or revenge, and therefore sought the opportunity presented at that time to gratify his feelings by inflicting upon him great bodily injury. So we conclude that the giving of the instruction complained of was proper, in this case, and the judgment of the trial court should not be reversed therefor.

Having thus disposed of the only contentions presented for our consideration by the brief and argument of the

defendant, it follows that the judgment of the district court should be, and is,

AFFIRMED.

SEARLE & CHAPIN LUMBER COMPANY, APPELLANT, V. M. F. JONES ET AL., APPELLEES.

FILED JANUARY 23, 1908. No. 15,056.

1. **Mechanics' Liens: EVIDENCE.** The verified account filed for the purpose of securing a mechanic's lien for material furnished in the erection of a building is no evidence of the delivery of the material or the state of delivery.
2. **Evidence** examined, and *held* insufficient to show the delivery to defendants of certain material.

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

Flansburg & Williams, for appellant.

Hall, Woods & Pound, contra.

DUFFIE, C.

In 1903 M. F. Jones entered into a contract with J. A. Watson to erect for her a dwelling house on lot 8, in block 9, Capitol addition to the city of Lincoln. The plaintiff, the Searle & Chapin Lumber Company, is engaged in the retail lumber business, and furnished Watson the material used in the construction of the Jones dwelling. The last item charged in the account was on September 14, 1903, and consisted of 16 pieces of quarter-sawed oak flooring. The item preceding this last charged was made on September 2, 1903, and plaintiff's claim for a lien was filed November 12 of that year. Suit was brought to foreclose the lien, and the defense made was that the claim for a lien had not been filed within 60 days from furnishing the last material. The defendants assert that the flooring charged under date of September 14 was not delivered.

The district court dismissed the plaintiff's petition, and it has appealed, asking a reversal of the judgment.

One D. E. Green was manager of the plaintiff's yards at the city of Lincoln. He testified that 16 pieces of flooring were sent to the lot upon which the building was being erected, on September 14, 1903, on the order of Watson, the contractor. The driver was furnished with two tickets containing the items to be delivered. One of these he presented to the contractor or other person in charge of the work, who receipted the same, and the driver returned this receipted ticket to the office of the company, where the ticket was used in charging the material described therein to the party to whom delivery was made. C. I. Jones, husband of M. F. Jones, was present at the building when the driver arrived with the flooring. He testified that he is the husband of M. F. Jones, the owner of the premises on which the house was built; that J. A. Watson was the contractor for the building of the house; that he was at the house at the time the lumber was sent out on the 14th; that no part of it was taken from the wagon; that he signed the receipt "exhibit 2"; that the driver came into the building with a ticket, while the wagon stood on the opposite side of the street; that some pieces of lumber were taken from the house and piled on the wagon, and the whole load was then returned to appellant's yard; that the lumber sent out that day was rejected because it was not kiln-dried; that no flooring was used in the house that was not kiln-dried at the N street mill; that this lumber came from the yard, and was not kiln-dried, and Watson told the driver to take it back; that just previous to this he had a conversation with Watson in regard to using the kiln-dried lumber in the dining room, and the lumber on the wagon was not kiln-dried, and for that reason was sent back; that he knows positively of his own knowledge that none of the lumber sent out on the 14th was delivered at the house or on the premises, or even unloaded from the wagon. Jones further testifies that the driver left his team in the street, and

brought the ticket into the house and he signed it, but he could not say whether Watson instructed him to sign it; that not taking up the receipt he had signed was an oversight; that he knows the lumber was hauled away, together with some other material taken from under the porch of the house and loaded on the wagon; that he saw the lumber taken away. Green, the manager, only knows that the flooring was taken from the yard by the driver for delivery at the Jones place, and that the driver returned the receipted ticket, from which the charge was made, but he does not pretend to have any personal knowledge of the delivery of the lumber. In this condition of the case, we think the court was right in accepting the positive evidence of one who was present and knew the facts. So far as appears from the record, the only persons who had personal knowledge of the disposition made of the flooring were Mr. Jones and the driver of the wagon. The latter was not used as a witness, and Jones' evidence is contradicted only by the fact that he allowed his receipt for the flooring to be returned to the office of the lumber company by the driver. That the bookkeeper should charge this item to Watson on the return of the receipt is natural, and a strong presumption in favor of the delivery of the lumber arises from the return of the receipt; but we do not think that it can prevail over the direct and positive evidence of Jones. The charge entered in the books of the company is no proof that the flooring was delivered. If these 16 pieces had been delivered and accepted by the contractor, or other party in charge at the building, the date for filing a lien would date from such delivery, but if no delivery was made, if, as seems most probable from the evidence, the flooring was not accepted, but was returned, then it is evident that there could have been no delivery, and the time for filing a lien would date from the last charge preceding this, which was more than 60 days prior to the filing of the lien.

We recommend an affirmance of the judgment of the district court.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

IONE AMBLER, APPELLANT, V. D. C. PATTERSON, TRUSTEE, APPELLEE.*

FILED JANUARY 23, 1908. No. 15,236.

1. **Tax Deed:** SETTING ASIDE. After confirmation of a sale for delinquent taxes made under the so-called scavenger act, the deed issued to the purchaser will not be set aside on account of irregularity in the levy of the tax, or because an item of void special tax was included in the sale.
2. **Taxation:** NOTICE TO REDEEM. A fair construction of the statute requires that a separate notice to redeem from a tax sale should, when published, be given to the owner of the land sold.
3. ———: ———. A notice running to several different persons, and describing different tracts in which each had a separate interest or ownership, is not sufficient.

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

W. A. Saunders, for appellant.

H. P. Leavitt, contra.

W. H. Herdman and *Charles Battelle, amici curiæ.*

DUFFIE, C.

The plaintiff brought this action to quiet her title to lot 9, in block 16, in Ambler Place, an addition to the city of Omaha. She alleges that the defendant is in possession thereof, claiming title to the same under a tax deed issued by the treasurer of Douglas county under what is known as the "Scavenger Tax Law." The district court sustained

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

a demurrer interposed to the petition, and dismissed the action, and the record has been brought here on appeal.

It is alleged in the petition that on July 1, 1904, a petition was filed in the office of the clerk of the district court for Douglas county, Nebraska, in the form prescribed by chapter 77, art. IX, Comp. St. 1903; that notice thereof was published as provided by section 7 of said act; that in the petition and notice plaintiff's property was described and taxes to the amount of $47.09 claimed as due thereon; that of these taxes $8.69 was for regular city taxes for the years 1894 to 1897, both inclusive; that $2.52 of said taxes was for repairing a sidewalk adjacent to the property. It is further alleged that the sidewalk tax is void for noncompliance with certain provisions of the charter of the city in assessing and levying the same. It is shown that a default decree was entered against the lot in September, 1904, the lot being described as tract No. 2,835, and that subsequently to the entry of said default decree "a notice of sale was published as provided in said act"; that on January 27, 1905, a sale of the lot was made to defendant herein and a certificate duly issued to him. Further it is alleged "that subsequently, on the 3d day of October, 1906, a certain affidavit for publication of final notice was filed in said tax suit, a copy of which is hereto attached marked 'Exhibit 5' and made a part hereof, and thereafter a certain notice, designated as 'Final Notice,' was published in the Omaha Bee, a copy of which, together with proof of publication, was filed in such suit on January 25, 1907, is hereto attached, marked 'Exhibit 6,' and made a part hereof"; that thereafter notice of confirmation was entered in the confirmation record, and an order of confirmation made on February 16, 1907. It is further shown that during all of these proceedings the plaintiff was a nonresident of and absent from the state of Nebraska, and had no actual or personal knowledge of the proceedings. It is also alleged that prior to commencing the action plaintiff had tendered to the defendant the full amount by him paid at tax sale and all subsequent taxes by him

paid upon the lot, together with interest and costs, and that she had tendered to the treasurer of the county the full amount of the county and city taxes charged against said real estate, after crediting the amount paid by the defendant at the time of the sale.

The objection made to the sidewalk tax is that no notice of any kind to construct or repair the sidewalk was ever served upon the plaintiff, who at that time had a known residence in the city; that in respect to the regular taxes of the city, which were delinquent upon the lot when the sale was made, the city council failed to hold a session of not less than five days as a board of equalization to equalize the taxes of said year, and failed to give notice of any sitting or session of the council for said purpose. After confirmation of the sale made under the provisions of the scavenger tax law, no irregularity in the assessment or levy of the tax will operate to avoid the sale. Ample opportunity is offered the owner of real estate to contest the validity of the tax prior to the issuance of the deed. The statute is a public one, and of itself is notice to the taxpayer that any and all objections to the tax assessed against his property must be presented to the court before confirmation of the sale is had. After confirmation the purchaser takes absolute title to the land purchased, and the taxpayer has no remedy to recover his estate, unless he can impeach the proceedings on grounds upon which equity would base relief against a judgment in other cases.

In an *amicus curiæ* brief filed by W. H. Herdman, it is insisted that the notice of sale set out in the petition is insufficient, for the reason that it was not published three consecutive weeks in October, 1904. Section 17 of the act provides for the notice of sale in the following words: "It shall be the duty of the county treasurer of each county in the month of October of each year to cause a notice to be published once a week for three consecutive weeks, in some newspaper published and of general circulation in the county," etc. Comp. St. 1903, ch. 77, art. IX. The

proof of publication found in exhibit 3, attached to the petition, shows that the notice of the sale was published on October 11, 18, and 25, 1904, and it is insisted that the last week of the publication would end November 1, and that the completed publication was not made in the month of October. To us this objection appears extremely technical, and we are satisfied that three successive publications made in a weekly newspaper, each issue of which was published during the month of October, meets the requirements of the statute.

Again, it is insisted that the final notice of redemption is insufficient. Section 33 of the act provides for personal service of notice to redeem upon the resident owners and upon parties in possession of the real estate sold. Section 34 makes provision for such notice to be given to non-resident owners by publication. The notice in this case is headed "Tracts No. 2,820, 2,821, 2,831, 2,835," and is directed to "Fannie Edna Osborn, Ione Ambler, Louisa P. Ambler, owners, and to unknown owners, and to the occupants, of the real estate described below." The real estate described in the notice is lots 1 and 2, in block 15, and lots 1 and 9, in block 16, in Ambler Place. The record does not show, nor is it claimed, that the plaintiff herein was the owner of more than one of these lots, and the question is whether a notice which may be called a "blanket notice," directed to several parties owning several distinct and separate tracts of land, is such a notice as is contemplated by the statute.

The scavenger act provides for the enforcement and collection of delinquent taxes by an action in court. The treasurer is to file a petition embracing a description of all lands delinquent for taxes, each tract to be numbered. While all tracts that are delinquent are embraced in the same petition, the statute makes the action a separate suit against each tract and its owner. Section 6 of the act provides: "The filing of such petition shall operate as the commencement of a separate (several) action against each parcel of real estate shown in the petition,

as well as against every party having or claiming any interest, right, title or claim in, or to, such real estate or any part thereof." Section 14 of the act, among other things, provides: "The court may, on its own motion, or on motion of either party, consolidate all cases and defenses in which the answers present identical issues, provided, cases shall not be consolidated where objection is made by either party." There can be no doubt that we must regard the proceeding as a separate action against each tract of land and against each owner, and that all proceedings had relating to any particular tract, or the owner of such tract, must be regarded as an independent and separate action brought against that tract and the owner thereof. It is true that the purchaser of more than one tract may have the several tracts bid in by him embraced in one certificate of sale, and in one deed when confirmation of the sale is made, but this may be done only because the statute makes special provision therefor. In no other respect can duality of proceeding occur.

An Iowa statute provides for giving notice to the owner of real estate sold for taxes by the holder of the certificate. The effect of embracing several different tracts owned by different parties in one published notice was before the supreme court of that state in *White v. Smith*, 68 Ia. 313, 25 N. W. 115, and it was there said: "The statute provides that the notice shall be given by the 'lawful holder of the certificate of purchase.' It evidently contemplates that a notice shall be given by the holder of each certificate of purchase. A fair construction of the statute requires that a separate notice should be given to the person in possession of or to whom each tract of land was taxed. It is required, we think, that the holder of each certificate of purchase must give a notice which describes only the land therein referred to and states the other statutory requisites. The notice in this case may be well designated as a 'blanket notice,' and such a notice is unknown to the law. A person is not and should not be required to look over fifteen or more descriptions of land to see if any is

described in which he is interested, nor should he be required to look over as many names in a published notice to see whether such notice is directed to him. The notice is insufficient; and, as both deeds are based on the same notice, the right to redeem exists unless no notice was required to be given, which counsel for defendant contend in the case." We fully concur in this reasoning, and believe that each owner is entitled to a separate notice directed to him alone, describing his own land only, and that what the Iowa court terms a "blanket notice" is not sufficient.

Other objections raised in this brief need not be considered, as the petition recites that the matters objected to were done and performed as required by the provisions of the act, and no fact to the contrary is alleged or shown.

Because of the insufficiency of the final notice of redemption, we recommend a reversal of the judgment appealed from.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment appealed from is

REVERSED.

The following opinion on motion for rehearing was filed October 8, 1908. *Rehearing denied:*

DUFFIE, C.

A motion for rehearing, supported by a brief of unusual merit, induced us to order a reargument of the case, and to reexamine the opinion herein, *ante,* p. 570.

The objection urged against the opinion is our holding that a notice running to several different persons and describing different tracts, in which each had a separate interest or ownership, is not sufficient to comply with the statute relating to "final notice" before confirmation of the sale is had. A thorough examination of what is known

as the "Scavenger Act" (Comp. St. 1903, ch. 77, art. IX) convinces us that it was the intention of the legislature to allow the owner of land, against which a decree of sale for delinquent taxes has been entered, every opportunity to save his land, either by paying the amount of the decree prior to a sale, or by redeeming from the sale afterwards made. That the act should receive a liberal construction in favor of the owner to comply with this evident purpose of the legislature should not be denied; and it is our duty to afford the owner the opportunity to redeem his land where full and actual compliance with the statute has not been observed. The language of section 33 of the act, providing for service of a "final notice," is, to our minds, quite conclusive that a separate notice relating only to his own lands should be served on each owner and occupant thereof. It is true that the statute allows a purchaser to have any number of tracts purchased by him embraced in the same certificate, but it would be absurd to hold that the sheriff, in preparing the final notice which he is required to serve upon the owners and occupants of land, should embrace in such notice a hundred or more of such owners, and a like number of tracts belonging to different owners, if the certificate of sale contains that number. While we inadvertently misquoted the language of section 6 of the act, using the word "separate" instead of the word "several" in our former opinion, we cannot escape the conclusion that, while the legislature provided for embracing in one petition all lands upon which taxes were unpaid, it was the intention to deal with the several tracts and the several owners thereof as though a separate action had been filed against each. The language of section 6 implies that this is so: "The filing of such petition shall operate as the commencement of a several action against each parcel of real estate shown in the petition, as well as against every party having or claiming any interest, right, title or claim in, or to, such real estate or any part thereof." If a separate suit had been commenced against each tract and the owner thereof, it would hardly be con-

tended that numerous tracts and numerous owers could be embraced in the same final notice, and it would be unfair to the owner of the land, especially where the notice is given by publication, to require him to examine a list of numerous names to see if his own appears therein, or numerous descriptions of real estate to ascertain whether any of his own lands were among the descriptions. The purpose of the statute was to bring home to the owner by direct notice the fact that his land had been sold and that a last opportunity to redeem was now offered him. Further consideration and reflection has convinced us that our former holding is right, and should be adhered to. Of course, different tracts belonging to the same owner may be included in one notice, as this could have no tendency to mislead him. A rehearing is

DENIED.

FIRST NATIONAL BANK OF PLATTSMOUTH, APPELLEE, V. ALBERT B. GIBSON ET AL., EXECUTORS, APPELLANTS.*

FILED JANUARY 23, 1908. No. 15,145.

1. **Exceptions, Bill of:** MOTION TO QUASH. A bill of exceptions will not be quashed upon the motion of an appellee, to whom it had been properly submitted, because it was not served upon another party to the action.
2. **Fraudulent Conveyances.** The former adjudications of the question here involved examined, and *held* decisive of this case.

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

S. L. Geisthardt, for appellants.

A. N. Sullivan, contra.

EPPERSON, C.

The subject matter of this litigation has been before the courts of this state since 1889. The former opinions con-

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

tain a statement of the facts. See 57 Neb. 246; 60 Neb. 767; 69 Neb. 21; 74 Neb. 232, 236. On the last appeal (74 Neb. 236) the judgment was reversed and the cause remanded. Trial was had, and the First National Bank of Plattsmouth (appellee) was awarded the sum of $2,328.60 against the representatives of Francis N. Gibson, deceased, to pay the bank's judgment against John M. Carter out of the rents and profits of certain lands in Cass county claimed and formerly adjudged to have been fraudulently conveyed to Benjamin A. Gibson, and by the latter to Francis N. Gibson, now deceased.

Appellee filed a motion to quash the bill of exceptions because it was not served upon the administrator of Carter's estate. The administrator was a party to the suit, having been substituted upon Carter's decease. It was decided in *First Nat. Bank v. Gibson*, 69 Neb. 21, that Carter was a necessary party to this action in the court below. It does not necessarily follow that a submission of the bill of exceptions to the administrator is prerequisite to a consideration thereof upon the issues existing between the plaintiff and Gibson. In *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683, it was held: "Where there are two or more principal defendants against whom the plaintiff is seeking to enforce a claim, there being no particular controversy between them, service of the bill of exceptions upon one of such defendants or his attorney within the time fixed by statute will be sufficient." We think the same rule should apply in this case, where there was in fact no controversy between the appellant and his codefendants, Carter and the administrator. A failure of the appellant to serve the bill of exceptions upon all of the appellees was held in *Fitzgerald v. Brandt*, 36 Neb. 683, not to be such a submission as was required by section 311 of the code. But it will be observed that the bill of exceptions was quashed only as to the appellees to whom it was not submitted. In this case the exceptions were submitted to the appellee, and his motion to quash must be overruled.

REVERSED.

Appellants' sole contention is that the bank's right in the present suit to have the rents and profits applied to the satisfaction of its claim could have been determined in the action to set aside the fraudulent conveyance (57 Neb. 246; 60 Neb. 767), and, hence, the judgment in that case is a bar to the relief now sought. This identical question was an issue in this court when this case was here before. As reported in 74 Neb. 232, the conclusions first announced were favorable to defendants' (appellants') present contention. Upon rehearing, the former judgment was vacated (74 Neb. 236), and the conclusion announced there, we consider, resolved this question adversely to appellants. It is there said: "When a conveyance of real estate is set aside as fraudulent at the suit of a creditor, and the land subjected to the lien of his judgment, and is insufficient to pay the judgment, such fraudulent grantee may, in proper proceedings, be compelled to apply upon the judgments the rents and profits of the land which accrued while the land was in his possession under the fraudulent conveyance." And in the opinion we find the following: "If the judgment debtor had transferred current funds to the defendant for the purpose of defrauding his creditors, the creditors, upon making this appear, might in equity recover the amount from the defendant; and so, if, to defraud his creditors, he placed in the hands of the defendant that which would produce value, intending that the proceeds should be placed beyond the reach of his creditors, such proceeds could in equity be reached by the creditors." This court refused to apply to this case the rule contended for by appellants, and, moreover, remanded the case for proceedings in accordance with that opinion. Agreeably thereto a new trial was had, resulting in the judgment appealed from in the instant case.

Appellants amended the eighth defense in their answer referred to by SEDGWICK, J., and the same now sufficiently alleges the bar of the former suit. Appellants contend that for this reason the case now falls within the rule announced in the vacated opinion, reported in 74 Neb. 232.

We do not understand that the opinion was vacated solely for the reason that the bar was not sufficiently pleaded, but because an action in equity would lie to recover the rents and profits; the land previously subjected to the payment of the bank's claim being insufficient therefor.

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

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

AFFIRMED.

The following opinion on rehearing was filed June 26, 1908. *Judgment of affirmance vacated and judgment of district court reversed:*

Res Judicata. "The plea of *res judicata* applies not only to the points upon which the court was required by the parties to pronounce a judgment, but to every point which properly belonged to the subject matter of litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time. This rule is not inflexible, and may yield in cases where a good and valid reason or excuse for the failure to allege the facts and seek relief in the former action is shown, but in the instant case such excuse is neither pleaded nor proved." *First Nat. Bank v. Gibson*, 74 Neb. 232.

REESE, J.

It would serve no good purpose to give an extended history of this case, for the reason that a sufficient statement is contained in the last opinion by Commissioner EPPERSON, *ante*, p. 577, and the many prior opinions upon the case found in the reports. After the filing of the last opinion, a motion for rehearing was filed and sustained, and the cause was rebriefed, reargued, and submitted to the court. That opinion is founded largely upon the last prior opinion written by Chief Justice SEDGWICK, and it was held that that and other opinions and decisions of this court were conclusive of the case upon the contention of defendant that the decree in the prior suit (60 Neb.

767) was a final adjudication of the rights of the parties involved in this suit. The commissioner says: "Appellants' sole contention is that the bank's right in the present suit to have the rents and profits applied to the satisfaction of its claim could have been determined in the action to set aside the fraudulent conveyance (57 Neb. 246; 60 Neb. 767), and, hence, the judgment in that case is a bar to the relief now sought. This identical question was an issue in this court when this case was here before. As reported in 74 Neb. 232, the conclusions first announced were favorable to defendants' (appellants') present contention. Upon rehearing, the former judgment was vacated (74 Neb. 236), and the conclusion announced there, we consider, resolved this question adversely to appellants." It is not deemed necessary to quote further from the opinion, as it consists to considerable extent of quoting the discussion presented by the chief justice. The conclusion is that that last decision is a final adjudication of the point involved, and must be accepted as closing the door upon defendants.

In order to a full understanding of this subject, it is necessary for us to consider the former opinions found in 74 Neb. 232, 236. The former of these opinions was written by Judge LETTON while on the commission. In that opinion it was held that the issues involved and triable in the former suit constituted a bar to this action. After a full discussion of the subject, the commissioner said: "It is unnecessary to discuss any other of the numerous assignments in the briefs of both plaintiff in error and of the appellant, since these considerations dispose of the case. We are of the opinion that the former recovery is a bar to this action, and that the judgment of the district court should be reversed and the cause dismissed." That opinion was approved by the court, and it was ordered that, "for the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause dismissed." The opinion was filed, and the order dismissing the case was made, June 22, 1905. For some reason,

not stated in the report, Judge SEDGWICK did not sit in the case. A motion for rehearing was made and sustained. The grounds assigned for the rehearing were: "(1) That the sole ground upon which the finding of dismissal was based was adjudicated in the former decision of this court, and a conclusion reached in favor of plaintiff. (2) That the sole ground upon which said dismissal is based was not within the issues of the case. (3) That the conclusions reached by the court in this case are in direct conflict with the conclusions reached in the former adjudication. (4) The authorities cited in the opinion do not tend to sustain it."

The final opinion, upon the rehearing, was written by Chief Justice SEDGWICK, and filed January 18, 1906, in which it was held that the question of former adjudication was not sufficiently presented by defendants' answer, and that, under the pleadings, there was no such issue in the case. In the opinion it is said: "There is no sufficient plea in bar in the answer. The petition sets out all the facts in regard to the former action and its results, and in regard to the foreclosure proceedings in the federal court, and the application of the land in payment of the judgment upon those proceedings. These allegations of the petition are admitted in the answer, and there is in the answer what is called the eighth defense, in which it is alleged, 'that the suit brought by the plaintiff against this defendant and commenced on or about the 7th day of August, 1899, was an action in equity, wherein and whereby the plaintiff sought to recover of this defendant all and singular the relief to which the plaintiff was or might be entitled by reason of the several matters and facts in the petition in said suit set forth with reference to said land, and whereby the court awarded to the plaintiff the relief asked by the same, and all and singular the relief herein asked in this petition might have been awarded to the plaintiff in said suit if the plaintiff had established its right thereto; that the plaintiff had full power and opportunity to ask the relief now herein sought,

and the court had full power and authority to grant the same. This defendant alleges that by reason thereof the plaintiff's cause of action herein is barred by a former recovery, and the plaintiff by reason thereof is not now entitled to have and maintain this action.' None of the facts which were supposed to constitute this defense was pleaded in the answer. The plea amounts only to conclusions of law derived from the allegations of the petition. No reply to this defense was necessary."

It is true that other questions are discussed and decided in the opinion, which we need not here notice, but we think enough is here shown to clearly indicate that the question of the former adjudication was not decided, for the reason that it was not sufficiently put in issue by the answer. The opinion of the court, as written by Judge LETTON, when commissioner, fully discusses that question, and decides it in favor of defendant upon the theory that the issue was made and presented in the answer. The judgment of the district court being reversed, and the cause having been remanded for further proceedings, defendants obtained leave in that court to amend their answer, and, the amended pleadings having been filed to meet the requirements of the opinion of the chief justice, the cause was again tried under the new issues, and the question is now before us, if not at the former hearing, for decision. When we consider the opinion by Judge LETTON, holding that the former adjudication was a bar, the judgment of the court thereon, the motion for a rehearing based in part upon the ground that the averments of the answer were not sufficient to present that issue, the opinion of the chief justice, and the holding of the court sustaining plaintiff's contention on that behalf, the subsequent amendment of the answer on that particular subject, its presentation to the district court and to this court, we are persuaded that the former holding well nigh forecloses the subject, and that, as the case now stands, the holding on that decision should be adhered to as covering the conditions now presented. We have carefully considered the

former opinion, the opinions by the chief justice and Commissioner EPPERSON, and are convinced that Judge LETTON'S views were correct, probably upon the issues as then formed, but certainly as they now stand, and that the holding in that case must be reaffirmed and readopted.

Our former judgment is therefore vacated, the former recovery held to be a bar to this action, the judgment of the district court reversed and the cause dismissed.

REVERSED.

LETTON, J., not sitting.

AMANDA E. WETHERELL, APPELLEE, V. FRANK G. ADAMS ET AL., APPELLANTS.*

FILED JANUARY 23, 1908. No. 15,016.

1. **Appeal:** CONFLICTING EVIDENCE: FINDINGS. Where the evidence in the district court consists of oral testimony which is in sharp and irreconcilable conflict, and the conclusion derivable therefrom is dependent in part upon inferences from circumstances, some of which are in dispute, and in part upon the weight and credibility of testimony to be determined from the degree of competency of the witnesses, their opportunity for knowledge and the apparent clearness of their recollection, and the reasons therefor, the findings of the trial judge will be considered in determining the issues in this court. *Cooley v. Rafter*, *ante*, p. 181, followed and approved.
2. **Evidence** examined, and *held* sufficient to support the findings of the trial court.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Martin & Ayres and *John J. Sullivan*, for appellants.

Patterson & Patterson, contra.

GOOD, C.

Plaintiff brought this action in the district court to cancel and set aside a deed of conveyance to 80 acres of land

* Rehearing denied. See opinion, p. 589, *post*.

in Merrick county, and to quiet the title to the premises in her. The defendants, who are husband and wife, answered, alleging title in the husband and asking that his title be quieted. Upon a trial of the issues the district court found in favor of the plaintiff, and entered a decree in conformity with the prayer of her petition, and awarded to the defendants a lien upon the premises for $42 for permanent improvements made by the defendants. From that decree the defendants have appealed to this court.

The appellants, Frank Adams and wife, are the son and daughter-in-law of the appellee. The following is a substantial statement of the facts out of which this controversy arose: Amanda E. Wetherell and her husband separated. Each was the owner of real estate, and upon their separation they entered into a contract whereby each released, or attempted to release, to the other any rights that the respective parties may have been entitled to in the lands of the other by reason of their marital relation. Amanda E. Wetherell owned the 80 acres in controversy, and leased the same unto the appellants, and resided with them. Mrs. Wetherell had two other children, daughters, both of whom were married. It appears that Mrs. Wetherell had promised that the 80 acres in controversy should be given to her son at her death. The rental for the 80 acres was $110 a year, and from her scanty income she was unable to make such repairs and improvements upon her premises as she desired to have thereon. They discussed the question of making these improvements and repairs, and he was willing to make them, provided he was assured that the premises would be given to him at his mother's death. They decided to go to Central City and arrange for drawing such papers as would vest the title to the land in Mr. Adams at her death. On the 20th day of January, 1905, they went to the office of Patterson & Patterson, attorneys at law, in Central City, where Mrs. Wetherell had them prepare a will, which she executed, wherein the premises were devised to Adams. After this was done, it seems that he was still not satisfied, and had

some fears that the contract entered into between Mrs. Wetherell and her husband would not be sufficient to cut off any rights her husband might have in the land, in the event that he should survive her. Thereupon a deed was drawn, signed and acknowledged by Mrs. Wetherell, conveying the premises to Adams, and at the instance of Patterson & Patterson a life lease of the premises from Adams to Mrs. Wetherell was prepared and signed by him. It seems to have been understood and agreed at the office of Patterson & Patterson that the deed and lease were not to be delivered. The will, the deed and the lease were placed in one envelope and given to Mrs. Wetherell. The question arose as to where the papers should be kept. Some one suggested that they should be left in the custody of Patterson & Patterson, but Mrs. Wetherell said that she had a safety deposit box in a bank at Clarks, where she would place them. Thereupon Mrs. Wetherell handed the envelope, containing all the papers, to Adams, asking him to put them in his pocket to carry them home for her, and that on their way home they would stop at Clarks and leave them at the bank. Up to this point there is practically no controversy as to the facts. The appellants claim that after reaching home, and after they had eaten their supper, the papers were read over and examined by them in the presence of Mrs. Wetherell, and that further conversation ensued with reference to the making of the repairs and improvements, and that Adams then claimed that he was unwilling to go ahead and make the repairs unless the deed was delivered to him, and that, thereupon, Mrs. Wetherell consented to his taking the deed. The appellants claim that Mrs. Wetherell requested that the deed should not be recorded, because it might lead to unpleasantness with her married daughters. Mrs. Wetherell denies entirely this conversation, and claims that she never delivered the deed, nor authorized the delivery, and that she entrusted the papers to Adams to place in her box in the bank at Clarks. In the month of June following Mrs. Wetherell assigned to Adams a fire insurance policy

covering a part of the buildings upon the premises. At this point it should be remarked that Mrs. Wetherell was practically blind and unable to read, and she claims that she did not know that she was assigning her policy of insurance to her son, but believed that it was a new insurance policy which was being taken out, and which, she was informed, it was necessary for her to sign. The appellants both claim that the assignment was read over to her and that she fully understood it. In December following this a disagreement arose between Mrs. Wetherell and her daughter-in-law, and Mrs. Wetherell left the home of her son and went to the home of one of her married daughters. Thereupon the son caused the deed to be recorded. Mrs. Wetherell's daughter saw in the newspaper the reported transfer of the real estate and informed her mother, who immediately instituted this action to cancel the deed and quiet the title.

It will be seen that this action hinges upon the question as to whether or not there was a delivery of the deed by Mrs. Wetherell to her son. There is a sharp and irreconcilable conflict in the testimony. It appears that Adams made certain improvements upon the premises in the way of a workshop, planting some trees and some tame grass seed, and papering and painting the interior of the house, and that he paid the taxes upon the land for the year 1905. All that he did in this respect would be consistent with the claim of Mrs. Wetherell that he was to make the improvements upon the understanding that he was to have the property at the death of his mother. There are certain circumstances that tend to corroborate Mrs. Wetherell's testimony. It would seem that Adams was entirely satisfied to make the improvements and repairs if he could be assured that the land would be his at his mother's death. To accomplish this purpose her will was executed. He seems then to have had some fears of the claims of Mr. Wetherell, and for that reason desired the deed. This deed was signed and acknowledged, but it was agreed between them that it should not be delivered until Mrs.

Wetherell's death. While it is, perhaps, plain that this deed had no efficacy while undelivered, yet it was sufficient to satisfy Mr. Adams, and it is not apparent that anything came up, or any new information came to him, to cause him to change his mind. It is somewhat singular, then, that if he was satisfied to make the repairs and improvements on the condition that he was to have the land at his mother's death, and believing that this was accomplished by the will and the deed, he should then refuse to make the repairs and improvements until the deed was delivered to him. Again, the evidence indicates that Mr. Adams was a man of intelligence, and he appears to have been very cautious and prudent in his dealings with his mother. It is somewhat singular that one so prudent and cautious should permit the insurance policy to stand for five months without being assigned. And if, as he asserts, Mrs. Wetherell consented that the deed should be delivered, and that he should do with it as he pleased, it is somewhat remarkable that one so cautious and careful should not have had the deed recorded for eleven months after its delivery. There was also evidence of the fact that Mr. Adams had had access upon one or more occasions to Mrs. Wetherell's private box in which she kept her papers in the bank at Clarks. Under all these circumstances, we do not think it can be said that the evidence preponderates in favor of the appellants. The burden of proof was upon the appellee. The evidence was in direct conflict. The witnesses were personally before the trial judge, who had an opportunity to judge of their fairness and candor; and these facts were, doubtless, considered by the trial court in finding the issues in favor of the appellee.

While the parties to this suit are entitled to a trial *de novo* in this court, yet this court has held, in *Cooley v. Rafter, ante,* p. 181: "The rules laid down by this court for its guidance in such cases in *Faulkner v. Simms*, 68 Neb. 299, as well as in subsequent cases decided under the present statute, are sound and indispensable to the due

administration of justice. The trial judge, who knows the parties and who personally presided over the examination of the witnesses and observed their demeanor, is far more competent, in most cases, to weigh their testimony and deduce correct conclusions therefrom than can this court be, having before it nothing more than an unresponsive written record. The findings of the trial court in such cases will be considered in determining the issues in this court. The whole evidence, however, will be examined, and the issues determined anew." We are in entire accord with this statement of the law, and think that it is peculiarly applicable to the case at bar, and that under this holding we cannot conscientiously say that there was any error in the findings of the trial court.

The judgment of the trial court is amply supported by the evidence, and we therefore recommend that it be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

The following opinion on motion for rehearing was filed June 4, 1908. *Rehearing denied:*

Judgment: CONCLUSIVENESS. Where the validity of a certain deed was the sole issue tried in an action *quia timet*, a decree of the court "that the title to said premises be forever quieted in said plaintiff" will not bar defendants from asserting rights to possession or title acquired by virtue of other contracts.

EPPERSON, C.

A statement of the facts may be found in the opinion, *ante*, p. 584. Plaintiff's action is founded entirely upon the alleged surreptitious possession by defendants of the deed in controversy. In their answer defendants pleaded the delivery of the deed to them. The evidence, however, discloses that at the time of the execution of the deed the

defendants were in possession of the land under a lease which expires March 1, 1909. This lease apparently was superseded by a contract of the parties contemporaneous with the execution of the deed. Plaintiff agreed to devise the land in controversy to her son, the defendant Frank G. Adams, and during plaintiff's lifetime defendants were to have possession, use and control of the land, for which they were to pay plaintiff $110 annually during her lifetime, and in addition thereto agreed to make certain improvements upon the land. The court decreed "that the title to the said premises be forever quieted in said plaintiff."

It is now contended upon a motion for a rehearing that the decree of the court which we affirmed will bar the defendants from asserting whatever right or title they may have under the contract above referred to. We considered that defendants' right to the land derived from the possession of the deed only was pleaded, tried or determined, and the decree of the court only quiets and confirms the plaintiff's title as against the deed, which it is adjudged was never delivered. The judgment must not be taken as a bar to whatever rights the defendants have or may have hereafter under the contract of the plaintiff to devise the land to her son, nor under the contract for possession during her lifetime.

With this construction placed upon the decree of the court it is apparent that a rehearing is unnecessary, and we recommend that the defendants' motion be denied.

By the Court: For the reason given in the foregoing opinion, defendants' motion for rehearing is

OVERRULED.

G. SAM ROGERS, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JANUARY 23, 1908. No. 15,371.

1. **Cities: CONTRACTS: VALIDITY.** Where a municipal corporation enters into a contract which, under the existing law, it was authorized to make, but where the procedure laid down by the statute was not followed, the contract is not *ultra vires*, but irregular, and the contractor or his assignee may maintain an action to recover a remainder due upon such contract.

2. **Limitation of Actions: ACKNOWLEDGMENT OF DEBT.** A warrant issued by the proper authorities of the city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and a promise to pay, and arrests the running of the statute of limitations.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

H. E. Burnam, I. J. Dunn and *John A. Rine,* for appellant.

W. A. Saunders and *E. C. Strode, contra.*

GOOD, C.

This is an action to recover from the city of Omaha a balance on a contract for grading a part of Mason street in that city, and is for the second time before this court for consideration. The former opinion appears in 76 Neb. 187, where a sufficient statement of the facts will be found. After the cause was reversed and remanded, a second trial was had in the district court, resulting in a judgment for the plaintiff, and from that judgment the defendant has appealed.

The second trial in the district court was upon the same issues that were presented in the first, and the same issues are now involved that were presented when the case was first before us. Several questions are argued with much earnestness in the very able and elaborate brief of the appellant, but the case must be disposed of upon the ques-

tions decided in the former opinion. The soundness of the rulings in the former opinion on both the questions that the contract was not *ultra vires* and that the action was not barred by the statute of limitations is vigorously assailed, and we are asked to disapprove the former holdings. In effect, we are asked on this appeal to grant a rehearing on the questions disposed of in the former opinion. We have reexamined the questions presented upon the former hearing and again presented in this appeal, and have reached the same conclusions that were reached in the former opinion.

Appellant urges most strenuously that the city council did not have the power to make the contract until a petition, signed by the owners of a majority of the foot frontage, had been filed asking for a change of grade, and that until such petition had been filed the action of the mayor and council in awarding the contract was not within their power, and the contract was therefore *ultra vires*. In this view we cannot concur. The power to change the grade of the street was vested by statute in the mayor and council. No new legislation was necessary to authorize such action. The power to change the grade is conferred by section 109, ch. 12*a*, Comp. St. 1903. Said section and the ones immediately following prescribe the manner of exercising this power. As long as the city was authorized to change the grade of the street under the legislation then existing, it cannot be properly said that, because the manner of exercising that power laid down by the statute was not strictly followed, the action of the mayor and council was *ultra vires*. Properly speaking, *ultra vires* contracts of a municipal corporation are such as the corporation has no power to make under any circumstances or for any purpose. A contract of a municipal corporation is *ultra vires* in its proper sense when it has no power under the existing legislation under any circumstances to enter into such contract. Such a contract, of course, is wholly void and gives rise to no rights. The objection to such a contract is not merely that the corporation should not have

made it, but that it had no power to make it. But, in the case at bar, by the statute then existing the mayor and council were given the power to change the grade of the street and to award contracts for perfecting such change. Where the municipal corporation has the power to make the contract, but fails to follow the procedure laid down by the law for making of the contract, it cannot properly be said to be *ultra vires* and void, but is merely irregular. Such was the former holding, and we believe it to be sound, and it should be adhered to.

With reference to the statute of limitations, appellant contends that that question was not decided by the trial court on the first trial, and that it was not properly before this court upon the former hearing. However that may be, it does not in anywise affect the correctness of the holding. In the case of *City of Omaha v. Clarke,* 66 Neb. 33, cited in the former opinion, it was held that, where an award had been made by the proper city officers upon a claim for damages, the statute did not begin to run until the time of the filing of the award, and that such award was a record obligation in writing on which an action would lie for five years. In the case of *Abrahams v. City of Omaha, ante,* p. 271, it was held that a warrant issued by the proper authorities of the city in consideration of a valid indebtedness against it is a written acknowledgment of such indebtedness and a promise to pay it, and arrests the running of the statute of limitations. So far as the statute of limitations is concerned, that case is identical with this one. In both actions warrants were issued against a special fund which had never been created, and where the city became liable upon a contract obligation. The holding in that case is conclusive in this case. The action was not barred by the statute of limitations.

It follows that the judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

ACME HARVESTER COMPANY, APPELLEE, V. HENRY H. CARROLL, APPELLANT.

FILED JANUARY 23, 1908. No. 14,976.

1. **Sales:** RESCISSION. "A harvesting machine was sold under a warranty which provided that 'if it could not be made to work well it would be taken back if returned immediately to the agent of whom purchased and the cash payment refunded and the notes given therefor returned.' *Held*, That after the purchaser had used the machine a part of two harvests he could not rescind the contract, even though the machine failed to comply with the warranty." *Clark v. Deering & Co.*, 29 Neb. 293, reaffirmed.

2. **Evidence** examined, and *held* to fully sustain the findings and judgment of the district court.

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

A. N. Sullivan, for appellant.

Matthew Gering, contra.

FAWCETT, C.

This action was brought by appellee against appellant, Henry H. Carroll, and his wife, Carrie, upon a promissory note, dated June 13, 1903, given to appellee for a combined reaper and header, purchased on that date from appellee by appellant, Henry H. Carroll. Defendant, Carrie Carroll, interposed the defense of coverture, which was sustained by the trial court, so that the case now before us stands upon the appeal of Henry H. Carroll from the judgment against him on the note referred to.

One of appellant's assignments of error is "miscon-

duct of appellant's (appellee's) attorney." An examination of the record fails to disclose any evidence to convict appellee's attorney of such charge. Counsel for appellant argues the questions of "accident and surprise," "newly discovered evidence," and "the measure of damages." As none of these three alleged errors appear in the assignment of errors, filed as required by rule 34, they cannot be considered. *Erck v. Omaha Nat. Bank,* 43 Neb. 613; *Raker v. State,* 50 Neb. 502; *Phœnix Ins. Co. v. King,* 54 Neb. 630.

This leaves for consideration the questions as to whether the judgment is sustained by sufficient evidence, and whether or not the law has been properly applied to the evidence. The case was tried to the court without the intervention of a jury, and its findings, upon the questions of fact presented by the evidence, cannot be disturbed unless they are clearly wrong. The record disclosed that appellant purchased the machine under written contract, reading as follows: "All our machines are warranted to be well made, of good material, and, with proper usage and management, to do good work. If, in one day's trial, any machine does not perform as above, the purchaser agrees to notify Acme Harvester Company, at its principal office at Peoria, Ill., and the agent from whom he purchased the machine, by registered letter or telegram, and allow them time to get to the machine and remedy the defect, if there be any (if it be of such a nature that a remedy cannot be suggested by letter), the purchaser rendering necessary and friendly assistance. If the machine cannot be made to fill the warranty, it shall be returned by the purchaser to the place where received, and another furnished which shall perform the work, or the money and notes which shall have been given for same returned, and no further claim made on Acme Harvester Company. It is further mutually understood and agreed that continued possession of said machine after the expiration of the time named in the above warranty shall be evidence of fulfillment of the warranty to the full satisfaction of the purchaser, who agrees thereafter to make no further claim on

Acme Harvester Company; and further, that any alterations or erasures made in the above warranty, or in this special understanding and agreement, are unauthorized and void."

Without going into the evidence in detail, it is sufficient to say that the machine was shipped by appellee to appellant's farm in Kansas; that appellee sent an expert to set up the machine and put it in operation; that appellant used it during the entire harvest of 1903, and again during the harvest of 1904. Appellant testifies that during this time the machine did not do good work; that he made numerous complaints to appellee, and that, by reason of the unsatisfactory or bad working of the machine, he lost a portion of his crop in 1903, and again in 1904, the value of which crops, together with other expenses incurred by him, he seeks to recover of appellee as damages resulting from the failure of the warranty. The evidence also shows that he never returned the machine to appellee, nor to the agent from whom he purchased it, but kept and used it, and that it was still upon his premises at the time of the suit; that an agent of appellee made three trips to appellant's place in Kansas in the summer of 1904, but was never able to find appellant at home; that on one of those trips he took with him an expert to put the machine in order; that they examined the machine, and could discover nothing wrong with it, except a few breakages, the total repairs of which would cost not to exceed $7 or $8; that he told appellant's son, a young man 20 or 21 years of age, that he would be in a little town nearby for several days, and that if his father would come in and pay the note he would give him all the repairs he needed, but that appellant never called for such repairs, and never has paid the note.

We think the evidence also fairly shows, not only that appellant never in fact returned the machine to the company or to the agent from who he purchased it, but that he never even offered to return it until after the maturity of the note and when payment thereof was demanded by ap-

pellee's representative. We think the findings and judgment of the court are fully sustained by the evidence and were in strict conformity to the law governing such a case. *Sycamore Marsh Harvester Mfg. Co. v. Sturm*, 13 Neb. 210; *Edgerly v. Gardner*, 9 Neb. 130; *Clark v. Deering & Co.*, 29 Neb. 293.

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

AMES and CALKINS, CC., concur.

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

AFFIRMED.

FIRST NATIONAL BANK OF COLUMBUS, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED JANUARY 23, 1908. No. 14,974.

A public office cannot be created, and its powers, duties and emoluments prescribed, by concurrent resolution.

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

W. T. Thompson, Attorney General, and *W. B. Rose,* for appellant.

Reeder & Hobart and *J. J. Sullivan, contra.*

AMES, C.

The legislature adopted in 1897 a measure entitled "Concurrent Resolution," and having prefixed thereto the usual enacting clause. After a series of preambulatory "whereases," it is by this measure "resolved by the house of representatives, the senate concurring therein, that the governor be and is hereby authorized to appoint a committee of three competent persons whose duty it shall be to carry

out the intent and purpose of this resolution." Such intent and purpose is thereupon recited to be to "ask the assistance of the interstate commerce commission" and boards of railroad commissioners of certain sister states and of the territory of Oklahoma in procuring for the citizens of said states and territory (and of this state also, we presume) "just and equitable freight rates, and if necessary, as a last resort, to consider the propriety of building an interstate railroad to the Gulf of Mexico." It was further "resolved, that said committee shall receive a compensation not to exceed three dollars and actual expenses for each day's service, which claims for services and expenses shall not be valid until the same shall be examined and approved by the governor." The measure was, after its passage, signed by the presiding officer of each house and presented to and approved by the governor. Shortly afterwards the governor appointed Warwick Saunders and two other persons to serve as such committee, and Saunders at various dates and times during the summer of 1897 presented to the governor itemized claims for "salary" and expenses to which he deemed himself entitled, and which the governor certified in writing to having examined and found correct, and which the latter approved as valid claims against the state, accrued pursuant to the resolution. These claims, thus certified, Saunders embodied in duly executed vouchers which he presented to the auditor of public accounts, from whom he demanded warrants in payment therefor upon the state treasurer. The auditor rejected the claims, which were thereupon assigned by Saunders to the plaintiff, the First National Bank of Columbus, Nebraska, and the latter appealed from the decision of the auditor to the district court for Lancaster county. Upon this state of facts, which is admitted by the pleadings, the court reversed the decision of the auditor and rendered a judgment in favor of the plaintiff for the aggregate sum of $455.57. The state, by the attorney general, appealed to this court.

The task of exposition has been considerably abridged

by an agreement by counsel, implied in their briefs and explicit in oral argument, that if the object of the resolution is one which requires for its accomplishment the enactment of a public law, as distinguished from a temporary legislative or administrative regulation, the judgment appealed from is erroneous. That it is such we entertain no doubt. It is not now necessary to attempt the formulation of a general rule for the ascertainment of those things whch may or may not be done by concurrent resolution, but we think it quite safe to say that one of the things which cannot so be done is the creation of a public office and endowing it with powers and duties and emoluments or compensation. Such a measure is one which affects or may affect the public and private interests, the life, liberty and property of every citizen, and it can be enacted, if at all, only by public law. An appropriate title for the measure under consideration would have been "A bill for an act creating a commission to solicit the aid of the interstate commerce commission and of the railroad commissions of Kansas, Texas and the territory of Oklahoma for the procurement of equitable freight rates for the citizens of said states and territory and to consider the propriety of building an interstate railroad to the Gulf of Mexico." There is nothing contained in this measure that is regulatory of any existing office or institution, or that purports to control or direct the conduct of, or to confer any powers or duties upon, any existing functionary; but it attempts to create an independent official body, a sort of gubernatorial commission, somewhat analogous to the English royal commission, but for whose functions and compensation legislative provision was deemed to be requisite because of the deprivation of the office of governor of the remnant of qualified legislative power pertaining to kingly prerogatives. No time is fixed within which the commission shall expire, and the methods it shall adopt and the expenses it shall incur are, subject to the approval of the governor, left to their sole discretion. The governor is given no power to discharge them, and they

are not required to make any official report of the results of their inquiry, and it is left solely to his discretion and approval what amount of expense they shall incur or for what immediate purposes, which, apparently, may extend to the procurement of surveys, drawings and estimates by engineers, proposals by railway contractors, and the exploitation of the market for railway securities; or, on the other hand, the solicitation of assistance may be limited to four postal cards at a total expense of four cents, and the consideration of "the propriety" of gulf railway construction to silent philosophical contemplation.

Whether such a body, with such vague and indefinite powers, wholly free from control or responsibility, and of perpetual duration, can constitutionally be created by any form of legislation, we do not express an opinion; but we are convinced that such a feat cannot be accomplished by a mere concurrent resolution, and we therefore recommend that the judgment of the district court be reversed and the proceeding dismissed.

FAWCETT and CALKINS, CC., concur.

By the Court: We concur in the conclusion reached in the foregoing opinion, and the judgment of the district court is reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

BENJAMIN F. MOORE, APPELLANT, V. ROBERT F. NEECE ET AL., APPELLEES.

FILED JANUARY 23, 1908. No. 15,030.

Statutes: VALIDITY. When the legislative journals show affirmatively that a bill which has passed one house has been amended in the other before final passage thereby, and that such amendments have not been concurred in by the house in which the measure originated, and also show affirmatively that such amendments

have not been receded from with the assent of a majority of all the members elected to the house by which they were made, the bill is void as a measure of legislation.

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

Allen G. Fisher, for appellant.

R. L. Wilhite and *M. F. Harrington, contra.*

AMES, C.

In January, 1903, defendants Robert F. and Margaret Neece, for the purpose of securing payment of part of the purchase price of a tract of land conveyed to the latter, executed and delivered to the vendor, the defendant Allison, their negotiable promissory note, payable four years after date, with interest at the rate of 7 per cent. per annum payable annually, and also executed and delivered a mortgage upon the land conditioned for the payment of the note, and containing a covenant to the effect that upon default in payment of any instalment of interest the holder of the note might declare the whole amount of principal and accrued interest due and payable, and enforce the mortgage by foreclosure accordingly. In July of the same year Allison, the payee, for a valuable consideration indorsed and delivered the note and assigned the mortgage to the plaintiff, who has since remained and now is the owner thereof. In May, 1904, default having occurred in the payment of the first instalment of interest reserved by the note, the plaintiff exercised the option expressed in the covenant above mentioned, and began an action for a foreclosure of the mortgage, making parties thereto both the defendants Neece, and their grantees of the premises, and Allison the indorser. This action proceeded regularly to decree, sale and confirmation. At the time of the confirmation the amount of the proceeds of the sale applicable to the payment of the mortgage debt was deficient of the amount of the latter, with accrued interest,

in the sum of $10,192.73, and the court at that time made and entered, on the application of the plaintiff, an order that he be permitted to withdraw the note from the files, "and that the plaintiff herein, Benjamin F. Moore, be and is hereby granted and adjudged the right and authority to commence an original action on said note, so withdrawn from the files of this court, against Robert F. Neece and Margaret Neece, as makers thereof, and Peter Allison, as indorser thereon, for the recovery of any deficiency or residue that may remain unpaid on said note after the proper application of the proceeds of said sale of real estate thereon." This action was brought pursuant to the foregoing order, which is recited in the petition. There is no dispute about the facts. The defendant Allison filed an answer, but it differs from the petition only in the respect that it recites the foregoing facts somewhat more fully than does the latter. The defendants Neece filed separate answers, each to the same effect as the foregoing. Upon a trial before the court there was a judgment for the defendants, from which the plaintiff appealed.

The litigation involves two questions with respect to chapter 95, laws 1897, entitled "An act to repeal sections 847 and 849 of the code of civil procedure relating to deficiency judgments, and to amend section 848 of said code of civil procedure by striking out the last five words of said section, namely: 'unless authorized by the court.'" The first of these questions relates to the validity of the said chapter, having reference to its form and the manner of its passage, and the second relates to its interpretation and effect, if it is valid. The former of these questions has given rise to several inquiries, the first of which in natural order seems to be whether the measure passed the two houses in such manner that it can be affirmed that in its present form it expresses the joint will of a constitutional majority of each. Under the rules adopted by former decisions of this court this question can be determined only by an examination of the journals of the two houses.

The history of the measure, as disclosed by the record, is as follows: The bill was introduced in the senate and read a first time as senate file No. 108 on the 20th day of January, 1897. On subsequent days of the session it went duly and regularly through the usual and necessary stages of consideration in that body, and on the 19th day of March was read a third time and put upon its passage and passed by an affirmative vote of 21 senators. On the following day it was reported to and read a first time in the house of representatives, and on the next day read a second time and referred to general file. On March 25, the committee of the whole house reported the bill back with mention of amendment, but with a recommendation that it be indefinitely postponed. Thereupon a motion was made that the report of the committee be not concurred in, "but that the original bill as printed and without any amendments be ordered to a third reading." A point of order was made against this motion "that a motion to amend a bill or strike out a portion of such bill, when the report of the committee of the whole was before the house, was not in order." The point of order was overruled, and the motion, being put, was defeated by a vote of 47 to 46; 6 members being absent or not voting. On March 31 the bill was read a third time, and the speaker announced that, it "having been read at large on three different days, and the same with all its amendments having been printed, the question is: 'Shall the bill pass?'" There were 58 votes in the affirmative and 24 in the negative, and 17 members were absent or not voting, and the measure was duly declared passed. On the 1st day of April the senate voted to nonconcur "in the house amendments to senate file 108," and on the same day this action was by the secretary of that body reported to the house. On the next day, April 2, a motion to recede from the house amendments received 43 affirmative and 39 negative votes; 17 members being absent or not voting. The motion was declared carried, and so reported to the senate by the clerk of the house. The bill with the customary certifi-

cates was then signed by the presiding officers of the two houses and presented to the governor for his consideration.

This record can leave no reasonable doubt in any mind familiar with it that the bill was amended by the house after its passage by the senate and that the amendments were not concurred in by the latter body. What was the number or nature of those amendments we are without sufficient knowledge upon which to base even a conjecture. But we do know that the number of absentees, both on the vote on the final passage in the house and on the vote therein to recede from the amendments, was the same, namely, 17. And we know, also, that with the exception of 5 members the absentees on both occasions were the same persons, and that on the passage of the bill 4 of these 5 persons voted in the affirmative and 1 in the negative. Now, if we suppose these 5 persons to have been present when the vote to recede was taken, and to have voted to the same practical intent and purpose to which they did vote on the final passage, the number of affirmative votes on the motion to recede would have been increased to 47 and the negative to 40. It is a demonstration, therefore, that 11 members who voted "aye" on the final passage voted "nay" on the motion to recede. The presumption is, therefore, well-nigh irresistible that by these 11 members the amendments were regarded as of so great importance as to be decisive of their votes on both occasions, and, if the latter had been absent or cast in the negative when the bill was upon final passage, that measure would have received but 47 affirmative votes and would have been defeated. It is not unfair to assume that the 4 absentees on the last occasion, who voted "aye" on final passage, would, if they had been present, have swelled the negative vote to 43, and the motion to recede would have failed for want of a majority of the votes cast thereon. This last assumption is strengthened by the fact that the motion to order the bill to a third reading without amendment was lost by a vote of 51 to 32, and that of those then voting with the majority 9 were members who were absent

when the vote was taken on the motion to recede. Presumably, therefore, if all these 9 persons had been present on the latter occasion the negative vote would have been increased from 39 to 48. Of the remaining 8 members, 3 were absent on both occasions. If the still 5 remaining absentees had been present and had voted for the motion to recede, the total affirmative vote would have been but 48 and the motion would still have been lost for want of a majority voting thereon.

The governor did not exercise his power to veto, but neither did he approve the bill, but he transmitted it to the secretary of state, by whom it was certified and published in the printed volume of laws of the session. But it is clear to a demonstration that the measure, as so filed and published, was never assented to by a majority of the members elect of both houses of the legislature, and, in our opinion, the inevitable consequence is that it has never become a law. To put the matter briefly: It is clear from the record, beyond doubt or cavil, that a majority of all the members elected to the house expressly refused to pass the bill without the amendments, and the record shows with equal conclusiveness that such a majority never retracted that refusal. In *Hull v. Miller*, 4 Neb. 503, it was held, in effect, that, when the journal of either house recites that amendments made by the other have been submitted to a vote and have been concurred in, the presumption is that the recital is true and the requisite vote has been cast in their favor, and that it is not necessary for that purpose that the roll of members shall be called and their votes entered upon the record; but this is not equivalent to holding that, when the journal discloses that the roll was called and the vote was recorded, and the evidence thus furnished is conclusive that a majority of the members elect did not assent, the concurrence of a majority of those present and voting is sufficient for the adoption of the amendments. Such a rule would violate the spirit, if not the letter, of the constitution. Provisions of the greatest importance and

of far-reaching effect are frequently brought into legislative bills by amendment. A majority of the members elected to each house constitute a quorum for the transaction of business. If the contention of counsel for appellees is upheld, then the affirmative vote of 26 members of the house or of 9 in the senate is sufficient for the adoption of such amendments, although the journals show affirmatively that 25 members in one case and 8 senators in the other are present and vote in the negative. If this practice can be upheld as valid legislation, the requirement of section 10, art. III of the constitution, that "no bill shall be passed unless by assent of a majority of all the members elected," etc., may easily be evaded and will soon become of little practical force or effect. Of course, the same considerations prevail, with even greater reason, with respect to the vote requisite for recession from amendments after they have been formally incorporated into a bill and have been solemnly adopted by a vote on final passage. To permit less than a constitutional majority afterwards to eliminate them from the bill by a vote of recession would be to defeat the manifest object of the constitutional provision, which is to require the concurrence of a prescribed majority of each house in every measure of legislation.

The conclusion thus reached disposes of this appeal, and dispenses with a decision of the remaining questions raised and argued by counsel, none of which is likely to recur in this case.

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

FAWCETT and CALKINS, CC., concur.

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

REVERSED.

H. F. CADY LUMBER COMPANY, APPELLEE, V. WILSON STEAM BOILER COMPANY, APPELLANT.

FILED JANUARY 23, 1908. No. 15.045.

1. **Appeal:** VERDICT: EVIDENCE. When a verdict of a jury is found from conflicting testimony, this court will not inquire into the preponderance of the evidence.
2. **Trial:** EVIDENCE: OBJECTIONS. An objection that a question is leading, incompetent, immaterial and irrelevant is not equivalent to an objection that the party is seeking thereby to discredit or impeach his own witness.
3. **Witnesses:** IMPEACHMENT. It is within the discretion of the trial judge to allow counsel to ask a witness called by him, who takes him by surprise by his testimony, whether the witness had not at a prior time made a statement to him contradictory of or inconsistent therewith.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

W. J. Connell, for appellant.

Baldrige & De Bord, contra.

AMES, C.

The petition in this case alleges, in substance, that the defendant was indebted to Johnson & McAllister, a partnership, in the sum of $680 for goods sold and delivered by the latter to the former, and that on the 21st day of February, 1903, Johnson & McAllister for a valuable consideration assigned the claim in writing to the plaintiff, and that on the same day notice of the assignment was given to the debtor, but that the latter had neglected and refused to pay thereon any further or greater sum than $404.05, leaving due and unpaid the sum of $222.75, for which plaintiff prayed judgment. The discrepancy is due to a mistake in computation, which is not in dispute and does not require explanation. The answer admits that at some prior time, not stated, the defendant had been in-

debted to Johnson & McAllister in some unspecified amount, but prior to the making of the "pretended assignment" pleaded in the petition the indebtedness had been fully paid by the defendant to Johnson & McAllister, and that subsequently thereto the defendant had by their direction paid to the plaintiff the sum of $404.05. Proof of payment was attempted to be made by evidence tending to show that before the defendant had notice of the assignment it had, by the direction and authority of Johnson & McAllister, paid the sum in dispute to and for the use of the latter to certain of their creditors. There is no dispute that at about that time the defendant made payment by such direction to certain of such creditors to the amount stated, but whether before or after receiving notice of the assignment is disputed. The plaintiff had a verdict and judgment, and the defendant appealed.

The evidence is largely circumstantial, and each party contends with equal ardor and sincerity that it is so overwhelmingly in support of his side of the issues as to be practically without conflict. For that reason the plaintiff maintains that the verdict returned is the only one that could be permitted to stand, and for the same reason the defendant insists that the same verdict is wholly without support by the evidence. The arguments are about equally balanced, and there appears to us to be no great preponderance of the evidence on either side, and so the question seems to be one peculiarly within the province of the jury to decide. The examination of the witnesses, which is very long, we do not think it necessary to set out in this opinion. We have made such an examination of the record as to satisfy us that the evidence is conflicting within the meaning of the rule above alluded to. Neither do we feel called upon to set out the instructions, to the giving and refusal of which the defendant excepted. Suffice it to say that none of them appear to us to have been prejudicially misleading or to have been likely to confuse the jury in determining the very simple fact in issue.

Smith, a member of a partnership which was a creditor

of Johnson & McAllister, to which the defendant claims to have made a payment on the day before the date of the assignment, was an unwilling witness for the plaintiff. He testified, among other things, that the payment in question was made by a check which was not presented to the bank on which it was drawn, and cashed, until the 29th day of May, but that he had no recollection and did not know when it was dated or when it was delivered to his firm. But he was the bookkeeper of his firm, and his ledger account book was produced and showed it to have been received on May 28, more than three months after the date of the assignment, and he testified generally that his books were correctly kept. But before this last incident happened he was asked on direct examination if he had not, within 25 minutes previously, stated to counsel for plaintiff that the check was given on May 28. The question was objected to by the following language: "I object to the question, now that it is allowed by the court, as an improper question, as an attempt to entrap his witness making a statement contrary to what he has already made, and for the reason that it is leading, and that no statement or claim has been made by counsel, nor has any foundation been laid, that will permit, authorize or justify the asking of any such question of this witness, and for the further reason that it is incompetent, irrelevant and immaterial." The objection was overruled, and the witness answered: "I think I made that statement to Mr. Baldrige at the recess. That is my recollection." Leading, the question undoubtedly was, but the admission of leading questions is largely within the discretion of the trial court; the fact that they are such affecting only the weight and credibility of the testimony elicited by them. We do not think that in this case the court abused its discretion in this regard. *St. Joseph & G. I. R. Co. v. Hedges,* 44 Neb. 448; *City of Harvard v. Stiles,* 54 Neb. 26; *Schmelling v. State,* 57 Neb. 562. Was it relevant or material that the witness stated out of court that he recol-

lected an alleged fact of which he professed, a few minutes later, when on the witness stand, to have no recollection? Incompetent, in connection with the answer given as affecting the credibility of the witness, it certainly was not, because it is incredible that his memory on the stand would have been a blank concerning a fact that he recollected and related a few minutes before. It was competent, as being such a question as is always treated as such for the purpose of laying the foundation for an impeachment; and such a question is not legally or technically, although it may be strictly, irrelevant or immaterial. The real reason for exclusion, if any, is that it is not such a question as counsel for the plaintiff was entitled to ask his own witness, although he would have had a right under precisely the same circumstances to ask exactly the same question of the same witness, if the latter had been produced and sworn at the instance of the defendant; but that objection, or its equivalent, was not made, and so was waived. But it is by no means certain that even this objection would have been valid, if taken. As a preliminary to the question, the witness was told by counsel that its object was to refresh the recollection of the former, and so undoubtedly the latter would have been bound by the answer, that is, would not have been permitted to dispute the witness had he denied the statement referred to. The authorities do not appear to be quite uniform as respects such a situation, but the weight of them seems to be to the effect that in such circumstances the question is, in the discretion of the trial court, admissible for the purpose of eliciting the truth from a confused or unwilling witness, and in the absence of abuse is not reversible error. *People v. Payne*, 13 Mich. 474; *Dallas C. E. Street R. Co. v. McAllister*, 41 Tex. Civ. App. 131, 90 S. W. 933; *Smith v. State*, 46 Tex. Cr. Rep. 267, 81 S. W. 936; *State v. Cummins*, 76 Ia. 133; 30 Am. & Eng. Ency. Law (2d ed.), 1130-1132, and notes.

We are satisfied that the defendant suffered no prejudice, and that the record is free from other error, and

recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

WILLIAM A. CATE V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1908. No. 15,205.

1. **Criminal Law**: CONTINUANCE. The right of a defendant to continuance on account of the unforeseen and unavoidable absence of his counsel depends largely upon the nature of the case, his diligence, and the inability to procure other counsel in time properly to prepare for the trial, and, unless the discretion of the trial court in refusing the continuance has been abused, a reviewing court will not interfere.

2. ———: WITNESSES. DISCRETION OF COURT. Where a number of witnesses have testified to a fact which is not in dispute, the trial court may, in the exercise of a reasonable discretion, limit the number of witnesses testifying in regard to same.

3. ———: INSTRUCTIONS. Instructions must be construed together, and, even though a certain portion standing alone may not be technically correct, yet if, taken as a whole, they set forth the law applicable to the issues and the evidence they will be upheld.

4. ———: ———: INSANITY. Under the proofs in this case, *held* it was not error for the court to omit to instruct as to the defense of insanity, no instruction having been requested by defendant on that point.

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

Halleck F. Rose and *Wilmer B. Comstock*, for plaintiff in error.

W. T. Thompson, Attorney General, Grant G. Martin, J. T. Dysart and *W. F. Buck, contra.*

LETTON, J.

At the January, 1907, term of the district court for Nuckolls county the defendant was convicted upon the charge of making an assault upon and stabbing one Lee Gress with intent to wound. From this judgment of conviction he prosecutes error to this court.

The information contained two counts; the first charging stabbing with intent to wound, and the second stabbing with intent to kill. The jury found him guilty of the charge in the first count, and acquitted him of the charge in the second count. The defendant, Dr. William A. Cate, is a practicing physician at Nelson, Nebraska. The complaining witness, Lee Gress, is a farmer residing a few miles from that place. Cate had been the family physician for Gress, and had rendered services in that capacity for which a balance was owing him from Gress. The doctor was about to take a trip for the benefit of his wife's health, and was attempting to collect money due him to produce funds for that purpose. A day or two before the assault Mrs. Gress was in Nelson, and he spoke to her with reference to the account, asking her to give a note for the balance due. On the day of the assault he met Gress upon the street, told him he would like to speak with him, and led the way to the side window of a drug store on the level of the street, where Gress sat upon the window sill and the doctor stood or leaned at the side of the window. According to the witnesses for the state, the doctor asked Gress to pay his account or give a note for it, and when Gress refused to do this he applied an opprobrious epithet to Gress and struck or pushed his fist in Gress' face several times. Gress rose to his feet, threw off his overcoat and a blouse which he was wearing, and, just as this was done, was struck a violent blow with a pocket knife in the hands of the doctor. The knife penetrated his clothing, went through a pocket memorandum book, and entered his body, striking a rib near the region of the heart. He was almost immediately again struck a blow

in the side, which penetrated the pleural cavity. Another blow cut through the front of the cap which he was wearing, and struck about half an inch above and to the right of his eye. Gress, in the meantime, had been trying to strike Cate, but did not succeed until after these wounds were inflicted, when he struck him a severe blow in the mouth, knocking him to the sidewalk. This terminated the affray. There were a number of persons standing nearby. Enoch Gress, a brother of Lee Gress, at the time the quarrel began was standing with some others upon the sidewalk toward the east end of the building. He had a pocket knife in his hand, with which he was figuring on or boring into the wall. When he heard the words applied by the doctor to his brother, he moved toward the combatants, dropping his knife into his pocket as he did so, but before he reached them Cate had been knocked down by Lee. When the doctor was striking Lee Gress with the knife, Gress called out, "Somebody give me a knife," but did not obtain a knife from his brother, and was unarmed during the assault. The evidence of the defendant's witnesses, except that of the defendant himself, as to the essential points, varies but little from that of those of the state, the variance apparently depending largely upon their different points of view of the affray. Dr. Cate testifies that, after he and Gress had had some words, while Gress was sitting in the window, Gress arose and threw off his overcoat; that at that time Enoch Gress came rapidly toward them with a knife; that Lee Gress asked for the knife, and, he thought, got it from Enoch; that Gress then struck him a blow which dazed him; that he then went to fighting, and that he has no recollection or knowledge of having struck Gress with the knife, and that, if he did so, it was done while he was in this dazed condition. Some of the witnesses for the defense say that, after the quarrel began, Enoch went toward Lee, saying, "not to take that off of him"; that Lee then took off his coat, told Enoch to give him his knife, and that the doctor then said, "You will take your knife, will you? I have got a knife too," and the

doctor then took his knife out of his pocket, and the fight began. But on cross-examination no witness testified that Lee Gress ever had a knife, or ever received one from his brother, or that Enoch had a knife in his hand when he reached the point where Lee and the doctor were. From a careful reading of the evidence, we are convinced that it was ample to warrant the jury in coming to the conclusion that the defendant was guilty of a malicious assault upon Lee Gress with intent to wound him.

1. It is contended that the court erred in refusing to continue the case to permit of the attendance of one of defendant's counsel, who resided in Kansas City and who was detained by the sickness of one of his family. The information in this case was filed on March 28, 1905. In November of that year a trial was had at which the jury disagreed. From that time for more than a year the case was pending, and the record does not show the cause of the delay. On November 20, 1906, the case came up for hearing upon the application of the defendant for a continuance, and the case was continued until January 14, 1907. On the 15th of January, on defendant's application, the case was again postponed to January 23 "to allow defendant time to procure counsel to take the place of his attorney G. W. Stubbs," and the sheriff was directed to call 35 talesmen to appear at that time for the trial of the case. The record does not show upon what ground the case was continued from November 20 to January 14, except that it was at the request of the defendant. On the 23d of January he again applied for a continuance, upon the ground that Honorable G. W. Stubbs, of Kansas City, who was his leading counsel, was unable to attend the trial for the following reasons, shown by Judge Stubbs' affidavit, viz.: That his little daughter was taken sick before the 14th of January; that on the 14th the physician in attendance advised him that he might safely leave home; that he reached Nelson on Tuesday morning, the 15th, but was immediately advised that his child was much worse and called back to Kansas City; that her condition is

now such that he cannot at present leave her bedside, but that, if the trial is delayed two or three weeks, he believes he will be able to be present and assist in the trial; that the defendant could not procure other counsel between the time when it was apparent that he could not be present and the date that the case was set for trial, so that such counsel might be of any material value in the trial of the case. This application was overruled, and exception taken. It appears that Mr. H. H. Mauck, counsel for defendant, who tried the case, had been engaged as one of defendant's counsel for a long time; that the probability of Judge Stubbs being unable to attend the trial had been anticipated at the time of the application for the continuance on January 15, and that a week's continuance had been granted, in order to allow defendant to procure other counsel, if necessary. The evidence in the case was simple, consisting mostly of the statements of eye-witneses to the transaction, and, so far as the examination shows, all the facts bearing upon the question of the defendant's guilt or innocence seem to have been brought out at the trial by Mr. Mauck. It is no doubt true that, if a defendant has been surprised by the unforeseen and unavoidable absence of his counsel, which may result in serious prejudice to him, a new trial may in some cases properly be allowed; but this depends largely upon the nature of the case and the inability to procure other counsel in time for the trial, and, unless the discretion of the trial judge has been abused, a reviewing court will not interfere. The defendant knew that 35 talesmen had been summoned from the body of the county to attend for the trial of his case on the 23d, and that a continuance had been granted so as to allow him to procure other counsel in the event that Judge Stubbs was unable to attend. He apparently took no steps to avail himself of the time allowed him for this purpose, but preferred to take the chances of the little girl improving so that his counsel could attend, or, on the other hand, trying the case with Mr. Mauck, who was fully cognizant of the facts. We think no error was committed

by the trial court in overruling the motion for a further continuance.

2. Error is assigned on the refusal to allow the witness Schaffer to testify. Several witnesses were called by the defendant to testify to the fact that after the occurrence the defendant bore evidence of having received a severe blow upon the mouth, and also that there was an abrasion upon his cheek, apparently for the purpose of contradicting Gress' testimony that he only struck the doctor once during the affray. The record is as follows on this point: "Alma Schaffer is called as a witness by the defendant. Court: Is this witness on the same subject? Mr. Mauck: Yes, sir. Court: You need not call any more witnesses on that point. Defendant excepts." A number of cases have been cited which hold that a court may not arbitrarily determine the number of witnesses to be called upon a given point. As a general principle this may be said to be the law. The principle, however, is subject to many exceptions. Where a number of witnesses are called and have testified to a point that is not disputed, it is unnecessary to take up the time of the court with more of such testimony. The blow on the mouth was admitted, and the fact that there was an abrasion upon the doctor's cheek was not disputed by the state. It is true Gress testified that he only struck one blow, and that that blow knocked the doctor to the ground; but neither he nor any other witness for the state denied or disputed the fact that the doctor's cheek showed an abrasion afterwards. The matter was largely within the reasonable discretion of the trial court, and we think no error was committed; moreover, no offer was made to prove the facts as to which this witness was called to testify.

3. The definition of malice in instruction No. 11 is complained of. Instruction 11 is as follows: "Malice in its legal sense denotes that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. It means any wilful or corrupt intention of the mind; and, as applied to this

case, if you shall be satisfied by all the evidence, beyond a reasonable doubt, that the defendant, without just cause or excuse, committed the offense charged in manner and form as charged in the information, then it was done with malice, or maliciously." This instruction is, in substance, identical with that approved in *Housh v. State,* 43 Neb. 161, and *McVey v. State,* 57 Neb. 471, and we see no reason to change the rule, though we think a better statement would have been "any wilful *and* corrupt intention of the mind," instead of using the disjunctive. This definition, or one substantially the same, has been adopted by many other courts. See 25 Cyc. 1667, notes 83, 84. The instruction must be read as a whole and considered in connection with the charge in the information, and, thus considered, it is a fair statement of the law applicable to the case.

4. Complaint is made of the giving of the third instruction, and of the supplemental instructions given at the request of the jury. Instructions must be construed together. In instruction 1, section 16 of the criminal code, the violation of which is charged in the information, is set forth, as also is section 17, relating to assault and battery. By instruction 3 the jury were told, in substance, that they may find the defendant guilty of malicious stabbing and cutting with intent to wound, as charged in the first count, or with intent to kill, as charged in the second count, the intent being the only difference in the two counts, or that they might find the defendant guilty of assault and battery. In the supplemental instructions they were told that section 16 is the law on which the information is based in both counts, and that under section 17, if they found the defendant not guilty of the greater charge, they will lawfully find him guilty, if the evidence justifies, of a less grade of the offense, as is explained in instruction 3. We find no error in this.

5. With regard to the complaint with reference to no instruction having been given as to the defense of insanity, we think counsel for t defense were in nowise to blame

for not requesting an instruction attempting to excuse the assault upon that ground. While it may not have been error to give such instruction, if requested, the proofs can hardly be said to require the court to submit such defense or to warrant the jury in giving it much consideration.

6. It is urged that the court erred in excluding testimony as to the permanent character of the injury to the defendant, caused by the blow on the mouth. While the objection to the question asking Dr. Buffington what the effect of the blow upon Dr. Cate was as to the permanency of the injury was sustained, the witness immediately thereafter testified "that at the point of the depression there was an injury to the spine that remains." The state moved to strike this answer out, but it was permitted to stand. We think the court took the proper view in holding that the permanency of the injury inflicted by the blow upon the mouth had no relevancy to the issue which was being tried, but, even if it had any bearing, the evidence as to its permanent nature was eventually brought before the jury as just stated.

Lastly, it is urged that the evidence is insufficient to justify or excuse conviction of a felony. We have carefully read the entire bill of exceptions, and are forced to come to the conclusion that, however, much to be regretted the consequences to the defendant and to his family may be, the conviction must be sustained. It was apparently by the merest accident that the wounds inflicted on the body of Lee Gress did not reach a vital spot, and the defendant is to be congratulated that the result was not much more serious. The trial court seems to have carefully preserved all the defendant's rights, and we think no prejudicial error is to be found in the record.

The judgment of the district court is

AFFIRMED.

CARL E. CARSON V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1908. No. 15,123.

1. **Criminal Law:** PRELIMINARY EXAMINATION: FINDING. A complaint was filed before an examining magistrate charging plaintiff in error with maliciously killing and destroying 14 certain hogs of the value of $120, the personal property of a person named in the complaint as the owner thereof. A warrant was issued, plaintiff in error was arrested, and an examination had, in which he was held to appear at the next term of the district court. He gave the required recognizance, and was discharged from custody. In the docket entry of the examining magistrate a history of the case was given, and it was recited that, "after hearing the testimony of the witnesses, and being fully advised in the premises, the court finds that there is probable cause to believe that the defendant is guilty as charged in the complaint. It is therefore considered by me that the defendant give bond in the sum of $500 for his appearance" at the next term of the district court, etc. *Held*, That this sufficiently showed that the magistrate found that an offense had been committed.

2. ———: VERDICT: REVIEW. Upon the trial there was a sharp conflict between the testimony of the witnesses for the state and those on behalf of the defense. If the jury believed the witnesses produced by the state there was sufficient evidence to sustain a verdict finding the accused guilty. They being the sole judges of the weight of the evidence, their finding cannot be molested.

3. ———: INFORMATION: VARIANCE. The information charged the malicious killing and destruction of 14 certain hogs of the value of $120, the offense charged to have been committed on the 5th day of May, 1906. The evidence tended to show that 5 hogs were killed on the 23d day of April, 1906, the value of which was found to be $44.17, the offense proven being identified as the one charged in the information. *Held*, That the verdict responded to the charge in the information.

4. ———: EVIDENCE OF VALUE. There was a conflict in the evidence as to the size and weight of the hogs alleged to have been killed and destroyed. A witness, a dealer in live stock, was called by the prosecution and asked as to the value of the hogs on the date of the alleged offense, specific weights being given in the question and which corresponded with the weights testified to by some of the witnesses. The answer of the witness was given stating the value to be a certain price per hundredweight, leaving the jury to decide as to the weight of the hogs. *Held*, No error.

5. ———: MALICE: QUESTION FOR JURY. The question as to whether the acts charged, if committed, were maliciously done was one of fact for the jury to decide from all the evidence upon that part of the case.

6. ———: INSTRUCTIONS: REVIEW. In order to obtain a review of instructions given to a trial jury by the court, it is necessary that the record show that exceptions were taken to the instructions of which complaint is made.

ERROR to the district court for Greeley county: JAMES R. HANNA, JUDGE. *Affirmed.*

J. R. Swain, T. P. Lanigan and *George A. Adams*, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

REESE, J.

A complaint was filed before the county judge of Greeley county charging the plaintiff in error with the crime of wilfully, unlawfully and maliciously killing, wounding and destroying 14 hogs of the value of $120, the personal property of Patrick McManaman. A preliminary examination was had, which resulted in the accused being recognized to the district court. Upon the conclusion of the preliminary examination the county judge made the following entry in his docket: "After hearing the testimony of the witnesses, and being fully advised in the premises, the court finds that there is probable cause to believe the defendant is guilty as charged in the complaint. It is therefore considered by me that the defendant give bond in the sum of $500 for his appearance in the district court for Greeley county, Nebraska, on the first day of the fall term thereof, to wit, October 22, 1906." Plaintiff in error entered into the required recognizance, and the case was certified to the district court. The county attorney filed his information, whereupon plaintiff in error filed his motion to quash the information, which being overruled, he presented a plea in abatement, to which the county at-

torney demurred. The demurrer was sustained. Plaintiff in error excepted to the ruling in both instances.

The point presented by both the motion to quash and the plea in abatement was that no sufficient preliminary examination had been had, because there was no finding by the county judge that an offense had been committed, no reference to that subject being found in the entry of the decision by him. It is contended by plaintiff in error that such a finding is jurisdictional, that it should be entered in the docket of the examining magistrate, and that in its absence the county attorney had no authority to file the information or prosecute the case. The portion of the statute bearing upon this subject is found in section 302 of the criminal code. It is provided: "If, upon the whole examination, it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed," etc. In Clark, Criminal Procedure, p. 81, it is said: "In such jurisdictions, where the statute requires the examining justice to hold the accused to answer, when he is satisfied that an offense has been committed, and that there is probable cause to believe the accused guilty, it has been held that the decision of the justice on these points is a judicial determination necessary to the jurisdiction of the higher court, and that an information filed in the higher court before any return has been made, showing such a decision by the justice, should be quashed, and this, notwithstanding a proper return is made pending the motion to quash"—citing *People v. Evans,* 72 Mich. 367. In the case cited it is said: "The statute requires the justice, after 'an examination of the whole matter,' to come to an opinion as to whether or not an offense has been committed; and, if of opinion that there has been, then as to whether there is probable cause to believe the accused guilty thereof, and thereupon to discharge or hold him to answer according to the conclusion reached; and it is only when the conclusion reached by the justice, after an examination of the whole matter,

is that an offense has been committed, and that there is probable cause to believe the accused guilty thereof, and so certified to the circuit court, that an information may be filed. This conclusion or opinion of the justice is a judicial determination, and the basis of the right to proceed in the circuit court by filing information"—citing *People v. Annis,* 13 Mich. 511; *Turner v. People,* 33 Mich. 363; and *Yaner v. People,* 34 Mich. 286.

We have been unable to see that the case of *People v. Annis, supra,* touches the question involved; but in *Turner v. People, supra,* the decision is the other way, the holding being that it is not necessary for the examining magistrate to state his findings in his docket, the court saying: "But no record of a specific finding one way or the other is required to be kept or certified to the circuit court." In the latter case (*Yaner v. People*) the precise question is not decided, yet the logic of the case seems to support the text in Clark.

The contention of the attorney general is that the entry of the county judge that "the court finds that there is probable cause to believe that the defendant is guilty as charged in the complaint" is a sufficient finding that the offense has been committed, and that all the requirements of the statute have been met. This was probably the view taken by the district court. We are not aware of any decision having been made upon the precise point by this court, and therefore have no aid from previous expressions of the court. We are of the opinion that, if the statute requires such entry to be made in the magistrate's docket, the entry is sufficient to give the district court jurisdiction. The entry is substantially a copy of the form given in Maxwell, Criminal Procedure, p. 16, except that the name of the accused is not here used; the form being: "On consideration whereof I find that there is probable cause to believe that C D committed the offense charged in said complaint." It is true that before an accused can be legally held to answer a criminal charge upon information he is entitled to a preliminary examination, and there must

be proof and a judicial determination that an offense had been committed and that there was probable cause to believe the defendant guilty as charged in the complaint. But that does not conclusively argue that it is necessary, in the absence of a statute requiring it, that these findings should be entered, technically, or at all, upon the docket. Jurisdiction having been obtained, the preliminary examination had, and the accused recognized to the district court would probably be enough to be shown by the record to confer jurisdiction upon the prosecuting attorney to file the information and upon the district court to try the accused.

A jury trial was had in the district court, which resulted in a verdict finding plaintiff in error guilty as charged in the information, and finding the value of the hogs killed to be $44.17. A motion for a new trial was filed and overruled, and plaintiff in error was sentenced to imprisonment for 15 months in the penitentiary. From that judgment he prosecutes error to this court. The petition in error is of great length, but few of the assigned errors are discussed in the briefs upon which the case is submitted. All others will be considered as waived, and will not be noticed.

It is first insisted that the evidence was not sufficient to sustain the verdict. This contention is based largely upon the fact that there was a sharp conflict in the testimony of the witnesses, and that some of the witnesses produced by the state were unworthy of belief, and that in some instances their testimony was self-contradictory. We have carefully read the bill of exceptions, and find that in some particulars the contention of plaintiff in error is well founded. Indeed, were the question of plaintiff in error's guilt to be passed upon by us, sitting as a trier of fact, we might hesitate to hold that the guilt of plaintiff in error had been established beyond a reasonable doubt; but that question was submitted to and passed upon by the jury. The witnesses were before the jurors, their conduct and demeanor were observed by them, and their

apparent truthfulness was for the jury to consider, they being the sole judges of the weight to be given to the testimony of each witness. If they believed the statements of the principal witnesses for the state, as they must have done in order to find the verdict of guilty, the verdict must be held to be conclusive.

It is contended that the verdict does not respond to the charge in the information, as the information charges the killing of 14 hogs on the 5th day of May, 1906, and all the evidence submitted relates to the killing of hogs on the 23d day of April of the same year, and the proof showed but 5 hogs killed on that date. It is well settled in this and other courts that the precise date upon which an offense is committed is not a material matter, subject to two conditions: That the offense must have been alleged and proved to have been committed within the time within which a prosecution may be had, and that the offense proved must be identified as the one charged. This case seems to have been brought within these rules. The fact that the jury found that 5 hogs were killed instead of 14, as charged, and the value to be $44.17 instead of $120, as charged, is not a matter of which plaintiff in error can complain.

It is contended that the district court erred in permitting a witness, who was a dealer in live stock and had knowledge as to the values in the market at the time the crime was said to have been committed, to testify as to the value of hogs of a certain weight at that time; the contention being that the weights named in the question were not based upon the evidence adduced at the trial. While we think that there was not a material departure from the testimony of the witnesses as to the quality and weight of the hogs, yet we observe that the answer of the witness was that "they would be worth on the market that day" about $5.70 a hundred pounds. This left to the jury the question as to what the weights were, with a price per hundred, to be used as a basis for ascertaining the value of the property. The answer of the witness was

responsive to the question as framed, and we cannot see that the court erred in allowing the witness to answer. The fact that the jury found the value to be the sum fixed by the witness in computing 775 pounds at $5.70 a hundred, or $44.17, seems to indicate that they found the weight to be as stated in the question.

It is next claimed that the evidence failed to show that plaintiff in error entertained any malice as against the owner of the property at the time it is said he shot and killed the hogs. This was a question for the jury. To say nothing of the mere fact of killing the stock, if done wantonly, being proof of malice, if the jury believed the testimony of the witness Bolden, who claimed and testified that he witnessed the killing, as they must have done in order to return the verdict of guilty, the declarations of the plaintiff in error at the time of the killing were sufficient to show personal malice against the owner. The testimony of this witness, briefly stated, was to the effect that the stock killed were trespassing on the farm of one Mrs. Lamb, for whom plaintiff in error was working in repairing a fence; that plaintiff in error and Bolden went to where the hogs were, and that plaintiff in error began shooting them, and at the same time making threats against the owner, should he object or retaliate. This, if true, would be sufficient proof of malice.

Instructions numbered 8, 10 and 18 are sharply criticised by counsel for plaintiff in error. These instructions were given by the court upon its own motion, and none of them was excepted to, and therefore we cannot, properly, consider them. However, we have examined them, and cannot see that they misstated the law.

Finding no reversible error in the record of which complaint is made, it follows that the judgment of the district court must be, and is,

AFFIRMED.

MARY A. TRAINOR ET AL., APPELLANTS, V. MAVERICK LOAN & TRUST COMPANY, APPELLEE.

FILED FEBRUARY 6, 1908. No. 15,002.

1. **Constitutional Law:** TAXATION. An act for levying taxes and providing the means of enforcement is within the unquestionable power of the legislature.
2. **Due process of law** does not necessarily require a judicial hearing in matters of taxation.

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

William Mitchell, for appellants.

C. Patterson, contra.

DUFFIE, C.

The plaintiffs are the only heirs at law of Wiliam Trainor, deceased. The deceased was the owner of the northeast quarter of section 34, township 25, of range 47, in Box Butte county, Nebraska. The taxes assessed against said land for the year 1902 were not paid, and the defendant at the regular tax sale, held November 2, 1903, purchased the same for the delinquent taxes thereon. Due notice of the expiration of the time to redeem was given by the defendant, and the parties interested in the estate failed to redeem from the tax sale. The treasurer of Box Butte county, upon the surrender of the tax sale certificate, made a deed to the defendant for the said premises, under which it claims to be the owner of the land. In their petition the plaintiffs allege the foregoing facts, and further state that prior to the commencement of this action they tendered to the defendant the full amount of the taxes for which the land was sold, together with the subsequent taxes paid thereon, with interest and costs, and that they made a like tender to the treasurer of Box Butte county; that the defendant refused to recognize the right of the plaintiffs to redeem from the tax sale, whereupon

they brought this action asking that the tax deed be canceled and set aside upon the payment to the defendant of such amount as the court may find it entitled to receive on account of its purchase of the premises and of subsequent taxes paid thereon. A demurrer to this petition was interposed by the defendant and sustained by the trial court. Plaintiffs elected to stand on their petition, and the court thereupon entered judgment dismissing the petition and awarding costs to the defendant. The appeal is taken from this judgment.

Plaintiffs do not complain of any illegality in the tax for which the land was sold, nor of any irregularity in the sale, or of the proceedings leading up to the making of the tax deed. The complaint is that a sale of real estate made by the treasurer of the county, for delinquent taxes, in the absence of some proceeding in court is unconstitutional and void; that it is an attempt on the part of the legislature to deprive the plaintiffs of their property without due process of law. It has never been held that the state may not adopt summary or even stringent measures for the collection of taxes, so long as they are administrative in their character, and it was never held that such proceedings are open to the objection that they divest the citizen of his property without due process of law. While one is to be protected in his interests by the "law of the land," and to have the judgment of his peers in those cases in which it has immemorially existed, or in which it has been expressly given by law, there is no decision to be found that it is necessary for judicial action in every case for which the property of the citizen may be taken for the public use. On the contrary, a legislative act for that purpose, when clearly within the limits of legislative authority, is of itself of the law of the land. *Spencer v. Merchant*, 125 U. S. 345. An act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. *Kelly v. Pittsburg*, 104 U. S. 78. Due process of law does not necessarily require a judicial hearing in matters of taxa-

tion. *State v. Sponaugle,* 45 W. Va. 415. "The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe." Cooley, Taxation (3d. ed.), 54; *Leigh v. Green,* 64 Neb. 533, 193 U. S. 79; *Woodrough v. Douglas County,* 71 Neb. 354. The fact that the taxes for which the land was sold were levied under the law in force in 1902, and that the sale was had under the provisions of the revenue law enacted in 1903, cannot inure to the plaintiffs' advantage, as section 242 of the later act (Comp. St., ch. 77, art. I) reserves to the state and to all parties every right accruing to them under the law in force prior to the enactment of the last mentioned act.

The district court did not err in sustaining the demurrer to plaintiffs' petition, and we recommend an affirmance of the judgment appealed from.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

STATE, EX REL. JOHN W. MCDONALD, APPELLANT, V. J. C. FARRINGTON ET AL., APPELLEES.

FILED FEBRUARY 6, 1908. No. 15,298.

1. **County Board:** ALLOWANCE OF CLAIMS. The allowance by the board of county commissioners of a claim against the county, there being no money in the treasury at the time, and no tax levy against which a warrant can be drawn, while it may be irregular, is not in excess of the power given the board to examine and settle all claims against the county.

2. ———: ———: LIMITATIONS. The duty of the board of county commissioners to provide for the payment of all allowed claims, where such allowance is not absolutely void, is a continuing duty against which the statute of limitations is no defense.

APPEAL from the district court for Dawes county: JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

S. L. Geisthardt and *Roscoe Pound,* for appellant.

Albert W. Crites and *J. E. Porter, contra.*

DUFFIE, C.

The plaintiff asks a writ of mandamus commanding the defendants, three of whom are the county commissioners of Dawes county, and the fourth, the clerk of said county, to revise their estimates and levy for the year 1904, and to include in their estimates and levy of taxes an amount sufficient to pay the claims of the relator against the county, together with interest thereon, not exceeding in the aggregate the amount limited by law for such estimates and levy. A demurrer was interposed to this petition and submitted to the district court for Dawes county on April 24, 1905, and was by the court held under advisement until January 10, 1907, when the decision of the judge presiding at the hearing was, at his request, announced by the Honorable W. H. Westover, also a judge of that court, and judgment was entered dismissing the petition. Plaintiff has appealed.

It is shown in the petition, and admitted by the demurrer, that during the years 1892 and 1893 the county of Dawes became indebted to various persons on account of salaries and office expenses of county officers, witness fees, court costs in county and state cases, supplies furnished to the county, taking care of paupers, repairing county property, and the like. There is no claim that this indebtedness was not honestly incurred for actual services rendered, and supplies furnished; indeed, it is freely admitted by the county that the claims were all legally incurred, and constitute a moral obligation against the county. At various sessions of the board of county commissioners during the years 1892 and 1893 all the claims referred to in the petition were presented to the county board, examined

and allowed, and warrants were issued and delivered to the holders of these claims. The warrants were in the ordinary form, showing on their face the purported amount of the levy for the fund on which drawn, and the amount already drawn on such fund, which in each instance was less than 85 per cent. of the amount of the funds as shown on the face of the warrant. These warrants were subsequently sold, and after passing through one or more hands became the property of the National Life Insurance Company, of Montpelier, Vermont, and this company continued to hold them until some time during the year 1903, when it transferred them to the relator, who had become liable for their payment under a guarantee made to the insurance company at the time it purchased them. The warrants were all registered for nonpayment, and have never been paid. The county board of Dawes county has made several ineffectual efforts to provide for their payment. At a regular session of the board for making estimates for the year 1896 an estimate in the sum of $4,500 was made to pay outstanding warrants, including those in question, and a tax was levied for their payment. The county board further transferred to the general fund money in the hands of the treasurer to the credit of the bridge and other funds, in which there was a surplus, for the purpose of retiring these warrants. The tax levy made in 1896 was enjoined by the Grand Island & Wyoming Central Railroad Company. On appeal taken to this court from the judgment of the district court enjoining such levy, the judgment of the district court was affirmed. *Grand Island & W. C. R. Co. v. Dawes County,* 62 Neb. 44. After this the National Life Insurance Company, in the year 1899, brought suit against the county on these and other warrants, and in that action the district court adjudged that the warrants here in controversy were void, because prior warrants had been issued against the funds on which drawn in excess of 85 per cent. of the levy. This judgment was affirmed by this court January 7, 1903. *National Life Ins. Co. v. Dawes County,* 67 Neb. 40. After the decision in the case

last mentioned, and before the meeting of the board for making the annual estimates for the expenses for the year 1904, the relator made a demand upon the board that it include in the estimate for expenses for that year an amount sufficient to pay the claims represented by these illegal warrants, and to make a levy to raise a fund to pay such claims. A further demand was made upon the board prior to the annual levy for 1904 to raise a fund on which valid warrants might be drawn to pay these claims. The board refused to comply with either of these demands. The petition further recites that on January 30, 1904, there was cash in the general fund of Dawes county in the sum of $1,170.85, and that at all times since there has been in the general fund an amount sufficient to pay a portion of the relator's claims; that the assessed valuation of all the property in the county was sufficient to enable the county board to make a levy to pay all the expenses of the county, and in addition an amount sufficient to pay the claims of the relator.

In support of the judgment of the district court the defendant makes two contentions: First, that there has never been any valid allowance of the claims held by the relator, because when said claims were allowed there were no unexpended funds against which warrants might be drawn; and, second, that the relator's cause of action is barred by the statutes of limitations. If the allowance of these claims made by the county board in 1892 and 1893 was valid, then they stand as a liability against the county in the nature of a judgment. It was held in *Taylor v. Davey*, 55 Neb. 153: "An order of a county board allowing or rejecting claims against the county has the force and effect of a judgment, and is conclusive unless vacated or reversed on appeal." This being so, the duty of the county to provide for the payment of a judgment is a continuing duty against which the statute of limitations could not operate. The material question then is: Did the county board of Dawes county have jurisdiction to audit and allow these claims at the time they were audited and allowed;

there being no money in the fund out of which the claims were to be paid against which a warrant might be drawn? In *Lancaster County v. State*, 13 Neb. 523, this court refused to issue a mandamus directing the commissioners of Lancaster county to audit a claim where no estimate had been made for taxes to be levied to pay the same, and where there were no funds in the treasury for its immediate payment. The court, after examining the several sections of our statute relating to the allowance of claims against the county, said: "A fair construction of these provisions shows that the legislature did not intend that a claim should be allowed until a warrant could be drawn for the payment of the same; in other words, unless there are funds in the treasury or a tax levied upon which a warrant can be drawn. As it clearly appears that there are no funds in the treasury, or taxes levied upon which a warrant can be drawn to pay the relator's claim, the commissioners will not be compelled to audit his account." In the later case of *State v. Cather*, 22 Neb. 792, the relator applied for a writ of mandamus to require the respondents to include in their estimate for taxes and to levy a tax to pay a claim which he held against the county, and which had been allowed by the county commissioners a long time prior thereto. One of the defenses made by the answer was that the pretended allowance was not in law an allowance or judgment, as there were at the time no funds of Webster county against which warrants might or could be drawn in payment thereof, and no money in the county treasury out of which the allowed claims might be paid. It was held that this did not constitute a defense. How are these two seemingly conflicting opinions to be reconciled? It can be done only upon the theory that the allowance of a claim at a time when a tax has not been levied for its payment, and when there is no money in the treasury against which a warrant might be drawn, is not a void action on the part of the county commissioners, but is merely an irregularity or erroneous proceeding had by them. That this is the true rule to apply clearly appears,

we think, from an examination of the statutes, and from later expressions by the court. Section 23, art. I, ch. 18, Comp. St. 1897, defines the powers of the county board. Among other powers conferred by this section are the following: "To manage the county funds and county business, except as otherwise specifically provided, * * * to examine and settle all accounts against the county, and all accounts concerning the receipts and expenditures of the county." Section 33 of said chapter provides that, "upon the allowance of any claim or account against the county, the county board shall direct the county clerk to draw a warrant upon the county treasurer in payment thereof," etc. In the case of *Perkins County v. Keith County,* 58 Neb. 323, this court had occasion to examine and construe section 23 in connection with section 37 of chapter 18, and said: "It is entirely clear that section 37 is not a grant of power to the county board, but rather a provision regulating the exercise of the power granted in section 23." In *State v. County Commissioners of Cass County,* 60 Neb. 566, it was claimed that the board had no jurisdiction to audit and allow an unverified account. In the twelfth paragraph of the syllabus it is said: "Section 37 regulates the grant of power and mode of procedure in the allowance of claims against the county, and the failure to observe its provisions does not deprive the commissioners of a county of jurisdiction to act upon claims against the county." In this case the provisions of section 33, directing that a warrant may issue upon an allowed claim without any mandatory direction that it shall issue immediately, cannot, we think, be held either to take away or limit the jurisdiction conferred upon the board of county commissioners by section 23 "to examine and settle all claims against the county," and must be regarded as a provision regulating their proceedings in the exercise of the power conferred. The board of commissioners having charge of county affairs at the time when services are rendered, or supplies furnished, are best qualified to pass upon the legality of the claim and the amount due thereon.

In making the estimate of the necessary expenses of the county, we are at a loss to understand how they can proceed with any degree of certainty until it is known for what claims they will have to provide, as the amount of such claims cannot be known until they have been examined and passed on by the county board. The allowance of the claims now held by the relator may have been irregular, but the action of the county board in that respect was not void. The allowed claims stand in the character of a judgment against the county, imposing on it a continuing duty to make payment.

We recommend a reversal of the judgment of the district court and remanding the cause, with directions to that court to issue the writ as prayed.

EPPERSON and GOOD, 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 to the district court, with directions to issue the writ as prayed.

REVERSED.

CARL KOFOID, APPELLEE, V. LINCOLN IMPLEMENT & TRANSFER COMPANY, APPELLANT.

FILED FEBRUARY 6, 1908. No. 15,065.

1. **Statute of Frauds: PAROL LEASE: DIRECTING VERDICT.** Where, in an action of forcible detainer, it appears that the defendant claims possession solely under a parol lease for a longer period than one year from the making thereof, it is proper for the court to direct a verdict for the plaintiff.

2. **Justice of the Peace: APPEAL: PLEADING: AMENDMENT.** The original pleadings in an action pending in the district court on appeal from an inferior court may be amended for the purpose of correcting a clerical error.

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

T. J. Doyle, for appellant.

Burkett, Wilson & Brown, contra.

EPPERSON, C.

This is an action of forcible entry and detainer instituted in Lancaster county before a justice of the peace, from whose decision an appeal was prosecuted to the district court, where the plaintiff prevailed upon an instructed verdict. Defendant appeals to this court.

Plaintiff purchased the property in controversy about January 1, 1906, at which time defendant was in possession as tenant under a written lease from plaintiff's grantor. This lease was for one year, ending March 1, 1906, and was assigned to the plaintiff when he purchased the premises. Upon the expiration of the written lease plaintiff served a preliminary notice to vacate, and later instituted this action.

It is contended by defendant that at the time plaintiff bought the property the parties hereto entered into a verbal contract whereby plaintiff leased said premises to the defendant for one year. Plaintiff denies making such agreement, but in our consideration of this issue we assume that plaintiff did by parol agree to lease said premises to the defendant for one year. The controlling fact to be ascertained is the date on which such tenancy was to begin. The defendant's evidence does not fix the time for the beginning of this term. The witnesses, testifying to that fact, say no more than that it was to be for one year. In view of the fact that the written lease was then in force, and there being no evidence that the parties agreed to discontinue it and to substitute a verbal contract therefor, we are bound to conclude that the period of time provided for by the verbal agreement was to begin upon the expiration of the written lease. Another fact clearly indicating that the parties did not intend that the verbal lease should begin at the time it was made is that the same was made prior to the plaintiff's purchase of the property.

The tenancy under the verbal lease beginning at a subsequent time, the contract is void under section 5954, Ann. St. 1903, which provides: "Every contract for the leasing for a longer period than one year from the making thereof, * * * shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." See *Thostesen v. Doxsee*, 77 Neb. 536.

The bill of particulars, filed in the justice of the peace court, contained an allegation that the said lease "came to an end with the last day of March, 1906." Before trial in the district court the plaintiff was permitted to amend it by inserting the word "first" instead of the word "last" appearing in the above quotation. The defendant objected to the amendment, because it was changing the pleadings and issues upon which the case was tried in the justice of the peace court. The bill of particulars clearly sets forth the terms of the lease, and it is apparent that the issue determined in the justice of the peace court was based upon the rights of the parties as they existed upon the termination of the lease—March 1. This issue was not changed by the amendment. Again, as stated by the trial court, the amendment was simply the correction of a clerical error, and was not prejudicial to the defendant. As we understand the rule, a pleading may be amended in the appellate court where the issues are not changed, and such amendment is the correction of a clerical error.

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

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

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

FILED FEBRUARY 6, 1908. No. 15,319.

1. **Insurance Contract:** EVIDENCE. In an action upon an alleged insurance contract, plaintiff introduced evidence that defendant's agents sent to plaintiff a claim for the payment of the premium for the alleged insurance, as follows: "Martha J. Shoemaker, To Crutcher & Welsh (defendant's agents) Dr. To insurance premium advanced on policy No. —— of Commercial Union Assurance Company, held as collateral to loan No. 038701, * * * $14.40. If this amount is promptly remitted, the policy will be filed with the receivers of the Lombard Investment Company for the benefit of the present owner of the mortgage. If not paid, the receivers will call on the mortgage holder for payment, and this amount will be held by him as a lien against the property." *Held*, Insufficient to establish the consummation of an insurance contract.

2. ——: ——. Plaintiff, a mortgagor, agreed to maintain insurance upon the mortgaged dwelling-house for the benefit of the mortgagee. Upon the expiration of an insurance policy the receivers of the mortgage demanded the payment of a premium for the reinsurance of the property, and agents of the defendant company made the demand set forth in the preceding paragraph, and plaintiff introduced evidence that she had paid the premium to an agent of the receivers, but who is not shown to be the agent of the defendant company, and it is not shown that the premium paid ever reached the defendant or its agents, or that the plaintiff was directed to pay the same to the receiver's agent. *Held*, Insufficient of itself to prove a contract for insurance.

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

Walter J. Lamb and *George A. Adams*, for appellant.

Field, Ricketts & Ricketts and *Sylvester G. Williams*, *contra.*

EPPERSON, C.

On a former appeal a judgment in favor of the plaintiff was reversed and the case remanded for further proceed-

ings. 75 Neb. 587. When the case reached the district court the plaintiff filed an amended petition, alleging that on or about January, 1895, the defendant, in consideration of the sum of a premium of $14.40, agreed with the plaintiff and with her agents to insure, and did insure, her dwelling-house in the city of Lincoln against loss or damage by fire to the amount of $1,200 from November 30, 1894, to November 30, 1897, and agreed to issue to plaintiff its policy for such insurance, but never delivered the same to plaintiff and still refuses to do so. The amended petition further alleges that at the time of making the agreement to insure the property there was an outstanding mortgage thereon, given by the plaintiff to the Lombard Investment Company, for $1,100; that for further security the mortgagee held an insurance policy in the Orient Insurance Company to the amount of $1,200, expiring November 30, 1894, which had been taken out by the plaintiff, and that the mortgage contained an express stipulation between the parties making the Lombard Investment Company her attorney in fact to reinsure upon the expiration of the existing policy, and authorizing the Lombard company, upon insuring or renewing the insurance, to add the amount of the premium to the amount of the mortgage loan so held by it. It is further stated that the agreement between the plaintiff and the defendant to insure plaintiff's dwelling-house was made in connection with an agreement for the extension of the maturing unpaid loan thereon for $1,100. It is further alleged that prior to the making of the agreement to insure, entered into between the plaintiff and defendant, the defendant company entered into an agreement with the Lombard Investment Company to the effect that it would insure, and that it should have the right to insure, all the property upon which the Lombard company accepted or negotiated loans in Missouri or Nebraska and other western states; that the Lombard company consented to collect, or assist in collecting, the premiums for such insurance, and where not collected to pay the same and add the amount of the premium to such

loans, respectively; that in order to carry out this agreement between the defendant company and the Lombard company the defendant company commissioned one E. R. Crutcher, of Kansas City, Missouri, its agent; that Crutcher, at the same time, was general agent of the Lombard company, having sole supervision and control over all insurance business of the Lombard company, and that notice was given by defendant and the Lombard company that it would not accept or renew any loans, except upon the express condition that insurance upon the property upon which a loan was made should be effected in the defendant company; that shortly prior to the making of the agreement of insurance the Lombard company failed and went into the hands of receivers, and that the receivers appointed for that company, by agreement with the defendant company, continued the agreement existing between it and the Lombard Investment Company previous to its failure; that in order to consummate and carry out such agreement the defendant company thereafter acted in conjunction with the Concordia Loan & Trust Company, which was a defunct corporation owned by the Lombard company, and which was revived in name alone to carry on the business of the renewal or extension of loans held or taken by the Lombard company in connection with insurance in the defendant company and renewals of insurance, and that it was expressly agreed that no renewals of loans made by the Lombard company should be accepted, except when accompanied by an agreement that the applicant for such renewal should take out or renew its insurance in the defendant company through its agents, Crutcher & Welsh, at Kansas City, and that all notices in any way relating to the insurance connected with such loans or renewals were to be printed and prepared by the defendant company, and by its agents forwarded through the Concordia Loan & Trust Company. It is alleged that about October, 1894, plaintiff applied to one H. B. Sawyer, whom she alleges was then agent for the Lombard company and

for the Concordia Loan & Trust Company, and also for the defendant insurance company, for an extension of her loan of $1,100; that an agreement of extension of her loan was negotiated, and that she signed an application therefor; that at that time the Lombard Investment Company and the Concordia Loan & Trust Company, through the said H. B. Sawyer, required of the plaintiff that she take out an insurance policy in the defendant company for $1,200 for three years at a premium of $14.40, to date from November 30, 1894, to which she agreed; that this renewal application was sent to the defendant's office in Kansas City, which was also occupied by the Lombard Investment Company and its receivers and the Concordia Loan & Trust Company; that the same was accepted and its terms approved, and the defendant assumed, agreed and undertook to renew the said policy for $1,200 for three years from November 30, 1894, of which it gave the plaintiff and its agents due notice; and that afterwards, on or about the 30th of November, 1894, defendant agreed to insure, and did insure, plaintiff's property in the sum of $1,200, of which it gave plaintiff and her agent due notice. Other matters are alleged showing a waiver of the prompt payment of the premium, which was paid to H. B. Sawyer in January, 1895, and a bill for the same, it is alleged, was sent by the defendant to said Shoemaker for collection. The house was destroyed by fire April 24, 1895, and recovery is sought upon the agreement to insure. Upon the conclusion of the plaintiff's evidence, the trial court directed a verdict for defendant.

Much stress is placed by the plaintiff upon what is termed the "insurance clause" in the mortgage given to the Lombard company. That clause provided that plaintiff should insure the property for its insurable value, payable to the mortgagee, in some company approved by the Lombard company or assigns. In the event of the failure to do so, or to reinsure and assign the policy to the Lombard company before noon of the day on which the insurance expired, then the Lombard company was

authorized and empowered, as attorney in fact for the party of the first part, to insure or reinsure said building in such company as it might select. It was further provided that, in case the Lombard company insured or reinsured the property upon which its loan was made, interest should be allowed upon the premium paid by the Lombard company at the rate of 10 per cent. per annum, and the mortgage stand as security for the repayment thereof, and that the mortgage might be foreclosed if the money so advanced was not repaid within 30 days. Prior to going into the hands of receivers the Lombard company maintained an insurance department, of which one E. R. Crutcher was the head. After the receivers took possession of the assets of the Lombard company a circular letter, signed by the receivers, was issued and sent to the parties having loans from the company; Mrs. Shoemaker, among others, receiving a copy. This letter was dated October 1, 1894, and called attention to the early expiration of the old policy. It expressed dissatisfaction, experienced by the receivers in having mortgagors place insurance with various companies, and stated that the Lombard company had the insurance in which it was interested placed with the Commercial Union Assurance Company, and perfected arrangements with Crutcher to renew all policies, including that referred to above. It further stated: "The receivers cannot carry this insurance or make any advances for premiums, yet they deem it advisable to give gratuitously this notice of expiring insurance that all interests may be protected. To this end * * * we have arranged with him (Crutcher) to look after insurance whenever requested by any one interested in loans made by the Lombard Investment Company." This letter-head bears the names of the receivers of the Lombard company, and also of Crutcher & Welsh, insurance agents. The testimony discloses that after the receivership Crutcher formed a partnership with Welsh, for the purpose of carrying on the insurance busi-

ness. While at the head of the insurance department of the Lombard company he was commissioned as agent of the Commercial Union Assurance Company, defendant herein, and he retained said commission and acted as agent for the defendant company after associating himself with Mr. Welsh.

The Concordia Loan & Trust Company, as explained by one of plaintiff's witnesses, was originally a subcompany of the Lombard Investment Company, and was organized especially for the purpose of buying in taxes on defaulted loans and holding tax certificates. At the failure of the Lombard company it was discovered that the Concordia Loan & Trust Company was solvent, and it was used as a means of holding the business together, and the holders of those loans of the Lombard company which had been sold in the east were solicited to place their loans in the hands of the Concordia Loan & Trust Company for adjustment and settlement. Many of them did so. The witness further explained that a number of the parties holding loans purchased from the Lombard company preferred to use the receivers of that company in the adjustment of their claims, and the receivers for two or three years attended to their business. The loan of one party would be looked after by the Concordia Loan & Trust Company, and of another party by the receivers of the Lombard company; but both the receivers and the Concordia company had the same clerks and occupied the same offices. The guaranty of the Lombard company was indorsed on all of the loans which it had sold, and the receivers felt it their duty to do whatever they could for the investors to realize their money with a view to reducing the liability on the guaranty. This, it is explained, was the reason for the receivers handling a great many of these loans; but, where the investors were willing, then the receivers placed them in the hands of the Concordia Loan & Trust Company. It is undoubtedly true that the receivers and Crutcher & Welsh were anxious that any reinsurance effected on property on which loans were held

should be taken out in the defendant company. The reason for this is plain, and is explained in the letter of the receivers. Crutcher was undoubtedly anxious to write insurance in the company for which he was agent, on account of the commissions that would accrue therefrom, and, having been at the head of the insurance department of the Lombard company while it was a going concern, he had a better knowledge of the condition of the insurance existing upon property upon which loans had been effected than any other party, and the receivers allowed him access to the books of the company, and undoubtedly afforded him every opportunity in their power to secure reinsurance where policies had expired.

Under date of January 5, 1895, Crutcher & Welsh sent to Mrs. Shoemaker the following: "Kansas City, Mo., Jan. 5, 1895. Martha J. Shoemaker, 2209 So. 13th St., Lincoln. To Crutcher & Welsh, Dr. 11-30-'94. To insurance premium advanced on policy No. .... of Commercial Union Assurance Company, held as collateral to loan No. 038701. Sum insured is $1,200. Rate $1.20. Term 3 yrs. $14.40. If this amount is promptly remitted, the policy will be filed with the receivers of the Lombard Investment Company for the benefit of the present owner of the mortgage. If not paid, the receivers will call on the mortgage holder for payment, and the amount will be held by him as a lien against the property."

The mortgage referred to in this communication was one which the plaintiff had given on the property in question to the Lombard Investment Company, and by it transferred to Mrs. Longacre. As said by Judge ALBERT in his opinion on a former appeal of this case: "The letter is ineffective either to prove the fact of payment of the premium or an offer on the part of the defendant to insure the property. If the letter be treated as that of the company, at most it shows a waiver of payment of the premium as a condition precedent to the contract of insurance becoming effective." 75 Neb. 587. Plaintiff claims that she paid the premium to H. B. Sawyer, de-

fendant's agent, at Lincoln. In this connection it might be stated that the terms upon which a renewal of Mrs. Shoemaker's loan was agreed upon were that $100 upon her loan should be paid in cash and the remainder of $1,000 should be extended for a period of three years. Mrs. Longacre, the holder of her loan, had placed the mortgage in the hands of the Concordia Loan & Trust Company. She had made one payment of $50 of the $100 agreed upon, and subsequently, at another time, paid $25 to H. B. Sawyer, who was without doubt acting as agent for the Concordia company. Of this latter sum it is now claimed $14.40 was to be applied in payment of the premium upon renewal of the insurance; but we have searched the record in vain for any evidence which goes to show that the Concordia Loan & Trust Company was either the agent of the defendant company, or that it had effected insurance upon the plaintiff's property through that company or had made any arrangement or agreement for such insurance. Neither can we discover that H. B. Sawyer, to whom the money was paid by the plaintiff, had any connection whatever with the defendant company, or was in anywise authorized to act for it or in its behalf, nor does it appear that he or the Concordia company ever paid the premium to the defendant or to Crutcher. Again, it might be stated that, while the terms for the extension of Mrs. Shoemaker's loan had been agreed upon, the evidence is clear that she on her part never complied with the conditions of such extension by paying to the holder of her mortgage all of the $100 in cash which was made a condition of such extension. The receivers, as in duty bound, in order to protect the estate in their hands, offered Crutcher & Welsh and the Concordia Loan & Trust Company every opportunity at their command to effect reinsurance upon loans which had been sold to outside parties, in order to save liability on the guaranty which the Lombard company was under for the payment of such loans in case of loss by fire of the mortgaged property. This being the case, it is not at all strange that they

offered the services of their clerks to the Concordia company in its efforts to collect loans which had matured and to effect reinsurance where policies had expired. This probably explains a letter written by a clerk in the office of the receivers of the Lombard company upon a letterhead of the Concordia Loan & Trust Company calling for the deferred cash payment of $25 agreed upon for an extension of the loan, and $14.40 as premium upon reinsurance of the property, and also a letter of one Adams, purporting to be acting for the Concordia Loan & Trust Company, calling for payment of the premium for reinsurance of plaintiff's property. Mr. Crutcher, the agent of the defendant company, is explicit in his testimony that no policy of reinsurance upon the property of Mrs. Shoemaker was ever issued by the defendant company, that no agreement to reinsure was ever made, and that no application for such reinsurance was ever made by any one for or on behalf of Mrs. Shoemaker or any one interested in the property.

The evidence does not show that the Lombard company, or its receivers, or the Concordia company were the agents of the defendant company, nor does it appear that Crutcher, or Crutcher & Welsh, or defendant had ever agreed with any person to issue a policy of insurance upon the plaintiff's property. Defendant, acting through its agents, Crutcher & Welsh, was ready to insure plaintiff's property whenever authorized so to do by any one having an insurable interest therein; but the opportunity it gave was neglected. At most, the extent of the authority given to Crutcher & Welsh by the Lombard company, or by its receivers, or by the Concordia company, was to look after the insurance and to attempt to procure insurance business from the mortgagor. Upon their failure to do so, the receivers or the assignee of the mortgage could have procured the insurance; but until they did so the insurance company could not be liable. Relative to the bill rendered for the premium, an inference may be deduced that the insurance had been written, but it cannot be said that this

communication proved a contract of insurance. It rather indicated that the defendant's agents withheld the delivery thereof until some interested party should complete the transaction and make it a binding contract of insurance by paying the premiums and thereby procure a delivery of the policy. After their appointment the receivers arranged with Crutcher & Welsh to carry for a short time risks on mortgaged property which was owned by the Lombard company, and which had not been sold or disposed of when the receivers were appointed. Such insurance was not represented by any insurance policy, but by a special contract, the terms of which are not made clear by the evidence. But it is clear that this special arrangement did not include property, the mortgage on which had been sold by the mortgagee. The insurance on such property was not carried by Crutcher & Welsh; but they solicited such business and wrote the same when requested by interested parties. In view of the evidence that defendant company never insured the plaintiff's property, and never made a contract that it would insure the same, we must take it that the bill rendered for the premiums was intended as a forceful reminder that the old policy had expired. In other words, the inference it raises is insufficient to overcome the probative effect of the other facts adduced. Neither do the letters written to plaintiff by the Concordia company demanding payment of the premium prove any liability of the defendant. In our view of the evidence, it is wholly lacking to establish the allegations of the petition that defendant ever agreed to insure her property, or that such insurance was ever applied for.

In this state of the case, the district court did not err in directing a verdict for the defendant, and we recommend an affirmance of its judgment.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

CHARLES W. PARKER ET AL., APPELLEES, V. CLAUDE LOUDON, APPELLANT.

FILED FEBRUARY 6, 1908. No. 14,925.

Appeal: VERDICT: EVIDENCE. The verdict of a jury based upon conflicting evidence will not be disturbed in this court.

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

Hoagland & Hoagland, for appellant.

J. E. Morrison, contra.

GOOD, C.

Plaintiffs sued to recover the contract price for pasturing 61 head of cattle for the defendant for the season of 1905. The defendant answered, admitting the contract, and alleged the delivery of a greater number of cattle to the plaintiffs for pasturage, and that, pursuant to the contract, he was entitled to recover the value of the cattle not returned to him at the close of the grazing season. Plaintiffs replied with a general denial. On a trial of the issues a jury returned a verdict for the full amount claimed by the plaintiffs, and defendant appeals to this court.

It is conceded that 61 head of cattle were returned or properly accounted for by the plaintiffs. There is a hopeless conflict of the testimony as to whether a greater number than 61 were delivered to the plaintiffs for pasturage. There is ample evidence to sustain either contention. The jury evidently believed the plaintiffs' evidence, and found accordingly. The rule is well established in this jurisdiction that the findings of a jury based upon conflicting evidence will not be disturbed.

Defendant complains of certain instructions of the court, but has not pointed out any rule of law that has been violated, and examination of the instructions fails to disclose any error therein.

Defendant also complains of the introduction of certain evidence, particularly of the admission of an assessment roll, but the bill of exceptions does not disclose that the assessment roll is included in or attached to it. After diligent search we are unable to find this bit of evidence in the record.

No error being apparent, the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

JAMES KOTERA, APPELLANT, V. AMERICAN SMELTING & REFINING COMPANY, APPELLEE.

FILED FEBRUARY 6, 1908. No. 15,012.

1. **Master and Servant:** INJURY: APPLIANCES. The law requires a master to use reasonable care to provide reasonably safe tools and appliances with which, and a reasonably safe place in which, his servant is to perform the duties assigned him.

2. ———: NEGLIGENCE: QUESTION FOR JURY. Whether or not a master who requires his servant to stand upon two parallel, horizontal, iron rods 12 inches apart and about 8 feet above the floor, and to draw, by means of an iron hook, a slide weighing 200 pounds, without providing any railing, or other safeguard, to prevent the servant from falling in the event of his losing his footing, or the hook slipping from the slot in the slide, is guilty of negligence in failing to exercise reasonable care to provide a reasonably safe place for the servant to work is a question of fact for a jury to determine.

3. ———: ———: ———. Whether or not a master, who furnishes a hook, consisting of an iron bar with a hand-hold at one end, and two inches at the other bent at a right angle to the bar, so as to form an elbow to be inserted into a slot, with which to draw a slide weighing 200 pounds, instead of having the elbow of the hook bent at an acute angle to the bar, or in a curve, so as

to prevent its slipping out of the slot in the slide, is guilty of negligence in not exercising reasonable care to provide reasonably safe appliances for his servant is a question of fact for a jury to determine.

4. ———: ASSUMPTION OF RISK. A servant has a right to assume that his master has used due diligence in providing reasonably safe appliances with which, and a reasonably safe place in which, the servant is to perform his duties, and does not assume the risk of danger arising from the master's negligence in that respect, unless the servant knows and realizes such risk of danger.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Reversed.*

T. J. Mahoney and *P. A. Wells,* for appellant.

John C. Cowin and *Isidor Ziegler, contra.*

GOOD, C.

This is an action to recover for personal injuries sustained by the plaintiff while in the employment of defendant. The action is grounded upon the alleged negligence of the defendant in furnishing plaintiff with an unsafe and insecure place in which to work, and in furnishing plaintiff with unsafe and insecure tools and appliances with which to perform the task assigned him. The defendant answered, denying negligence upon its part, and alleging contributory negligence and assumption of risk on the part of the plaintiff. Upon the trial, after the plaintiff had introduced his evidence and rested, the court, on motion of the defendant, directed a verdict in its favor and rendered judgment thereon. From that judgment the plaintiff has appealed to this court.

Defendant, in the conduct of its business, uses a number of furnaces constructed of brick and iron, in which it smelts the ores handled by it. There are four of these furnaces in one room, or building. Each of said furnaces is about 8 or 9 feet high. Immediately above each of these furnaces are hoppers, extending about 3½ feet above them. Upon a level with the tops of the hoppers is an iron plat-

form, or trackway, over which small cars, containing the ore to be smelted, are hauled, and from which the ore is dumped into the hoppers. In the top of three of the furnaces, and beneath the hoppers, are large iron stoppers, or lids, which are lifted by means of iron handles, or bars, attached to the lids, by the employees who handle the ore. When a car of ore is ready to be dumped into one of the hoppers, the stopper, or lid, is lifted, the ore dropped through the hopper into the furnace, and the lid is then replaced. The fourth furnace, which is designated as "No. 1," has the same kind of a hopper, but a different manner of opening and closing. On this furnace, and between the top thereof and the hopper, is a slide constructed of fire brick set in a metal frame, which sets over and acts as a lid to the hole in the top of the furnace, through which the ore is fed into it. This slide is from 18 to 24 inches square, and weighs about 200 pounds; and upon two sides thereof there are slots, or eyes, into which an iron hook is inserted, and by means of this hook the slide is drawn horizontally over the furnace when ore is to be dumped into it. This particular kind of cover had been in use only a year or a year and a half before the accident. It appears that three men are employed at each of these furnaces; one, to attend to the firing of the furnace, is called a "furnaceman," and the other two, to haul the ore and dump it into the furnace through the hopper, are known as "helpers." Across the top of the several furnaces were two iron rods that ran horizontally and formed a part of the construction of the furnaces for holding them in position. These rods were, perhaps, about 1 inch in diameter and were about 1 foot apart, and were evidently 8 or 9 feet above the floor upon which the furnaceman worked. From the evidence it appears that the plaintiff had worked in this room as a helper and as a furnaceman for a number of years, but until the time of the accident had never worked at furnace "No. 1." It appears that at all of the other furnaces the stoppers, or lids, had been lifted by the helpers. In the case of furnace "No. 1" the

slide was operated by the furnaceman in the following manner: The furnaceman, by a ladder, ascended to the horizontal iron rods running across the top of the furnace, and, standing upon these rods without any platform and without any railing, or safeguards, around him, he inserted into the slot, or eye, on the side of the slide an iron hook, by means of which the slide was drawn from over the hole in the furnace. This iron hook was a bar of iron about 3½ feet long, with a hand-hold at one end, and about 2 or 3 inches at the other end bent at a right angle to the bar, so as to form an elbow. It was this elbow that was placed in the slot, or eye, on the slide, by means of which it was drawn from over the hole. On the day previous to the accident the foreman ordered the plaintiff to take charge of furnace "No. 1" on the following evening and act as furnaceman. Pursuant to this order of the foreman, he took charge of the furnace and fired the same, and, when the helpers came to dump the ore for the first time, he climbed upon the rods and inquired of the helpers if the hook was the tool used in opening the slide, and was informed that it was. Thereupon he took the hook, inserted it into the slide, and made two efforts to draw it from over the furnace, but failed. He then braced himself, by placing his left hand against the hopper, and exerted more force to draw the slide, when the elbow of the hook slipped out of the slot, and the plaintiff was precipitated backwards, and fell to the floor 8 or 9 feet below, and suffered severe injuries.

The accident occurred in the evening about 8 o'clock. At this time the plaintiff was working on what was called the "night shift." The room was lighted by incandescent electric lamps. It was claimed that the lamps were covered with dust, smoke and grime to such an extent that they gave a dim and insufficient light for performing the work. Plaintiff also contended that the defendant was negligent in not providing a railing, or safeguard, around the place where the furnaceman had to stand upon the rods when drawing the slide, and that the place furnished,

in which to perform the task, was unsafe and dangerous, and that the kind of hook furnished for drawing the slide was an improper appliance; that it should have had the elbow turned either at an acute angle or so as to form a curved hook, so that when placed in the eye and pulled upon it could not slip out. On the other hand, the defendant contends that the light was sufficient to enable the plaintiff to see where and how to place the hook in the eye, and that the lights were the same as had been regularly furnished and by which the labor had been performed for many years, and that, if there was any deficiency in the light, the plaintiff was fully aware of it and assumed the risk incident to performing his labor in a dim light. It also contended that the iron bar with the elbow upon it was a proper appliance with which to draw the slide, and the rods formed a safe place to stand upon; but that, if they were not a proper appliance and a safe place, the plaintiff was fully cognizant thereof, and that, if any defect existed, it was open and obvious to him, and that by undertaking to perform the task without protest he assumed the risk of dangers in the performance of the duty assigned him. So far as the dim light is concerned, it appears from the testimony of the plaintiff that by the light furnished he was able to see the eye and to place the elbow therein. Were that the only cause for complaint, we should be constrained to hold that the evidence failed to show that it was the cause of plaintiff's injuries. With reference to the place where the plaintiff had to stand, it would certainly seem safe, so far as the strength of the material was concerned.

The law requires a master to use reasonable care to provide reasonably safe tools and appliances for his servant, and a reasonably safe place in which to perform the duties assigned him. This rule of law is well established, and has been upheld in the following decisions of other courts: *Burns v. Delaware & A. T. & T. Co.*, 70 N. J. Law, 745; *Buehner v. Creamery Package Mfg. Co.*, 124 Ia. 445; *Walker v. Simmons Mfg. Co.*, 131 Wis. 542. It has been

so expressly decided in this court, as to the duty of the master to furnish reasonably safe tools and appliances, in the case of *Vanderpool v. Partridge*, 79 Neb. 165. Under this rule, can it be said as a matter of law that the defendant was not guilty of negligence in requiring the plaintiff to stand and balance himself upon the iron rods and use enough force to pull a slide weighing 200 pounds, without any railing, or safeguards, to prevent his falling in case the hook should slip or he should lose his footing? We think this question must be answered in the negative. There is no reason apparent why a railing, or safeguard, could not have been constructed around the place where plaintiff was required to stand to perform the duty. And it would appear that it would have been much safer to have provided a hook with the elbow turned at an acute angle, or in a curve, so as to prevent its slipping from the eye, or slot, in the slide when pulled upon. At least, we are convinced that the evidence is such as would have warranted a jury in finding that the defendant was negligent in the appliances furnished, and in its failure to provide railings, or safeguards, around the place in which plaintiff was required to stand while drawing the slide. Upon the question of defendant's negligence, there was ample evidence, in our view, to require the submission of the case to the jury.

The more vital question in the case is: Did the plaintiff assume the risk of the danger to which he was exposed? It is a well-recognized rule of law that a servant ordinarily assumes the risk of the dangers that are usually incident to his employment. But this does not require him to assume the risk of dangers due to the negligence of the master, unless such risk is known to him. The servant has a right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of his employer's negligence in performing such duties. The employee is not obliged to pass judgment upon his employer's methods of transacting his business, but may assume that reasonable

care will be exercised in furnishing the appliances necessary for its operation. *Choctaw, O. & G. R. Co. v. McDade,* 191 U. S. 64; *New Omaha T.-H. E. L. Co. v. Dent,* 68 Neb. 674; *New Omaha T.-H. E. L. Co. v. Rombold,* 73 Neb. 259; *Chicago, R. I. & P. R. Co. v. McCarty,* 49 Neb. 475. The rule of employer's liability, however, is different where the servant knows of the defects, or where they are so plainly observable that he would be presumed to know of them. From the record it is apparent that the plaintiff had only a superficial, general knowledge of how the slide was operated by seeing others perform that duty. He had seen this done repeatedly in the year and a half that it was in operation. The kind of hook used was simple, and the manner of using it would be apparent to any man of ordinary intelligence. The lack of any railing, or guard, was also open and apparent, and, if plaintiff had been injured by falling from the rods while climbing upon them, or about to attend to his duties, we think he would not be in a position to complain. But there are other circumstances which the record does not show that plaintiff knew. It is not shown that at the time of the accident he knew the weight of the slide, or the strength required to move it. Nor is it shown that he knew, or had reason to know, that there was any danger of the hook slipping out of the eye. But, even if he should be supposed to know of the danger of the hook slipping from the eye, still, unless he had some approximate knowledge of the weight of the slide and the power or strength necessary to draw it aside, he would not realize the danger to which he would be exposed by standing in such a place to operate it. Under these circumstances, we do not think it can be said that the danger was open and obvious, nor that from his observation he was negligent in not knowing the amount of force necessary to operate the slide. We think it was a question of fact for the jury to determine from the evidence whether or not the plaintiff assumed the risk of danger in operating the slide. It must not be overlooked that he had not operated the slide before. He therefore

had no knowledge from actual experience of the power necessary to be exerted, and, until he had made the attempt to operate the slide, we think it cannot be said that he was in a position to know and fully realize the danger of injury in attempting to operate it without any safeguards or railings. We are constrained, therefore, to hold that, under all the circumstances, the case presented was one that should have been submitted to the jury for its determination, and that it was error in the trial court to hold as a matter of law that the defendant was not liable.

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

DUFFIE and EPPERSON, CC., concur.

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

REVERSED.

ANSON E. BECKER, APPELLEE, V. ADOLPHUS F. LINTON ET AL., APPELLANTS.

FILED FEBRUARY 6, 1908. No. 15,051.

1. **Process: CONSTRUCTIVE SERVICE: AFFIDAVIT.** An affidavit for service by publication is not rendered invalid because it has a caption, nor because the persons named in the affidavit, against whom the petition is filed, are referred to as "defendants."

2. ———: ———: ———. The allegation "that said defendants and each of them are non-residents of the state of Nebraska, and that service of summons cannot be made within this state upon said defendants or any of them," is a sufficient allegation of fact, and is not open to the objection that it alleges a mere conclusion of law.

3. **Judgment: COLLATERAL ATTACK.** Where a question of fact or of law has been litigated in a court having jurisdiction of the parties and the subject matter of the action, its judgment upon such

question is final, and cannot be collaterally attacked in another court, though the latter might have reached a different conclusion upon the same question.

4. ———: RES JUDICATA. A judgment of a court having jurisdiction of the parties and the subject matter of the action is generally conclusive evidence of the fact that the indebtedness existed at the time of the rendition of the judgment; and such judgment and the pleadings upon which it is based are sufficient to establish the existence of the indebtedness as of the date of the filing of the petition.

5. **Antenuptial contract** set out in the opinion examined, and *held* to be executory, and not to vest any estate in the children of the parties to the contract.

6. **Fraudulent Conveyance:** SUIT TO ANNUL. Real estate, which has been conveyed without consideration in fraud of creditors of the grantor, may be levied upon and sold under an execution as the property of the grantor. In such case, the grantor, as to the execution creditor, has more than an equitable interest in the realty conveyed, and the purchaser at the execution sale may maintain an action against the fraudulent grantee to cancel the fraudulent conveyances and to quiet his title.

APPEAL from the district court for Douglas county: HOWARD KENNEDY, JUDGE. *Affirmed.*

John O. Yeiser, for appellants.

Frank H. Gaines, J. A. Story and *E. G. McGilton, contra.*

GOOD, C.

This is an action to cancel two certain deeds and to quiet title to certain real estate in Omaha. The defendants are nonresidents. Service was had by publication. A special appearance was made on behalf of the defendants, and objections to the jurisdiction of the court over the defendants were overruled. Defendants, still reserving the question of jurisdiction, answered, denying the plaintiff's title, and alleging that the title was held in trust by defendant Adolphus F. Linton for the defendants Charles S. and Fryda Linton. Plaintiff's reply was a general denial. Upon a trial, the district court found all the issues in

favor of the plaintiff, and entered a decree canceling the deeds and quieting his title. From this decree the defendants have appealed to this court.

The record discloses the following facts, out of which this controversy arises: The defendants, Adolphus F. and Phœbe R. E. E. Linton, are husband and wife, and the defendants, Charles S. and Fryda Linton, are their children. Prior to the marriage of Adolphus F. and Phœbe Linton a contract was entered into between them, which, omitting the formal parts, is in the following language: "It is agreed that all the moneys and property that said intended wife may become or is in possession of, or that she may at any future time become entitled to, shall be free from the debts, control and engagements of the said intended husband, and settled upon herself for her sole and separate use, and be divided amongst the children of the said intended marriage in such shares as the said intended husband and wife may appoint, but subject nevertheless to the said husband taking a vested life interest in any such money or property as above mentioned, in the event of his surviving the said intended wife. And it is further agreed between the parties that a formal deed of settlement shall be drawn up between the parties embodying in effect the said agreement as soon as conveniently possible after said marriage." Several years after the marriage Mrs. Linton inherited considerable real estate in Omaha, Nebraska, and in other places. On the 4th day of July, 1891, Mrs. Linton executed a power of attorney to Mr. John B. Finley, authorizing him, among other things, to mortgage her real estate. Finley, pursuant to the power vested in him, executed a number of mortgages upon various parcels of real estate belonging to Mrs. Linton. One of these mortgages, bearing date of June, 1892, and due June 1, 1897, was in favor of the National Life Insurance Company, to secure a note which was also executed by Finley on behalf of Mrs. Linton. In November, 1896, the Lintons having made default in the conditions of this

mortgage, the National Life Insurance Company commenced suit in the circuit court of the United States for the district of Nebraska against Mr. and Mrs. Linton to foreclose the mortgage. In this foreclosure action the complainant specifically prayed for a deficiency judgment in the event that the premises should fail to sell for sufficient to pay the amount due it. Issue was joined and a trial had, resulting in a decree in favor of the complainant, awarding a foreclosure, and findings and decree that it was entitled to a deficiency judgment in case the mortgaged property failed to sell for sufficient to satisfy the decree and costs. The defendants carried that cause to the circuit court of appeals, where the decree and judgment of the circuit court was affirmed. Thereafter, a sale of the premises was had pursuant to the order and decree of the circuit court. This sale failed to realize sufficient to pay the costs and the amount adjudged to be due the complainant. The complainant then moved for a deficiency judgment, to which objections were filed by the defendants. The court found in favor of the complainant, and awarded a deficiency judgment for $1,982.54, and awarded execution thereon. Thereafter, execution was issued and levied upon the property in controversy herein as the property of the defendant Phœbe R. E. E. Linton, and the property was sold to the plaintiff in this action. Objections were made to the sale and to the distribution of the proceeds, which were overruled, and a deed was ordered. The United States marshal, on August 28, 1905, executed and delivered to the plaintiff a deed to the premises. At the time of the commencement of the action of foreclosure in the federal court the title to the property stood in the name of Phœbe R. E. E. Linton. Shortly after the delivery of the marshal's deed to the property it was discovered that on the 28th day of June, 1902, deeds had been filed, which purported to have been executed on the 31st day of March, 1897. One of these deeds was from Mrs. Linton and husband to Kate Remnant, and the other, bearing the same date, was from Kate Remnant to Adol-

phus F. Linton. These deeds were not filed until long after the entering of the deficiency judgment against Mrs. Linton in the federal court. The date of the deeds is intermediate the commencement of the action and the entry of judgment. The plaintiff, purchaser at the execution sale, brought this action to cancel these two deeds and to quiet the title to the property in him. No consideration passed from either Kate Remnant or Adolphus F. Linton for the transfer. The defendants claim that it was for the purpose of vesting title in Mr. Linton pursuant to the antenuptial contract above referred to. The plaintiff in this action claims that the transfers were made for the purpose of hindering and delaying the creditors of Mrs. Linton in the collection of their demands against her, and particularly the claim of the National Life Insurance Company; that the conveyances were fraudulent and void; and that plaintiff is entitled to have them canceled and his title quieted. The record also shows that at the date of these two deeds Mrs. Linton was heavily involved, and most of her property in Omaha was heavily incumbered, and about that time a number of judgments were rendered against her, some of which have not yet been wholly satisfied. It also discloses that she was indebted to a considerable extent outside of her mortgage indebtedness.

The first question for determination is the one of jurisdiction raised by the special appearance. There are three objections urged: First, that the affidavit for service by publication is not an affidavit, because it had a caption showing that it was made for a case pending, whereas no case was then pending; second, that the affidavit does not show that service of summons could not be made upon the defendants; third, that it does not show that the defendants were nonresidents of the state of Nebraska. It is true that upon the sheet of paper upon which the affidavit appears, and immediately preceding the venue of the affidavit, there is a caption similar to that which usually heads a petition. Section 78 of the code provides

that the affidavit must be filed before any publication can be made, and section 19 of the code provides that the action shall be deemed to be commenced as to the defendant at the date of the first publication. Defendants contend that at the time of the making and filing of the affidavit no action was pending, and that it was, therefore, improper to have a caption upon the affidavit; that the affidavit purports to be in a pending action, and, because no such action was pending, such affidavit could not be the basis of a prosecution for perjury if it were false. This contention finds support among the English authorities, and, apparently, among some of the courts of this country. This objection appears to us to be extremely technical and without merit. The affidavit was complete without the caption. The caption forms no part of that which was sworn to, and is not a part of the affidavit. The caption preceding the affidavit amounted to nothing more than a means of identification as to the case in which it should be filed. In the body of the affidavit it is stated that a petition has been filed in a certain court and against certain parties, naming them, and the object and prayer of the petition are set forth. It appears to us that the affiant would be subject to a prosecution for perjury if the material allegations of the affidavit were untrue and falsely sworn to. It is true that in a certain sense the action was not yet pending. Section 19 of the code referred to relates to the time of the commencement of the action as regards the statute of limitations, and it is in this respect only that the action is not commenced until the first publication. We think it is the common understanding, however, that a case is commenced when the petition is filed, and that it is so generally understood and spoken of. Every pleading, petition or preliminary paper in any case bears a caption. The plaintiff in verifying the petition refers to himself as the plaintiff, and yet, as regards this particular section of the code, the action is not pending until the summons is issued, or until the first publication where constructive service is had. In

the case of *Crombie v. Little,* 47 Minn. 581, it was said: "Another objection to the affidavit is that it was void because entitled in a cause not yet commenced. There are undoubtedly decisions which go to this length, but they are, in our judgment, devoid of reason, and based upon a frivolous technicality. We do not suppose there was ever an affidavit made in this state for a replevin, garnishment, attachment, or publication of a summons that was not thus entitled, although, strictly speaking, the action was not yet commenced when the affidavit was sworn to. Even at common law it was, at most, a mere irregularity, which, in the language of the court in *Clarke v. Cawthorne,* 7 Term Rep. 321, 'did not interfere with the justice of the case.' A prosecution for perjury based on such an affidavit would lie. *City Bank v. Lumley,* 28 How. Pr. (N. Y.) 397. See, also, *People v. Sutherland,* 81 N. Y. 1, 9." While this opinion is severely criticised by counsel for appellants, we are impressed with the good common sense exhibited therein. In our opinion, the objection to the jurisdiction because the affidavit had a caption is entirely without merit. The second and third objections to the affidavit are that it does not show that service of summons could not be had upon the defendants, and that they were nonresidents of the state of Nebraska. We find in the affidavit the following: "Affiant further states that said defendants and each of them are nonresidents of the state of Nebraska, and that service of summons cannot be made within this state upon said defendants or any of them." The point to the objection is that the Lintons are designated under the name of "defendants," instead of their names. In the body of the affidavit the names of the persons against whom the action was being commenced were set out in full, and, after the object and prayer of the petition are given, the statement last quoted appears. These objections, like the first, are hypertechnical, and are based upon the theory that there was no action pending, and that referring to the persons as defendants was not a sufficient designation of the parties. We think that the designation was suffi-

cient, and that the objections to the jurisdiction of the court were properly overruled.

Defendants attack the deficiency judgment upon which the deed to the plaintiff in this action rests, and claim that the judgment is a nullity as to the defendants Charles and Fryda Linton. It will be observed that this is a collateral attack upon the judgment. A judgment may be collaterally attacked where it does not respond to the issues raised by the pleadings. Appellants contend that the deficiency judgment is void because it was unsupported by the petition upon which it was rendered. They urge that the petition discloses that the note was executed by an attorney in fact for Mrs. Linton; that the power of attorney under which he acted, being set forth and attached to the petition, disclosed that it was not broad enough to authorize the execution of a promissory note or any personal obligation of Mrs. Linton, and that it went no further than to authorize the pledging of her property by mortgage. It is true that this same power of attorney has been held, in the case of *Morris v. Linton*, 4 Neb. (Unof.) 550, not broad enough to justify the binding of Mrs. Linton to a personal obligation, and this court refused to render a deficiency judgment upon another mortgage executed under this same power of attorney and in the same manner. An examination of the petition in *National Life Ins. Co. v. Linton* discloses that it avers that she executed the note, and, afterwards, it is alleged that her name was signed thereto by her attorney in fact. It will be readily perceived that under the allegations of the petition in that action other proof may have been offered which would show that Mrs. Linton was personally liable. Whether such evidence was offered or not, we are not advised. Nor do we think it material to the inquiry here. Nor do we think the fact that this court took the view that the power of attorney was not broad enough to authorize the attorney in fact to bind Mrs. Linton in a personal obligation is material. The question as to the effect of the power of attorney was properly before the

United States circuit court. It had jurisdiction of the parties and jurisdiction of the subject matter. It was called upon to determine that question, which was embraced within the issues presented to it for determination. Its decision upon these questions is final, unless reversed by a court to which it might be carried on error or appeal. This court cannot act as a court of review to determine any possible errors that might have been made by the United States circuit court. *Ferguson v. Kumler,* 11 Minn. 62; *Bank of Wooster v. Stevens,* 1 Ohio St. 233, 59 Am. Dec. 619; *Swihart v. Shaum,* 24 Ohio St. 437; *Minnesota Threshing Mfg. Co. v. Schaack,* 10 S. Dak. 511; *Faber v. Matz,* 86 Wis. 370; *Carpenter v. Osborn,* 102 N. Y. 552; *Millard v. Parsell,* 57 Neb. 178. It therefore follows that the judgment of the circuit court is conclusive upon the question of the liability of Mrs. Linton to a deficiency judgment.

Defendants further claim, however, that the judgment goes no further than to establish the fact of indebtedness at the date of its rendition. If nothing but the judgment had been offered in evidence, there might have been some merit in this contention, but in this case the original and amended bills filed in the United States circuit court were offered in evidence, and these show the issues that were presented by the complainant in that case, and upon which that court rendered the judgment. We think it must be held conclusive that the court necessarily determined that Mrs. Linton's obligation was a personal obligation, and that it existed at the time of the filing of the bill in November, 1896. We need not go further to ascertain whether or not it determined that the obligation existed at a time anterior to the filing of the bill, because the bill was filed prior to the date of the deeds sought to be canceled in this action. The evidence in this case establishes the fact of Mrs. Linton's personal obligation and liability to the National Life Insurance Company previous to the date of the deeds. It therefore follows that plaintiff by his deed based upon the deficiency judgment obtained a

good title to the premises as against Mr. and Mrs. Linton.

Defendants contend that the transfers were not fraudulent or without consideration, and that they were based upon the antenuptial contract, and that said contract was a sufficient consideration, and that the defendants, Charles and Fryda Linton, took the property as purchasers. This same antenuptial contract or agreement has been before this court in other cases, and it has been practically held that it was merely an executory agreement, and amounted to naught, so far as giving anything to the children of Mr. and Mrs. Linton, until it was further carried into effect by a deed of settlement. *Morris v. Linton*, 74 Neb. 411. We think a careful examination of this ante-nuptial agreement will show clearly that it was not the purpose or intent of the parties to it to divest Mrs. Linton of her property and to vest it in her children to be thereafter born; but rather it was to preserve and save to her the property that she had then, or might thereafter acquire, free from the claims and liabilities of her intended husband. In any event, it is clear that it could not have the effect to create any trust or vest any title in trust in the children until some further action was taken. It shows upon its face that it was so intended, and that it was within the contemplation of the parties that, after the marriage, a deed of settlement should be executed. It will also be observed that the property should be divided among the children of said marriage in such shares as such husband and wife might appoint. Until they had determined this, it is clear that nothing could vest in the children. Without any further action being taken than the execution of this agreement, specific performance could not be enforced. In interpreting an agreement, it is always proper to look to the construction placed upon it by the parties themselves. If we take the construction placed upon this instrument by the parties, it is apparent that they did not intend by this agreement to limit Mrs. Linton's interest in her property to a life estate with a re-

mainder to her children. The record in this case discloses that mortgage after mortgage for large sums have been placed upon various tracts of real estate, in which Mr. and Mrs. Linton have both joined. The power of attorney which was executed by both Mr. and Mrs. Linton authorizes their attorney in fact to sell and mortgage and convey any and all of the property she might have in the United States, so that the construction which is now sought to be put upon the antenuptial agreement would appear to have been brought about by the financial straits in which Mr. and Mrs. Linton have found themselves, and as a resort to protect them in the enjoyment of property that should go to satisfy their just obligations. This view is strengthened by the affidavits and depositions of both Mr. and Mrs. Linton, which were taken in another cause, and which were offered in evidence in this case. The affidavits bear date of October 19, 1901, and the depositions bear date of December 21, 1901. On both occasions both Mr. and Mrs. Linton testify under oath with reference to the lots in controversy that they were deeded to Adolphus F. Linton only for convenience, for him to hold in trust for Mrs. Linton, and that she is still the owner thereof. The affidavits and depositions in the other case, therefore, show that as late as December, 1901, Mrs. Linton was the owner of the property, and that the purpose of the conveyances, as then stated, was one of convenience. Such conduct does not impress one with a belief that the Lintons are now sincere and honest in claiming that these conveyances were made for the purpose they now assert. It is true that a deed of settlement now appears of record, bearing date of May 17, 1901, but this deed of settlement was made and recorded long after the rendition of the deficiency judgment against Mrs. Linton. In any event it could have no more effect than a voluntary conveyance without consideration made by Mrs. Linton to her children. The antenuptial contract created no obligation that could have been enforced by her children. It therefore follows that any conveyance made by her to them, or made

by her to some other person to be held in trust for them, based solely upon this contract, was without consideration, and amounted to a mere voluntary conveyance, which would be void as against creditors.

The defendants contend that, as the legal title to the property in controversy was vested in Mr. Linton at the time it was levied upon under the execution, it was not subject to execution, for the reason that Mrs. Linton had only an equitable interest in the property, and that an equitable interest in real estate is not subject to execution. If it were true that Mrs. Linton had only an equitable estate in the property in controversy, then, under the rule announced in *Dworak v. More,* 25 Neb. 735, and *First Nat. Bank v. Tighe,* 49 Neb. 299, it might not be subject to sale on execution. In this contention the defendants apparently lose sight of another principle of the law which is applicable, and that is that, as to the creditors, the fraudulent conveyance is void, and is the same as if no conveyance had been made. And where property has been conveyed to a third person in fraud of the grantor's creditor, the latter, on obtaining judgment, may have his choice of remedies, either to bring an action to set aside the conveyances, or to levy upon the property and have it sold. If there are no bidders, he may become the purchaser thereof, and then litigate the question of title with the fraudulent grantee. This rule is recognized in *Bachle v. Webb,* 11 Neb. 423, and *Westervelt v. Hagge,* 61 Neb. 647. Under the rule announced in these cases, the property of Mrs. Linton in the hands of her husband, or others to whom it had been fraudulently conveyed, was subject to the excution for the satisfaction of the deficiency judgment.

Some objection is made by the appellants that the record does not disclose any fraudulent intent on the part of Mr. and Mrs. Linton in the making of the deeds. We do not understand the rule to be that it is necessary to prove a specific intent. The intent may be gathered from the acts of the parties, and a conveyance becomes fraudu-

lent in law when it is shown that it was made for the purpose of placing the property beyond the reach of creditors, or that it would hinder or delay them in collecting their just demands. The evidence in this case warrants the findings that the conveyances in question were made for the purpose of placing the property beyond the reach of Mrs. Linton's creditors, and of hindering and delaying them in the collection of their just demands. It follows that the conveyances in question were void as to Mrs. Linton's creditors, and that the plaintiff was entitled to the relief afforded him by the decree of the district court.

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

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

SCHOOL DISTRICT NO. 25, APPELLEE, V. T. W. DE LONG, COUNTY TREASURER, APPELLANT.

FILED FEBRUARY 6, 1908. No. 15,035.

1. **Injunction:** PETITION: CONSTRUCTION. The rule that under the code pleadings should be construed liberally applies only to ordinary actions. In all cases of application for any extraordinary writ, the petition will receive a strict construction.

2. **Petition** examined, and *held* not to state facts sufficient to constitute a cause of action for equitable relief.

APPEAL from the district court for Brown county: JAMES J. HARRINGTON, JUDGE. *Reversed.*

L. K. Alder, for appellant.

P. D. McAndrew, contra.

FAWCETT, C.

On February 3, 1906, appellee filed in the district court for Brown county the following petition: "Your petitioner, School District No. 25, complaining of the defendants above named, says: (1) That it is a duly constituted subdivision of the county of Brown, a body politic, corporate, duly organized and existing under and by virtue of the laws of the state of Nebraska, and has been so organized at all times mentioned in this petition, and C. Langley is its duly elected, qualified and acting treasurer. (2) That the above named T. W. De Long is the duly elected, qualified and acting treasurer of said Brown county, and Edward Moore, Luke M. Bates and Frank Lessif are the duly elected, qualified and acting board of county commissioners of said county. (3) That E. A. Ikenburg, C. E. Ikenburg and W. C. McNamara are each resident freeholders and own personal and other property in said school district subject to taxation in said district. That in the year 1905 the assessor of Smith precinct, of which precinct said School District No. 25 constitutes a part, duly assessed all property for taxation within said school district, and with other property that of the said E. A. Ikenburg, C. E. Ikenburg and W. C. McNamara, but for some unaccountable reason unknown to your petitioner designated the number of said district as that of 33, and a school tax was duly levied on all of said property, and the said E. A. Ikenburg, C. E. Ikenburg and W. C. McNamara each paid their said school tax under protest, and the said board of county commissioners at a meeting of their body held in Ainsworth on the 29th day of January, 1906, did issue an order, duly signed by their chairman, the said Edward Moore, directed to the treasurer of said Brown county requiring him, the said treasurer of said Brown county, to refund to the said E. A. Ikenburg the school tax so assessed, levied and paid, to wit, the sum of $2.83, and to refund to the said C. E. Ikenburg the said school tax so levied and paid by him, to wit, the sum of $3.75, and

ordered the said county treasurer to refund to the said W. C. McNamara the said school tax so levied and paid by him, to wit, the sum of $124.30, and the said county treasurer is about to comply with said orders of the said board of county commissioners, and unless restrained by an order from this court will refund said several amounts of moneys to said parties, and unless restrained your petitioner greatly fears and apprehends that the said county commissioners will issue other orders to the said county treasurer requiring him to refund school taxes to other parties in said School District No. 25 that are legally assessed and levied. (4) That all the school taxes that have been so assessed, levied, paid, and ordered refunded as above alleged rightfully and legally belong to the school fund of said School District No. 25, and great and irreparable damage will befall said school district, and it will be deprived of the benefits of a school for the coming year for want of funds if said moneys are not paid over to said school district; that said district is scarce of funds at the present time and in debt, and no school can be held in said district for some time to come unless the duly levied taxes for the year 1905 are paid into its treasury. (5) Plaintiff alleges it has no adequate remedy at law, and that unless defendants are restrained it will suffer irreparable loss as above set forth. Wherefore plaintiff prays that a temporary injunction may be granted restraining said defendants as follows: (1) That T. W. De Long, county treasurer aforesaid, be restrained from refunding said school tax to the said E. A. Ikenburg in the sum of $2.83 or any other sum whatsoever, to the said C. E. Ikenburg in the sum of $3.75 or any other sum whatsoever, to the said W. C. McNamara in the sum of $124.30 or any other sum whatsoever. (2) That the said board of county commissioners be restrained from issuing any further orders to the said T. W. De Long requiring him to refund to any persons whomsoever moneys levied for school purposes which is shown by the records of his office to have been levied within the boundaries of School District No.

25, and that upon the final hearing of this case it may be adjudged and decreed that the temporary injunction granted in this case be made perpetual, and that all the school taxes levied within the boundaries of said School District No. 25 be adjudged to belong to the plaintiff, and for such other and further relief as equity and good conscience may grant. School District No. 25, Brown county, C. Langley, Treas. By P. D. McAndrew, its Attorney." To which was added an affidavit as follows: "State of Nebraska, Brown county. I, C. Langley, plaintiff in the above entitled action, being first duly sworn, depose and say that W. H. Westover and J. J. Harrington, judges of the district court for Brown county, are absent therefrom, and the affiant is desirous of obtaining a temporary order of injunction from the county judge of said county."

Afterwards on the same day there was filed what is termed an "Order of Injunction." This paper runs to the defendants, and assumes to enjoin them in the manner prayed in the petition. It is not entitled in any cause or court, nor does it purport to be an order granted by any judge. It is signed "H. S. Jarvis, Clerk District Court." As counsel for defendants treated this paper as a valid order of injunction by assailing it by motion and demurrer on grounds other than those indicated, we will assume that the clerk omitted both the Alpha and Omega of the paper in copying it in the transcript, and treat it as a temporary injunction issued by the county judge.

Defendant De Long filed a motion to vacate the order of injunction on three grounds: (1) That the court had no jurisdiction; (2) that several causes of action were improperly joined, and different reliefs improperly asked; (3) that the petition did not state facts sufficient to constitute a cause of action. He also demurred to the petition on four grounds: (1) That plaintiff had not legal capacity to sue; (2) that the court was without jurisdiction; (3) that several causes of action were improperly joined, and different reliefs improperly asked; (4) that

the petition did not state facts sufficient to constitute a cause of action. The court overruled both the motion and demurrer, and in the journal entry says: "And said defendant, electing to stand upon his said motion and demurrer, and refusing to plead further, the court finds that by filing said demurrer the defendant confessed the allegations of plaintiff's petition to be true. It is therefore ordered and adjudged by the court that the defendant pay to the plaintiff the amounts stated in plaintiff's petition; viz.: The sum of one hundred thirty and 88-100 dollars, and plaintiff recover its costs, taxed at $...., and the injunction issued herein is hereby made perpetual. To each and all of said findings, orders and judgment the said defendant T. W. De Long duly excepted."

We dislike the idea of causing appellee any further costs in obtaining the taxes to which we have no doubt it is entitled, but we are compelled to hold that the district court erred in overruling both appellant's motion and demurrer. Appellants argue in their brief that the Ikenburgs and McNamara paid their taxes and demanded a return of the same under the first provision of section 10561, Ann. St. 1903, while appellee contends that they proceeded under the second provision of that section, and in their brief set out the notices that were served by them. The trouble with all this is that the petition does not contain any allegations which disclose any such state of facts. The petition does not allege any facts which show that the board acted without jurisdiction so as to render their proceedings void, nor does it allege that there is no such school district in Smith precinct as District No. 33. If the protesting taxpayers were proceeding under the first provision of section 10561, then, if the board acted wrongfully, appellee had a right of appeal, and could not maintain this suit. If, on the other hand, they were proceeding under the second provision of that section, no right of appeal existed, and the remedy by injunction could be resorted to. *Chicago, B. & Q. R. Co. v. Nemaha County,* 50 Neb. 393; *Custer County v.*

Chicago, B. & Q. R. Co., 62 Neb. 657. On all these important points the petition is silent.

Plaintiff asks to have De Long enjoined from doing an act which he has already been commanded to do, namely, the repaying to the Ikenburgs and McNamara of the moneys they had paid under protest, and asks to have the other defendants enjoined from making orders in favor of other taxpayers. There is no allegation of conspiracy or confederation betwen De Long and the other defendants, nor is there any allegation that any other taxpayer in District No. 25 has paid his taxes under protest, and that the defendants, members of the board, are threatening or intend to order such taxes refunded. Even if the petition contained these allegations, the further fact that plaintiff in its prayer asks a separate, distinct and different relief against De Long from that asked against the other defendants brings the case within the rule laid down in section 88 of the code, and announced by this court, in *Barry v. Wachosky*, 57 Neb. 534. We think that the lines have been drawn too loosely in the district courts of this state in the use of the writ of injunction. Instead of being an extraordinary legal remedy, to be invoked only when there is no adequate remedy at law, it has degenerated into a common, every-day writ, resorted to too frequently for the purpose of trying to circumvent some plain and adequate remedy at law. It is time to call a halt, and to deny the writ in all cases where the right to it is not made perfectly clear in the petition of the applicant therefor. It is a fair inference that a pleader can and will allege in his petition all that he can prove on the trial, and, if the petition fails to state facts sufficient to entitle the plaintiff to recover in any action, the case should not proceed further. We are not unmindful of the rule that under our code pleadings should be construed liberally; but that rule should be applied to ordinary cases only, and not to applications for any extraordinary writ. In all such cases the petition should receive a strict construction. Applying that rule

to the petition in the case at bar, we think the district court erred both in overruling the motion to vacate the temporary injunction and in overruling the demurrer, except as to the first paragraph of the demurrer. In that, the court was right.

Ordinarily, in reversing a judgment on these grounds, this court will order a dismissal of the action; but, under the circumstances of this case, we think that the judgment of the district court should be reversed and the cause remanded, with leave to appellee to file an amended petition, and we so recommend.

AMES and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with leave to appellee to file an amended petition.

REVERSED.

S. D. CHILDS & COMPANY, APPELLEE, V. OMAHA PARAPHERNALIA HOUSE, APPELLANT.

FILED FEBRUARY 6, 1908. No. 15,066.

1. **Contracts:** CONSTRUCTION. The words "as soon as possible" in a contract for the manufacture of certain specified goods mean "with all reasonable diligence" or "without unreasonable delay."
2. **Evidence** examined, and *held* sufficient to sustain the findings and judgment of the district court.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

Carr, McKenzie & Howell, for appellant.

Richard S. Horton, contra.

FAWCETT, C.

This suit is based upon an order received by appellee from appellant to manufacture 300 masonic levels, or

plumbs, as they are sometimes designated in the record. There was a trial to the court, the intervention of a jury being waived. From a finding and judgment in favor of appellee, appellant prosecutes this appeal.

The record shows that on January 6, 1905, appellant addressed to appellee the following letter: "Omaha, Nebraska, Jan. 6, 1905. S. D. Childs & Co., Chicago, Ill. Gentlemen: Inclosed you will find sketch of masonic level for which you will kindly make me 300 as soon as possible. Omaha Paraphernalia House." The masonic levels referred to were to be made of aluminum, and to be printed according to a sketch furnished appellee by appellant. They were designed for use on January 26, 1905, at the forty-eighth anniversary of Capitol Lodge No. 3, Omaha. The evidence shows that the order contained in the letter of January 6 was received by appellee on January 10. On January 20 appellant wrote the following letter: "Omaha, Neb., Jan. 20, 1905. Mr. S. D. Childs & Co., 200 Clark St., Chicago, Ill. Gentlemen: I desire to call your attention to the fact that the masonic plumbs should be here in plenty of time for delivery on Jan. 25th, so do not disappoint me by not having them here by that time. Sincerely, (Signed) Charles Callanan." This letter was mailed to appellee and received by it about 10 o'clock in the forenoon of the next day. The witness Charles Callanan, secretary of appellant, testifies that on the morning after writing the letter of January 20 he discovered that he had made a mistake in fixing the time for delivery as late as January 25, and immediately sent appellee the following telegram: "S. D. Childs & Co., 200 Clark St., Chgo. Ship masonic plumbs today sure. Will hold their meeting Monday night. (Signed) Omaha Paraphernalia House." The witness Greenberg, manager of appellee's manufacturing department, testified that on receipt of that telegram they immediately wired appellant as follows: "Omaha Paraphernalia House, Omaha, Neb. Impossible to ship until Monday. S. D. Childs & Co." And also followed that telegram with the following letter: "Jan. 21,

1905. Omaha Paraphernalia House, Omaha, Neb. Gentlemen: Answering your telegram of even date, it is utterly impossible to ship the PLUMBS today. The date specified was the 26th, and we expected to ship on the 25th, so they would be on hand the next day. We will, however, send them on Monday, so they will reach you Tuesday. To have sent them today would have been to spoil them, as it takes several days for the ink to dry on aluminum. Regretting we could not accommodate you, and hoping they will be there in plenty of time for use before the 25th, we remain, Yours very truly, (Signed) S. D. Childs & Co." On receipt of the above telegram appellant wired appellee as follows: "Omaha, Neb., Jan. 21, 1905. S. D. Childs & Co., Chicago, Ill. Can't use unless in Omaha Monday morning. Omaha Paraphernalia House."

The above constitutes the entire correspondence between the parties. Mr. Greenberg testifies that on receipt of the order on January 10, "This order was placed in our factory in its regular course. It was an article that required special work from beginning to end, something different from anything we had ever manufactured before. It required to be made by hand, to have special dies for stamping same, and to have special printing plate made. No one part of this work could be performed until the preceding part was completed, and printing on aluminum, owing to the fact that aluminum does not absorb ink, is a very difficult process. All the ink on aluminum work remains entirely on the surface, and as a consequence requires considerable time for drying." He also testifies that they started the work immediately after the receipt of the order, and constantly followed it up, as is their custom on all time work. He also says that the goods were complete and in the drying rack at the time they received appellant's letter of January 20 and their first telegram of January 21, and that appellant's second telegram did not reach him until 4:45 P. M. of that day, after their factory had closed for the day; and that they

shipped the levels on Monday, January 23. By stipulation of the parties it is agreed that the levels reached Omaha by express on the afternoon of January 24, after business hours. Mr. Callanan, secretary of appellant, testifies that he did not go to the express office for the levels, nor call the express office up by telephone, nor make any inquiries in regard to them. He says: "I paid no further attention to them when I got word. I answered that telegram, and said if the goods were not here Monday I could not accept them. I paid no further attention until they were brought for delivery along the latter part of the week."

It will be seen from the above statement of facts that the masonic anniversary was held on Thursday, January 26; that the levels reached Omaha on the evening of the 24th, and could have been obtained from the express office on the morning of the 25th had appellant so desired. But appellant made no effort to obtain them, relying upon its second telegram of Saturday, January 21, as a cancelation of its order, and as releasing it from all obligations to take the levels. Appellant's contention is that, when appellee received the order to manufacture the levels "as soon as possible," it was bound to do it immediately, and, not having done so, that appellee is not entitled to recover for the work done. We do not think that an order sent to a manufacturing company to manufacture a special article "as soon as possible" means "immediately," or that the company must stop all its other work and devote itself to that particular order; but that, as stated in *Rhodes v. Cleveland Rolling-Mill Co.*, 17 Fed. 426, cited by appellant, the term "as soon as possible" means "with all reasonable diligence" or "without unreasonable delay." And, as stated in that case, it must also be said here, "There is nothing in the proof in this case to show that there was any unreasonable delay." The record fails to disclose any facts even tending to show that appellee was in any manner negligent, or that it unnecessarily delayed the filling of the order it had received from appellant.

There was nothing in the letter of January 6 or in the letter of January 20 to advise appellee that appellant was purchasing these levels for purposes of sale. The design furnished showing upon its face that the levels were for use on January 26, appellee could well assume that if the levels were received in time for use on that date, or, at most, by the day preceding, the delivery would be in ample time. The levels were, in fact, delivered in Omaha upon the 24th, and we are unable to discover in what manner appellant was damaged, except by its own refusal to receive the articles that had been manufactured under its order.

The complaint of appellant is that the judgment is not sustained by sufficient evidence, and that it was incumbent upon the appellee in making out its case in the court below to show a strict compliance on its part with the terms of the contract, and that, as a matter of law, the court erred in finding that the appellee had complied with that part of the contract requiring it, the appellee, to make the goods "as soon as possible." We think it is clear that these contentions must be decided adversely to appellant.

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

AMES and CALKINS, CC., concur.

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

AFFIRMED.

ULYSSES G. ALBERT, APPELLEE, V. H. C. YOUNG, APPELLANT,

FILED FEBRUARY 6, 1908. No. 15,061.

1. **Appeal:** VERDICT: EVIDENCE. The verdict of the jury should not be set aside as being contrary to the instructions of the court, where the evidence does not establish the fact submitted so clearly that it should have been determined by the court as a matter of law.

2. ———: ———: ———. While the verdict of a jury should be set aside if contrary to an erroneous instruction of the court, this court is not bound by the theory of such erroneous instruction in determining whether the misconduct of a member of the jury constitutes prejudicial error.

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

Field, Ricketts & Ricketts, for appellant.

J. A. Brown, contra.

CALKINS, C.

The plaintiff and the defendant were each real estate brokers in Lincoln, and were on the 15th day of December, 1905, each endeavoring to sell to one Schoenlaber lands for the sale of which they were respectively agents. The plaintiff claims that at this time he entered into an oral contract with the defendant whereby it was mutually agreed that, if either should succeed in selling a farm to said Schoenlaber, he would divide with the other the commission received by him. In January the defendant made a sale to Schoenlaber, receiving a commission of $585, and the plaintiff brought this action to recover one-half of said sum under said alleged contract. There was a verdict and judgment for the plaintiff, from which the defendant appeals.

1. The answer was a general denial. The plaintiff's testimony, if true, established the making of a contract. The defendant denied the conversation at which the plaintiff alleged the contract was made, but admitted that at another time and place the plaintiff had proposed such an agreement, to which he had replied that he would do what was right. He testified that he later heard through a third party that the plaintiff expected him to divide the commission if he made the sale, and that he thereupon went to the plaintiff and disclaimed the making of any such contract, and notified him that he would not divide

the commission in case he himself made the sale, nor would he expect the plaintiff to divide with him in case he made the sale. This was repeated several times, the plaintiff in each instance insisting upon the performance of the contract as made. The district court took the view that the contract as alleged by the plaintiff was valid, but a contract from which either party would have a right to withdraw upon notice before sale; and on the subject of withdrawal instructed the jury, in substance, that the agreement set out in the petition was supported by a consideration and was a valid contract, but would be such a contract as either party would have the right to withdraw from upon notice before sale; and, if the jury believed from the evidence that the defendant did withdraw from such contract before sale, and gave the plaintiff notice of such fact, it should find for the defendant; but that the defendant would be required to act in good faith, and the withdrawal must have been in good faith and before the sale of the land was made by the defendant. The defendant contends that the verdict was contrary to this instruction. He argues that there was no dispute as to the fact of the defendant's actual withdrawal, and no evidence that he did not make the same in good faith. Assuming, for the purpose of determining this question, that the law was correctly embodied in the instruction, we think there is evidence upon which the verdict of the jury may be sustained. If this defense was proper to go to the jury, the defense of withdrawal was an affirmative one, and the defendant was bound to establish it by a preponderance of the evidence. Strictly speaking, the evidence fails to show a withdrawal, and a rescission of the contract. What the defendant did, according to his own testimony, was to deny its existence and notify the plaintiff that he would not perform it. But, be this as it may, still, assuming that the defendant had the right to withdraw upon reasonable notice and in good faith, it was for the jury, under this instruction, to determine what constituted reasonable notice, and from the evidence to decide

whether the action was taken in good faith. While the district judge did not define the elements of good faith in this transaction, we think it was fairly to be inferred that for the act to be in good faith it must have been performed before there had been any change in the condition of the subject matter of the contract, and before the defendant had any reason which he did not have at the time of the making of the contract to suppose that he, and not the plaintiff, would make the sale. We have carefully read the evidence. It does not establish the fact of withdrawal in good faith so clearly that it should have been determined by the court as a matter of law.

2. After the jury had retired and was considering its verdict, one of the jurors stated in the presence of his fellow-jurors that he was acquainted with Allen, the owner of the farm sold by the defendant, and for the sale of which the plaintiff was seeking to recover half the commission, and that about Christmas, 1905, Allen had told him that he had practically sold the farm. It is contended by the defendant that this statement tended to influence the minds of the jurors upon the question of good faith on the part of the defendant. It is conceded that the question of good faith was not in issue; and the plaintiff contends that, if this statement tended to or did influence the minds of the jurors, it was upon a question which was wholly foreign to the issue, and was therefore error without prejudice and should be disregarded. The defendant insists that, the question having been submitted to the jury, it must be considered as material in determining whether its verdict shall stand. He invokes the doctrine that, upon an application to set aside the verdict of a jury on the ground that it is contrary to the instruction of the court, the question whether such instruction correctly states the law will not be considered. It is a fundamental principle which is at the basis of jury trials, and never to be lost sight of, that the court is to decide all matters of law, and the jury all disputed facts. To maintain the function of the court to determine matters of law, it is essential

that the jury should take the law from the court; and, whenever it appears that the jury has clearly disregarded the law as laid down by the court, its verdict should be set aside, even though its construction of the law was correct, and that of the court mistaken. *Meyer v. Midland P. R. Co.*, 2 Neb. 319; *Aultman & Co. v. Reams*, 9 Neb. 487; *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229; *Standiford v. Green & Co.*, 54 Neb. 10; *World Mutual Benefit Ass'n v. Worthing*, 59 Neb. 587. This is necessary to the due and orderly administration of the law. To allow the jury to review, or even correct, the law as given to it by the court would lead to inextricable confusion and consequent injustice. The rule should go no further, however, than the reason therefor demands. In the case we are considering, there was no contumacy of the jury, and no disposition shown to disregard any rule of law laid down by the court; and the setting aside of its verdict would not vindicate nor tend to vindicate the right of the court to decide a question of law. In determining whether the question, the decision of which may have been improperly influenced by the indiscretion of the juror in stating facts within his own knowledge, was material, we are not bound by the opinion of the district judge at the time of his giving the instruction named. If the fact was really immaterial, and was so regarded by the trial judge when he came to consider the question upon a motion for a new trial, then we are at liberty to apply the principle that harmless error will be disregarded.

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

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

CHARLES O. WHEDON, APPELLEE, V. LANCASTER COUNTY ET AL., APPELLANTS.

FILED FEBRUARY 6, 1908. No. 15,348.

1. **Appeal:** DISMISSAL. Where the appeal of the original appellant, properly taken from a decree in equity, necessarily determines all of the questions presented by the record and disposes of the case on its merits, a motion to dismiss as to other appellants will not be considered.

2. **County Board:** BRIDGES: CONTRACTS. Under the statute authorizing the county board to make yearly contracts for the construction of all bridges, such contracts may not be made for a shorter period than one year; nor may the county board evade the provisions of the statute by terminating before its expiration a contract made for one year.

3. ———: ———: ———. Where the county board has a yearly contract for the construction of all bridges in the county, it may not make another to take effect before the expiration of the first; but it may, if the occasion for building a bridge arises during the life of the yearly contract, require it to be done thereunder, even though the same cannot be completed within the term thereof.

4. ———: ———: ———: DAMAGES. Where a county board has entered into a contract for the construction of bridges for the period of one year, and before the expiration thereof attempts to supersede the same with a contract much less favorable to the county, damages to the taxpayers will be presumed.

5. **Appeal:** PLEADINGS. This court will not consider on appeal facts not presented by the pleadings.

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

Strode & Strode, T. J. Doyle, F. M. Tyrrell and *C. E. Matson,* for appellants.

Charles O. Whedon, pro se.

CALKINS, C.

Under the provisions of the act of 1905 (Comp. St. 1905, ch. 78, secs. 83-85*p*) the county board of Lancaster county

on April 26, 1906, entered into a contract with one Charles G. Sheeley for the construction of all bridges that might be required to be built in said county within the period of one year from that date. After the completion of a large number of bridges under this contract the county board, on the 5th day of January, 1907, entered upon the record of its proceedings of that day that the contract in question "is hereby canceled by mutual consent," and on the same day caused to be indorsed upon the contract itself the words "this contract is hereby canceled by mutual consent," which indorsement was signed by the chairman of the board and by the agent of the contractor. Following this action the board, after advertising for bids and finding that the proposal of the defendant, the Nebraska Construction Company, was the lowest and best bid, awarded to it a contract for building all bridges that might be required to be built in the said county during the term of one year from the 1st day of March, 1907. It appears that the prices of both material and labor had advanced between the date of the execution of the contract of April 26, 1906, and the cancelation of the same, and that the cost to the county under the new contract would be much greater for the same kind of work than under the contract made in 1906. On the 2d day of March, 1907, the plaintiff, a taxpayer and landowner of Lancaster county, brought this action against the county board and the Nebraska Construction Company to enjoin them from proceeding under the new contract, upon the ground that the said board was without power to terminate the contract of 1906, and that in so doing its members were actuated by improper and corrupt motives. The court below granted the injunction prayed for, and from its judgment this appeal is brought.

1. It appears that, when this suit was brought the members of the county board and the county attorney did not agree as to the policy which should be adopted in defending the same; and the county board, acting in pursuance of the provision of the statute authorizing it to employ addi-

tional counsel when requested so to do by petition signed by ten freeholders (Comp. St. 1905, ch. 7, sec. 18), designated other counsel to conduct the defense of this cause. Thereupon the county attorney intervened on behalf of the county in a petition in which he practically joined the plaintiff in the charges made by him and in demanding the relief prayed for. When the case came to this court, it was upon the appeal of the defendant, the Nebraska Construction Company. The county board afterwards filed a separate appeal, which the county attorney moved to dismiss. This was denied, and a motion for a rehearing of this order was submitted with the main case upon the argument. The case having been submitted, it is unnecessary to determine whether the appeal of the county board was authorized or properly made. Under the provisions of the statute of 1903 (code, sec. 681*a*), we are practically required to hear *de novo* all appeals from decrees in equity cases, and to render or direct the rendition of such judgment as in our opinion the court below should have entered. The question presented by the appeal of the defendant, the Nebraska Construction Company, cannot be determined without determining the question raised by the appeal of the county board. If the Nebraska Construction Company had dismissed its appeal before the submission of the case, then the question might have arisen; but, as the case now stands, it is not involved.

2. The excuse of the county board for terminating a confessedly advantageous contract nearly four months before its expiration was that the season's work was practically over, and that the board desired to let the contract for the ensuing year at a date early enough to enable the new contractor to prepare himself for beginning work in the spring. This end might have been attained by negotiating for the new contract before the expiration of the old one. This suggestion is met by the statement that a former county attorney had advised the board that it was better to cancel an existing contract before advertising for new proposals, and that the board believed it to be neces-

sary to terminate the old contract before it could take steps for the making of a new one. It is also suggested that the price of material was rapidly advancing, and that the board believed more favorable prices could be secured by an early letting of the contract. The district court exonerated the members of the county board from any intentional wrongdoing; and, in the view we take of the powers of the county board, it is not necessary for us to determine whether the excuses presented by it for its action are sufficient to overcome the inference that would naturally arise from its conduct unexplained. The action of the board in terminating the contract of April 26, 1906, on January 5, 1907, was by it denominated a cancelation, and it has been so spoken of in the argument of counsel. We regard the use of the term cancelation as inaccurate and likely to be misleading. To cancel is to annul and destroy. The cancelation of a contract necessarily implies a waiver of all the rights thereunder by the parties. If, after a breach by one of the parties, they agree to cancel it, that is a waiver of any cause of action growing out of the original breach. *Dreifus, Block & Co. v. Columbian Exposition Salvage Co.*, 194 Pa. St. 475, 75 Am. St. Rep. 704. The contract had been in force for some 9 months, and a large amount of work had been performed under it. It is plain that the parties did not intend to cancel the contract in the true sense of that word. What they meant to do, and what they did do, if it was within the scope of the power of the county board, was to change the contract with respect to its duration. The question presented by the record is not whether a county board may cancel a contract of this character, but whether it can change the period of duration of the yearly contracts provided for by the act of 1905 (Comp. St. 1905, ch. 78, sec. 84). It is argued that the unmaking of a contract is within the power which made it, and is equally effectual. This is true when applied to natural persons, and it may be true when applied to corporate officers having a general power to contract; but, when the power to contract is granted to public

officers with accompanying restrictions and limitations as to the manner in which it is to be exercised, the power must be exercised within the limits of these restrictions. In the statute which we are considering, the board is authorized to make yearly contracts for all bridges to be built within their respective counties for the period of one year, at a specified sum per lineal foot for the superstructure, and at a specified sum per foot, board measure, for the wood material used in the substructure of such bridges. Having chosen to proceed under this power, the board has accepted the limitations imposed by the statute. The period for which it may make this contract has been fixed by the statute, and all bridges built within the period must be built under this contract. The county board may not let the contract for a greater period, nor for a less, than is prescribed by the statute. This is not only conceded by the defendants, but is insisted upon in their argument. To make a contract for a year, and terminate it at the end of 8 or 9 months, would be to do indirectly what the board might not do directly, and this cannot be permitted. We therefore conclude that the action of the board attempted to be taken on January 5, 1907, was without authority and void.

3. It is apparent that the county board cannot have, with different parties, two yearly contracts, any portion of which covers the same period, and that, if the contract expiring April 26, 1907, was in force on the 2d day of March in that year, the county board had no power to enter into the contract with the defendant, the Nebraska Construction Company, to begin on the latter date. It is urged that on March 2 the contract expiring April 26 was practically ended, and that no necessity for any further work thereunder was likely to arise, and that, if such necessity did occur, the contractor could not be compelled to undertake any work which he might not be able to complete within the year. We do not think the statute susceptible of any such construction. The purpose of the law was to have a contract in existence for a year, under which work

the necessity for which should arise during that period, could be performed. If the occasion for building a bridge arose during the life of this contract, the work should be ordered and done thereunder, and the circumstance that the completion of the work might require a time beyond the period of the yearly contract is immaterial. Any other construction of yearly contracts would imply an interregnum, in which no work could be ordered nor begun, lest it might not be completed within the year. The contract would therefore be, not for a year, but for some shorter and indefinite period. It therefore follows that the county board had no authority to enter into the contract of March 2, 1907, with the Nebraska Construction Company.

4. The defendants contend that the plaintiff has failed to show damage in common with the taxpayers of the county by reason of an unnecessary expenditure of the public funds, and argues that, if no other work would have been done under the contract expiring April 26, 1907, it was a matter of indifference to the taxpayers whether it was allowed to stand until it expired or not. We think the plaintiff had the right, on the 2d day of March, 1907, to assume that the necessity for work might, and probably would, arise before the 26th day of April, and that it would, in default of any action taken by him, be done under the contract entered into on the 2d day of March. The prices under this contract being very much higher than under the contract expiring April 26, damage would necessarily and naturally result to the taxpayers of the county. The fact that no such work was done may properly be attributed to the injunction obtained by the plaintiff in this action.

5. It appeared from the evidence that at the time of the making of the Sheeley contract on the 26th day of April, 1906, there was existing a former contract with the same parties, which would not have expired by its own limitation for about 15 days, but which the board had assumed to terminate before that date. It was contended

upon the oral argument that, if the board has no power to terminate such contract until the end of its term, then the contract of April 26, 1906, was void, and, being invalid, it left the county board free to make the contract with the defendant, the Nebraska Construction Company. That these facts were not pleaded is a sufficient answer to this argument. Whether, if pleaded, they could be used by the defendants to defeat the plaintiff's right to the relief demanded, it is not necessary for us to determine.

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

FAWCETT and AMES, CC., concur.

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

AFFIRMED.

ERNEST S. KENNISON V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1908. No. 15,154.

1. **Homicide**: MALICE: PRESUMPTIONS: INSTRUCTIONS. The law implies malice in cases of homicide if the killing alone is shown, but, if the circumstances attending the homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing or from the use of a deadly weapon. *Vollmer v. State*, 24 Neb. 838; *Lucas v. State*, 78 Neb. 454.

2. ———: INTENT: INSTRUCTIONS: QUESTION FOR JURY. Where the evidence of eye-witnesses shows that during or immediately after a fist fight between the deceased and the defendant, in which the defendant was being worsted, the defendant shot at, but missed, the deceased, and that the fatal shot was fired almost immediately thereafter during a struggle between them for the possession of the revolver, an instruction which assumes the crime to be murder in the second degree is erroneous, since it is for the jury to determine from all the evidence before them the intent with which the shooting was done.

3. ———: INSTRUCTIONS: BURDEN OF PROOF. An instruction that,

"if the jury believe from the evidence that the defendant unlawfully and feloniously shot deceased, Samuel D. Cox, and that said shot caused the death of said Cox, then, to reduce the killing from murder to manslaughter, the jury must believe beyond a reasonable doubt" that certain mitigating circumstances recited therein existed, assumes that, if the defendant unlawfully killed the deceased he was guilty of murder, and places the burden upon him to establish beyond a reasonable doubt the existence of mitigating circumstances before the jury would be entitled to "reduce the killing" from murder to manslaughter.

4. ———: ———: ———: PRESUMPTIONS. An instruction which, if the killing is shown, assumes the crime to be murder, and requires proof of a lower degree to be made by the defendant beyond a reasonable doubt before the jury will be justified in reducing the degree to manslaughter, is inconsistent with instructions that the burden of proof in a criminal case never shifts, but remains with the state throughout the trial, and that the defendant is presumed to be innocent until proved to be guilty beyond a reasonable doubt.

5. **Criminal Law**: INSTRUCTIONS: BURDEN OF PROOF. An instruction which requires a defendant to prove beyond a reasonable doubt his innocence of a graver crime before he can be found guilty of a less heinous offense imposes an unwarranted burden upon the defendant and is erroneous.

ERROR to the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. *Reversed.*

Hamer & Hamer and *M. J. Huffman,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

LETTON, J.

An information was filed in the district court for Scott's Bluff county, in which plaintiff in error was accused of murder in the first degree in killing Samuel D. Cox by shooting him with a pistol held by plaintiff in error. A jury trial was had, which resulted in a verdict of guilty of murder in the second degree, with recommendation that

the extreme penalty of the law for that degree be inflicted. The judgment of the court was that plaintiff in error be confined in the state penitentiary for the period of twenty-four years. The record is quite voluminous, and a number of errors are assigned, but in view of the conclusion which we have reached, and of the fact that the case will have to be again tried, it will not be necessary, nor would it be proper, for us to review the evidence or discuss the merits of the case as shown thereby. Motions were filed seeking a continuance of the cause, and also for a change of the venue to another county. Both were overruled, and complaint is made of the ruling on each motion. Both were supported by affidavits, and resisted by counter affidavits. In the rulings upon these motions we can discover no abuse of discretion, and are of the opinion that both motions were properly overruled. There is some complaint that the verdict was not supported by sufficient evidence, and that under the proofs it should have been an acquittal or, at most, not greater than manslaughter. We have carefully considered all the evidence introduced upon the trial, and think the verdict cannot be successfully assailed on that ground.

The defendant complains of the giving of the ninth instruction, given by the court upon its own motion. That part of the instruction complained of is as follows: "In cases of homicide, the law presumes malice from the unlawful use of a deadly weapon upon a vital part, and when the fact of unlawful killing or shooting causing death is proved, and no evidence tends to show or express malice on the one hand, or any justification, mitigation or excuse on the other hand, the law implies malice, and the offense is murder in the second degree. In law, a loaded gun or pistol is a deadly weapon, and if you believe from the evidence beyond a reasonable doubt that the defendant, Ernest S. Kennison, wantonly, cruelly and without justification or excuse shot Samuel D. Cox, and thereby caused his death, then the law presumes that such shooting was done maliciously, unless you are satisfied by the evidence

that it was done without malice." This instruction is in accordance with the ancient doctrine of the common law, which, after the fact of a killing was shown, imposed upon the defendant the burden of proving justification or excuse. This doctrine, however, has in this and other states long given place to the more modern and logical idea that the burden of proof in a criminal case does not shift, but remains with the state until the end of the trial, and that it is incumbent upon the state to prove beyond a reasonable doubt that the defendant's act was actuated by malice at the time the fatal shot was fired. Where no direct evidence is obtainable as to the circumstances immediately surrounding the killing, and the fact that the defendant killed another is proved, there is an inference that the killing was intentionally done. This inference arises from the nature of the circumstances, since it would be contrary to human experience to believe that the act was done without motive. If the killing was done, in fact, unintentionally or by accident, or if there existed justification or excuse for the same, the person who committed the act, in the absence of any witness, would be the only person who could furnish such evidence, hence, in such case, when the fact of the killing by a known person with a deadly weapon is proved, the inference or presumption arises that the killing was done intentionally, this being a rule of evidence founded upon the necessities of the case. But where all the circumstances surrounding the killing are testified to by witnesses, and the testimony of some of them would warrant the jury in finding that the killing was malicious, while the testimony of others, if believed, would warrant the jury in the conclusion that the fatal shot was fired by accident or in self-defense, then no presumption is to be indulged in. 1 Elliot, Evidence, secs. 90, 91, 98. The facts are all before the jury, and it is for them to say whether the killing was malicious, whether it was upon a sudden quarrel or in the commission of an unlawful act, or whether it was justifiable and excusable on the ground of self-defense or other equally valid rea-

sons. It is unnecessary at this time to enter into a full discussion of the history of the legal doctrine under discussion. The old and the new doctrines are set side by side in the opinion of Justice Shaw in *Commonwealth v. York,* 9 Met. (Mass.) 93, and the dissenting opinion of Judge Wild. See, also, Wharton, Criminal Evidence (8th ed.), secs. 738, 764; Wharton, Homicide (3d ed.), sec. 478; *Territory v. Lucero,* 46 Pac. (N. M.) 18, in which there is a full discussion of the conflicting doctrines, with many cases cited; *Territory v. Gutierez,* 79 Pac. (N. M.) 716. The law was settled nearly twenty years ago in this state on this point in the case of *Vollmer v. State,* 24 Neb. 838, in which it is said in the opinion by Chief Justice REESE, speaking of the following instructions: "'You are instructed that, where the fact of the killing is established without any excuse or explanatory circumstances, malice is presumed, and the crime would be, under such circumstances, murder in the second degree.' This instruction is objected to as not being applicable to the case made, and as being prejudicial, and as tending to direct the attention of the jury to that particular quality of homicide. This instruction is perhaps based upon *Preuit v. People,* 5 Neb. 377; *Milton v. State,* 6 Neb. 136. The doctrine contained in the instructions, when applied to a case in which nothing further than the killing is shown, is recognized by this court in the case cited, and in some others, but we think it can have no application to cases like the one at bar. All the circumstances of the killing are shown by those who were eye-witnesses. * * * Plaintiff in error was indicted for murder in the second degree. It was for the jury to say, from all the circumstances of the case, whether the killing was murder in the second degree, manslaughter, or excusable. When all the facts and circumstances connected with the killing were presented to the jury, it was for them to say whether plaintiff in error purposely and maliciously killed the deceased, or whether the killing was unlawful, without malice, upon sudden quarrel, or unintentionally done (as testified to by plain-

tiff in error upon the stand), while the slayer was in the commission of some unlawful act, which would be manslaughter, or whether in self-defense under a reasonable apprehension of danger to life, or great bodily harm, which would be excusable." Ten years later in the case of *Kastner v. State,* 58 Neb. 767, an instruction almost word for word identical with that in this case, except for the change of names, was given, and complained of by the defendant. After stating the rule in this court as laid down in *Pruit v. People,* and *Milton v. State, supra,* the court says, speaking of the *Vollmer* case: "In that case all the circumstances surrounding the transaction had been detailed before the jury by those who were present, and saw and heard what transpired. Extenuating facts were proven tending to show want of malice and that life was taken in self-defense. Manifestly the instruction given in that case, that malice was presumed from the facts of the killing and that the crime was murder in the second degree, was highly prejudicial to the defendant. But in the case at bar no person witnessed the shooting other than Tiedeman, whose life was taken. * * * Had the proofs adduced been of such a character as to make it appear that the killing of Tiedeman was either justifiable or that the offense committed was below murder in the second degree, then the instruction criticised would have been misleading and prejudicial." The same rule was again asserted in *Lucas v. State,* 78 Neb. 454, in which the question is reexamined by Chief Justice SEDGWICK, and the rule laid down in *Vollmer v. State, supra,* adhered to.

It will thus be seen that it has been the settled law of this state, since the question was first presented to this court for consideration, that in a case of homicide, where all the circumstances surrounding the transaction are in evidence before the jury, the fact of the killing gives rise to no presumption that it was done with malice, but it is for the jury to determine the motive or intent or lack of intent with which the act was done. In Good and Corcoran, Instructions to Juries, p. 309, this instruction is

set out at length, and the case of *Kastner v. State, supra,* is cited in support thereof. As we have shown, that case upholds its applicability in cases where the circumstances surrounding the killing are not in evidence, but it expressly upholds the doctrine of the *Vollmer* case that such an instruction is erroneous where all the facts are in evidence by eye-witnesses.

In this case the tragedy occurred about dusk on the principal street of the village of Minatare in the immediate presence of a large number of eye-witnesses. The evidence is to the effect that the shooting took place at the termination of a fight with fists between Kennison and Cox, in which Kennison had received the worst of the encounter. Kennison had been struck by Cox and knocked against the wall of a building. He recovered himself, drew a pistol and shot at Cox who, as a number of witnesses testify, was then standing still, six or eight feet away from him. This shot missed Cox. Cox then rushed toward Kennison, evidently to try to get the pistol, when a second shot struck his left arm. The shot which killed him followed during the struggle between them for the possession of the revolver. According to some of the witnesses for the state, the last shot was fired deliberately. The witness Pierpont, who was called on behalf of the state, testified as follows: "Q. As he pulled the gun, you say the first shot went wild? A. I think so. Q. Then what did Cox do? A. He clinched or reached for Kennison's arm. Q. Did you notice whether he got it or not? A. Yes, he got him by the wrist. Cross-examination: Q. You say Cox caught him either by the gun or the wrist? A. By the wrist, I think. Q. Might Cox have had hold of the gun at any time? A. He might have had, but I don't think he had." Other witnesses for the state told of Cox having hold of Kennison's arm or wrist in the struggle. Kennison testifies that Cox rushed at him before he fired the first shot, that this did not stop him, that Cox grabbed him, took hold of his arm and pushed his hand up, and that the gun was discharged accidentally. The witness Snell, who testified for the

defendant, swore that Cox had hold of Kennison's hand in which the gun was held, and that after he got hold of the hand with the pistol Cox threw the hand up that had the gun in it and the gun went off.

With all these facts before the jury, the use of the weapon or the fact of killing raised no presumption of malice, and the question of its absence or existence was one for the jury to determine from the evidence under proper instructions.

The defendant complains also of the tenth instruction, given by the court upon its own motion. The portion of that instruction which is claimed to be erroneous is as follows: "And in this case, if the jury believe from the evidence that the defendant unlawfully and feloniously shot deceased, Samuel D. Cox, and that said shot caused the death of the said Cox, then, to reduce the killing from murder to manslaughter, the jury must believe beyond a reasonable doubt that the provocation for such shooting arose at the time of the shooting, and that the passion therefor was not the result of a former provocation; that such passion was either rage, anger, sudden resentment, or terror, which rendered the defendant incapable of cool reflection upon the character and result of his act, and that the act or shooting was directly caused by passion arising out of the provocation at the time of the shooting, if there was any provocation therefor shown by the evidence." This instruction in effect tells the jury that, if they believe that the defendant unlawfully and feloniously killed Cox, the killing is murder, and in order to reduce the killing from murder to manslaughter the jury must believe *beyond a reasonable doubt* that the mitigating circumstances detailed in the instruction existed, thus placing the burden upon the defendant to prove the existence of circumstances which would lower the degree of the crime. If the unlawful killing is shown, by the instruction the degree of the crime is assumed to be murder, unless the existence of provocation at the time, and passion caused thereby, was proved beyond a reasonable doubt,

that is, the higher degree of the crime must stand as established, unless it is affirmatively established on the part of the defendant *beyond a reasonable doubt* that mitigating circumstances existed, which would lower the degree of the crime, or "reduce the killing," as the instruction states, "from murder to manslaughter." Under our statutes, if the defendant unlawfully and feloniously shot and killed the deceased, he might be guilty of either murder or manslaughter, since both of these crimes are felonious, but the instruction in effect tells the jury that he is guilty of the higher degree of the crime, unless he can prove his innocence of that degree beyond a reasonable doubt. This instruction invades the province of the jury, and is clearly wrong. It deprives the jury of the right to fix the degree from the evidence produced by the state, and it imposes an unwarranted burden upon the defendant. We have repeatedly held in this state that the burden of proof in a criminal case never shifts, but remains with the state throughout the trial. An instruction which places this burden upon the defendant, or which requires him to prove beyond a reasonable doubt his innocence of a heavier degree of crime, is highly prejudicial. Counsel for the state insist that this instruction, when taken in connection with the remainder of the charge, is not erroneous, and refer to the case of *Kemp v. State*, 13 Tex. App. 561, in which the word "reduce" was used by the court in much the same manner as in the instruction complained of, but the instruction in the *Kemp* case did not require the jury to be convinced beyond a reasonable doubt that mitigating circumstances existed before they would be justified in reducing the killing from murder to manslaughter.

It is contended also by the state that, as other instructions were given in which the different degrees of the crime of felonious killing were well and fully defined, the vice of this instruction, was fully corrected. But this could not be. An instruction that is clearly wrong, and which is inconsistent with the correct rule, is not cured

by a good one. This is too well settled to require citations of authorities.

In the sixth instruction, the jury were told that the burden of proof rests upon the state to prove the charge beyond a reasonable doubt, and that this burden never shifts from the state to the defendant; but this is inconsistent with an instruction which tells the jury that, in order to reduce the crime from murder to manslaughter, certain elements must be proved beyond a reasonable doubt. The eleventh instruction also is inconsistent with this one, and the necessary result of the two instructions, taken together, would be to confuse the jury, and leave them in doubt whether merely a reasonable doubt as to his guilt of murder in the second degree would be sufficient to warrant them in fixing the degree of the crime at manslaughter, or whether it would require them to be convinced *beyond* a reasonable doubt that mitigating facts existed, before they would be justified in reducing the degree, and finding him guilty of the lesser offense, instead of the greater.

The ninth instruction complained of sets against the defendant the presumption of malice, and of murder in the second degree; the tenth assumes the existence of that degree of murder, and requires proof of a lower to be made by the defendant beyond a reasonable doubt before the jury will be justified in reducing the degree. Under the testimony in the case, these instructions were prejudicially erroneous.

The constitution guarantees a fair and impartial trial to every citizen of this state, and this demands that in the consideration of the evidence the jury must be guided in their deliberations by a correct statement of the law. It was one of the constitutional rights of the defendant that no instructions should be given the jury which would impose upon him a burden to which he was not legally subject, and the effect of which would be to prevent him from having a fair and impartial trial under the law of the land.

For these reasons, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

JOSEPH SKIDMORE V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1908. No. 15,238.

1. **Criminal Law: VARIANCE.** A party charged as a principal cannot be convicted upon evidence tending only to show that he was an accessory.

2. **———: ACCESSORY.** One who advises others to commit larceny, but who is several miles distant at the time of the commission of the offense, and who takes no part therein, but assists in the disposal of the proceeds after the theft has been fully committed, is not a principal, but an accessory.

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

R. R. Dickson, for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

LETTON, J.

The defendant, Joseph Skidmore, was charged with stealing nine hogs on the 25th day of February, 1907, the property of one John Ferguson. Upon trial he was found guilty and sentenced to the penitentiary.

Ferguson resided in Iowa, but owned a ranch in Holt county, about twelve miles from the village of Atkinson. He employed a young man named Kimball to occupy the ranch and take care of the property. The evidence of the state, which was evidently believed by the jury, is about as follows: The defendant, Skidmore, had been employed by Ferguson upon the ranch in the same capacity as Kimball until December, 1906, the time that Kimball took

charge. On the day the property was stolen Kimball went to Atkinson, attended a show there, and remained over night. On several occasions before the night of the offense Skidmore had talked with three young men named Weller, Purnell and McShane, suggesting the theft of the hogs from the Ferguson ranch. On the day before the night that the hogs were taken he told Weller that Kimball was in town at the show, and that he, Skidmore, would procure a wagon from one Kazada and a team with which they could get the hogs that night. He made arrangements with McShane for the use of his team, and between 8 and 10 o'clock that night McShane, Weller and Purnell, using McShane's team and Kazada's wagon, left Atkinson for the Ferguson ranch. They went to the ranch, loaded nine hogs, and brought them to Atkinson, reaching there just before daylight. Purnell went to Skidmore's house to notify him of their arrival. Skidmore then joined them and went with them to the stock-yards of one Dibble, a butcher and stock buyer, where Skidmore helped to unload the hogs. Dibble some time during that day paid Skidmore for the hogs, and Skidmore paid Weller and McShane $16 each as their share of the proceeds. The defense is that the hogs were procured through Skidmore's agency in the manner detailed for the benefit of Kimball, who received a part of the money for them, and that Skidmore was merely his innocent agent in the matter. Kimball had sold some hogs without authority before this. The jury evidently believed that the defendant planned the theft and took part in it, and there is sufficient evidence to uphold the verdict if the proper crime had been charged.

The court instructed the jury, in substance, that, if the defendant requested, instigated and procured the three men to steal the hogs, and that pursuant to such procurement they took the hogs, brought them to Atkinson, and that they were there sold by defendant with the felonious intent to steal the hogs and deprive the owner of his property, then the defendant would be guilty as charged. In many states the old common law distinction between

principals and accessories before the fact has been abolished by statute. This seems to be a step in the general direction of reform by simplifying the law and abolishing technicalities; but the legislature of this state has seen fit to abide by the ancient and technical distinctions. Mr. Wharton says: "The obstructions of justice caused by these subtleties have long been deplored." 1 Wharton, Criminal Law (10th ed.), 205. In this state aiding or abetting or procuring another to commit a felony is a substantive and independent crime. Criminal code, sec. 1; *Oerter v. State,* 57 Neb. 135; *Casey v. State,* 49 Neb. 403; *Dixon v. State,* 46 Neb. 298; *Lamb v. State,* 69 Neb. 212. Since a person cannot lawfully be convicted of a crime other than that with which he is charged, it is clear that, if from the facts related Skidmore was an accessory before the fact, he could not lawfully be convicted of the larceny itself. Unless the defendant was actually or constructively present at the time of the commission of the offense, he could not be held as principal, but, if he aided, abetted or procured the commission of the crime, he could properly be convicted as an accessory. Since he was not actually present, the question arises: Was he constructively present? "A person is constructively present, and therefore guilty as a principal, if he is acting with the person who actually commits the deed in pursuance of a common design, and is aiding his associate, either by keeping watch or otherwise, or is so situated as to be able to aid him, with a view, known to the other, to insure success in the accomplishment of the common enterprise." Clark and Marshall, Law of Crimes (2d ed.), sec. 173. *Breese v. State,* 12 Ohio St. 146. "But persons not actually assisting are not principals at common law. * * * And, although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offense is committed, are not principals in cases where the felony is immediately executed by responsible agents, but are accessories before the fact." 1

Wharton, Criminal Law (10th ed.), sec. 219. In order to be a principal, therefore, it is essential that the party charged, where the act is committed by confederates, take some part in the execution of the plan. *State v. Valwell*, 66 Vt. 528, 29 Atl. 1018. In most of the cases cited by the state where a conviction as principal was upheld, the defendant had in some way taken part in the execution of the common design at or about the time of the commission of the felony. The case of *Scales v. State*, 7 Tex. App. 361, cited by the state, has virtually been overruled in the later Texas cases, which are now in harmony with the general rule. In *Holmes v. State*, 49 Tex. Cr. Rep. 348, 91 S. W. 588, the rule is stated thus: "In felony cases in order to constitute one a principal he must be present or doing some act at the time in furtherance of and in assistance to the principal." *Barnett v. State*, 46 Tex. Cr. Rep. 458, 80 S. W. 1013; *McDonald v. State*, 46 Tex. Cr. Rep. 4, 79 S. W. 542.

In *Lamb v. State, supra*, the facts were that Hill and Stewart stole cattle and drove them to a railroad stock-yard at Lamb's instigation and procurement. Lamb, soon after, brought some of his own cattle to the stock-yard, mingled them with the stolen cattle, shipped and sold the whole number and appropriated the proceeds. It was contended that the refusal of the court to tell the jury that defendant could not be convicted if he was a principal in the second degree was error, but the court said: "The refusal of the court to tell the jury that defendant could not be convicted if he was a principal in the second degree was not error. There is, in our opinion, no evidence tending to prove that Lamb was present when the cattle were stolen, or that he was near enough to give aid or encouragement in the perpetration of the crime." The court also said: "The law of the case is very plain. If the cattle were stolen as alleged, and if Lamb was an accessory before the fact, that is, if by his command, request, advice or suggestion the crime was committed when he was neither actually nor constructively present, he was an

aider, abetter or procurer within the meaning of the statute above quoted." The facts in this case are very similar. The three young men stole the hogs and took them to a place where the defendant sold them. The defendant was not with them at the time they started on the trip, nor until after the theft had been accomplished. He was never nearer the scene than Atkinson. He took no part in enticing Kimball away or keeping watch of him, or in anything connected with the doing of the act itself. The crime was fully committed before he saw the hogs. What he did was to aid, abet and procure the others to steal the hogs. He was neither actually nor constructively present. The instruction was therefore erroneous.

He was indicted for one crime and convicted of another. This cannot lawfully be done. *Hill v. State*, 42 Neb. 503; *Dixon v. State, supra.*

The judgment of the district court is

REVERSED.

MCCAGUE SAVINGS BANK, APPELLANT, V. FANNIE M. CROFT ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,009.

1. **Abatement and Revival:** PARTIES. Where the transfer of the subject of an action is made by the plaintiff during its pendency, the action may be prosecuted for the benefit of the assignee in the name of the original plaintiff, such party remaining *in esse.*
2. ———: ———. The insolvency of, and the appointment of a receiver for, the original plaintiff, who has assigned the cause of action prior to the appointment of a receiver and since the action was begun, does not prevent the prosecution of the action in the name of the original plaintiff.
3. **Action:** JOINDER. An action to foreclose a mortgage cannot, against objections made by the defendant, be joined with an action to obtain a money judgment upon a note not secured by the mortgage.
4. **Pleading:** MISJOINDER: DISMISSAL. In case of misjoinder of two causes of action in the same petition, the plaintiff may dismiss one of such causes of action and proceed to trial upon the other.

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

Hall & Stout and Charles Battelle, for appellant.

John L. Webster, Joel W. West and *John O. Detweiler, contra.*

DUFFIE, C.

On April 28, 1894, plaintiff filed its petition herein, alleging that on the 24th day of March, 1892, the defendant Fannie M. Croft executed and delivered to the defendant John B. Finlay her promissory note for $5,000, due one year after date, and her mortgage securing the same on certain real estate in the city of Omaha; that on April 8, 1892, the defendants Finlay, Manley, Cathers and John W. Croft borrowed from the plaintiff $5,000, giving their note therefor, due one year from its date; that to secure the same the defendant Finlay indorsed and delivered over to plaintiff the above described note and mortgage given to him by Fannie M. Croft; that defendants Manley, Finlay, Cathers and John W. Croft became liable as guarantors upon the Fannie M. Croft note by signing an indorsement on the back thereof as follows: "April 7, 1892. For value received we hereby guarantee the collection of the within note and payment thereof"; that said note was presented when due for payment, which was refused, and said note was duly protested. Defendants Houska, Stewart and Dodge were made parties because it was alleged that they have, or claim to have, some interest in or lien upon said mortgaged property, junior and inferior to the lien of plaintiff's mortgage. Other usual allegations common in foreclosure proceedings were made. The prayer of the petition was for an accounting of the amount due plaintiff upon the notes described; that it may be decreed that plaintiff have a first lien upon the mortgaged premises therefor; that the defendants Manley, Cathers, Finlay and John W. Croft, or some of them, may be decreed to

pay plaintiff the amount so found due upon said notes and mortgage; that, in default of payment, the mortgaged premises may be sold according to law, and that, in the event the premises should not sell for a sum sufficient to pay the amount due, plaintiff may have judgment for the deficiency against the defendants Manley, Cathers, Finley and John W. Croft.

Issue was joined upon answers filed by the several defendants now interested, and replies thereto by plaintiff, but the case was not brought to trial until 1906. Before trial defendants Finlay and Fannie M. Croft died, and the action was revived in the names of their successors in interest. July 7, 1905, plaintiff filed a supplemental petition in which it was alleged that at the commencement of the action it was the legal owner and holder of the note dated April 8, 1892, but thereafter for a valuable consideration it sold and assigned the same to one Frank H. Parsons of New York city, for whose benefit this suit is now pending and continued in the name of the plaintiff; that a receiver has been appointed to take charge of the affairs of the plaintiff; that since the commencement of this action the property covered by said collateral mortgage has been taken by foreclosure of prior liens, and that there is no personal liability on the said collateral note and mortgage, so that the security is of no value and there will be nothing therefrom to be applied upon the principal note, and therefore the plaintiff asks nothing by reason of said collateral security; that no part of said note of date April 8, 1892, has been paid, and plaintiff prays judgment against defendants Manley, Cathers, John W. Croft, and J. O. Detweiler as administrator of the estate of John B. Finlay, deceased.

Separate answers were filed by the defendants, appellees herein, in which they deny liability. Plaintiff alleged by way of reply that the transfer of the notes and mortgage to Parsons was made prior to the appointment of a receiver. However, it is unnecessary to set forth fully the answers and replies. A jury was impaneled to try the

case, and plaintiff offered in evidence the note of date April 8, 1892. Objections to its admission were made by defendants Cathers and Detweiler, administrator. The objections were sustained, for the reason, as stated by the court, that plaintiff has no right to prosecute this action for the benefit of the party named in the supplemental or amended petition who is the assignee of the note in controversy. Thereupon the said Frank H. Parsons asked leave of court to be substituted as party plaintiff and that the action proceed in his name. Objection to this request was sustained. Thereupon the trial proceeded as against the defendants Manley and John W. Croft, who were then not present or represented by counsel. Upon the conclusion of the testimony, the court directed the jury to return a verdict against the defendants Croft and Manley for the sum of $6,198.74, and in favor of the defendants Cathers and Detweiler, administrator. Afterwards the defendant John W. Croft was granted a new trial, which was had to the court without the intervention of a jury, and was determined upon the evidence adduced at the first trial, and resulted in a finding favorable to the said defendant. Judgment was rendered upon the verdict and finding, and plaintiff appeals.

The first of two principal questions presented relates to the authority of the real party in interest to maintain the action in the name of the plaintiff. Section 45 of the code provides: "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In the case of a marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and, in the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the

person to whom the transfer is made, to be substituted in the action." In the event of a transfer of interest by a sale and assignment after the institution of a suit, the action may ordinarily be continued in the name of the original party. *Harrington v. Connor,* 51 Neb. 214; *Howell v. Alma Milling Co.,* 36 Neb. 80, and cases cited.

In the case before us, the plaintiff was the owner of the notes and mortgage when the suits were instituted, but later transferred its interest to Parsons; still later the plaintiff became insolvent, and a receiver was appointed to take charge of its affairs. It is contended by the appellees that the appointment of the receiver suspended the right to further prosecute this action in the name of the bank without obtaining the receiver's consent or making him a party. Thompson, Commentaries on Law of Corporations, sec. 6900, says that "the necessary effect of the appointment of a receiver, * * * is to suspend all rights of action, of whatever description, on the part of the corporation." The rule there announced, we think, was intended to apply to cases in which the corporation was the real party in interest at the time of the appointment of the receiver. In such cases it is the practice to have the receiver substituted as plaintiff in actions previously instituted by the corporations. Beach, Receivers, sec. 697. But this rule should not control cases where the corporation had, before the appointment of a receiver, sold and transferred its interest in the subject matter of the action. The receiver had no interest in the case. The notes and mortgage were no longer a part of the bank's assets. The appointment of a receiver did not dissolve the corporation; it remained *in esse.* Upon its assignment of the notes and mortgage, the action did not abate, but under section 45, *supra,* continued in the name of the bank to the same extent and in the same manner as the assignee could have maintained it had he been substituted at the time of the assignment.

This brings us to the second question presented. It is urged by appellees that a proper practice will not permit

of the transformation of a suit from one to foreclose a mortgage into an action at law on a promissory note not secured by a mortgage. In the original petition filed by the plaintiff no personal judgment against the makers of the principal note was asked until after the mortgaged property was exhausted, but it was sought to obtain a personal judgment on the principal note, less any amount which might be derived from the mortgaged premises. It is true that, as against objections made by a defendant, an independent note cannot be joined in an action to foreclose a mortgage. Defendants understood that such was the practice, and raised the question, first, by demurrer, and again by answer. When objection is made to a petition on the ground that two causes of action are improperly joined therein, the plaintiff may dismiss as to one cause of action and proceed upon the other, or he may file several petitions, each including such of said causes of action as might be joined, and an action shall be docketed for each of said petitions, and the same shall be proceeded in without further service. Code, sec. 97. A suit upon the principal note of Finlay and upon the mortgage taken by the bank as collateral could not, as against the objections of the defendants, be joined in the same action, but when the plaintiff filed its amended and substituted petition upon which the case was tried, and withdrew any demand for relief on account of the mortgage, it was in effect a dismissal of the cause of action upon the mortgage, and the case then stood for trial upon the principal note declared on; the objection to the petition on the ground of the misjoinder of causes of action being eliminated by the allegations of the amended and substituted petition. As to the defenses raised by the several answers, we are not called upon to pass; the only questions raised by the record are questions of practice, and the merits of the case are not before us. We think the court erred in directing a verdict in favor of the defendants Cathers and Detweiler and finding for Croft, and that the case should proceed in the name of the McCague

Savings Bank as plaintiff, if the parties interested so elect, or that the assignee of the note may be substituted as the party plaintiff upon the application for such substitution.

We recommend a reversal of the judgment of the district court, and that the cause be remanded for further proceedings not inconsistent with this opinion.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

CHARLES A. SCHAPPEL, ADMINISTRATOR, APPELLEE, V. FIRST NATIONAL BANK, APPELLANT.

AVERY PLANTER COMPANY, APPELLEE, V. FIRST NATIONAL BANK, APPELLANT.

FIRST NATIONAL BANK, APPELLANT, V. CHARLES A. SCHAPPEL, ADMINISTRATOR, ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,070.

Contribution: TRESPASS. One who sues for contribution on the ground that he has satisfied a judgment for a trespass committed against a third party must show that the defendant joined in committing the trespass and was liable therefor equally with the plaintiff.

APPEAL from the district court for Pawnee county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Story & Story, for appellant.

J. C. Dort, contra.

DUFFIE, C.

In February, 1895, Meek, Skinner & Company, doing business in Pawnee City, made and filed a chattel mort-

gage covering all their personal property to secure their creditors, 65 in number. But three of the creditors knew of this mortgage at the time it was filed, and they were the only ones who at that time consented to accept it as security. The First National Bank of Pawnee City, the Avery Planter Company and Maggie Wishard, now deceased, and of whose estate Schappel is administrator, refused to accept the security offered by the mortgage, and commenced actions in attachment against the firm of Meek, Skinner & Company, and these attachments were levied on all the property covered by the mortgage and also on certain real estate in Pawnee City. The attachment of the First National Bank was first levied, that of Maggie Wishard was next in point of time, and that of the Avery Planter Company was levied last. Motions, all based on the same ground, were made to dissolve these three attachments, were heard on the same evidence, and were each overruled. Judgment was entered in favor of the several attachment plaintiffs against Meek, Skinner & Company for the amount of their several claims, and an order for the sale of the attached property made. Meek, Skinner & Company prosecuted error to this court from the order of the district court refusing to dissolve the attachment issued in favor of the First National Bank, and the order sustaining the attachment in that case was reversed and the attachment dissolved, but the judgment on the merits in favor of the bank was affirmed. See *Skinner v. First Nat. Bank,* 59 Neb. 17. After the levy of the attachment in these three cases certain of the mortgagees brought an action in replevin against the sheriff to recover possession of the mortgaged property. The property was not taken on the writ of replevin, and the case proceeded as one for damages. It is claimed in this action that all the attaching creditors joined in the defense of the replevin suit, although they were not parties to the record, the sheriff alone being made party defendant. The action in replevin resulted in a judgment in favor of the mortgagees and against the sheriff for $4,089.87,

and costs of the suit. The sheriff prosecuted error to this court, where the judgment was affirmed. See *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713. Each of the creditors had executed an indemnifying bond to the sheriff prior to his levy under the attachments, and the First National Bank paid to him the sum of $1,872, being the amount of the judgment against him after applying the proceeds of a sale of the mortgaged property, which had been made by the sheriff, who had, pending the determination of the replevin suit, been appointed receiver of such property.

In the meantime the bank had sold the real estate taken on its attachment, and bid in the same for $505, and applied the amount upon its judgment. After these several suits had been finally determined in this court the Avery Planter Company commenced an action against the First National Bank to recover its judgment against Meek, Skinner & Company out of the proceeds of the sale of the real estate of the said firm, which had been sold under the attachment, in favor of the First National Bank. That suit was brought upon the theory that the attachment in favor of the bank had been dissolved by this court in *Skinner v. First Nat. Bank*, 59 Neb. 17; that, as a consequence of the dissolution of the bank's attachment, the attachment of Maggie Wishard had become a first lien upon said real estate, and the attachment of the Avery Planter Company a second lien. In that suit the bank filed a counterclaim for contribution, which was stricken out on demurrer. On error taken to this court by the bank the syllabus of the opinion filed in that case is in part as follows: "Writs of attachment issued in separate suits of several creditors against a common debtor, were successively levied on the same property. Motions to dissolve these attachments were overruled and afterwards all the actions were prosecuted to final judgment. From the order sustaining the first attachment and a final judgment rendered in the same proceeding, the defendant in attachment prosecuted error to this court where the order was reversed and the final judgment affirmed, but no proceed-

ing in error was prosecuted from the order sustaining the other attachments. Pending a review in this court, the property attached, belonging to the defendant, was sold to the first attaching creditor under an order of sale issued on the judgment of such party, rendered in the attachment suit, and the proceeds applied on that judgment, the other judgments remaining wholly unsatisfied. *Held:* (1) That an action for restitution would not lie against the first in favor of the subsequent attaching creditors, but that an action for money had and received could be maintained to which the defendant might interpose a counterclaim or set-off. * * * (2) The seizure of the goods of a third party by the sheriff under an order of attachment is tortious, and attaching creditors who join with the sheriff in resisting an action brought by such third party to recover the goods become trespassers *ab initio,* and jointly and severally liable for a money judgment rendered therein in favor of such third party. (3) When such judgment is satisfied by one of the parties, contribution will be enforced, where it appears that the parties acted in good faith and without any intention of committing a trespass. (4) The basis of contribution in such cases is the ratio the claims of the several attaching creditors bear to each other." *First Nat. Bank v. Avery Planter Co.,* 69 Neb. 329. On the decision of that case Schappel, administrator of the estate of Maggie Wishard, and the Avery Planter Company commenced separate actions against the bank to recover from it the amount for which the real estate of Meek, Skinner & Company had been sold under the attachment issued in favor of the bank, and which attachment had been dissolved by the judgment of this court. The bank also filed a bill in equity against Schappel, administrator, and the Avery Planter Company, asking for contribution, these three cases were, by order of the court, consolidated and tried together. The court entered a judgment finding that the bank had paid to the sheriff the sum of $1,872, being the difference between the judgment obtained in the replevin action brought against the sheriff and the

amount received from a sale of the mortgaged goods in controversy in that action. It was further found that, while these consolidated actions were pending, Meek, Skinner & Company, the common debtor of all the parties, paid the First National Bank by way of compromise and settlement the sum of $1,000, which should be credited on the amount paid by the bank, leaving $872 toward which contribution should be enforced; further, that the First National Bank received from the sale of the attached real estate the sum of $505, and that the cost of such sale was $26.25, which amount would have attended a sale by either of the other attaching creditors, leaving the net proceeds in the hands of the bank, the sum of $478.75. Following the rule announced in *First Nat. Bank v. Avery Planter Co., supra,* that contribution should be made on the basis of the ratio which the several judgments of the parties bore to each other, the court found that the judgment of the bank was for $4,850.70, of Wishard, $187.50, the Avery judgment, $171.88, and contribution was awarded the bank in the proportion that the judgments bore to each other; and the judgment was entered against the bank in favor of Schappel, administrator, and the Avery Planter Company, for the amount of their several judgments, with interest, after deducting from the amount the sum found due the bank by way of contribution. From this judgment the bank has appealed.

The first contention of the bank is that its attachment has never been dissolved. The theory, as we understand from the brief of counsel, is that while the order of the district court sustaining its attachment was reversed by this court, and a mandate issued directing the district court to carry into effect the judgment of the supreme court, the district court failed to make any order showing upon its records that the attachment had in fact been dissolved. This we regard as a pure technicality. The order of this court was final and determined the rights of the parties. A copy of the mandate is contained in the record, and it is expressly recited therein that "upon a

trial of which cause in said supreme court during the September term, 1899, it was considered by said court that the judgment rendered by you in said cause on the pleadings be affirmed, and that the order overruling the motion to dissolve the attachment and order directing the sale of the attached property be reversed." This mandate is a part of the records of the district court for Pawnee county, and the parties affected by that decision have, ever since it was filed, proceeded upon the theory that the bank's attachment had been dissolved.

We have examined the records with some care, and think the bank has no cause to complain of the judgment appealed from. The only ground on which contribution could be enforced in favor of the bank against the other parties is that they joined the bank in resisting the action brought against the sheriff to recover the mortgaged goods. There is no direct evidence in the record which in our judgment establishes the fact that they did join with the bank in resisting the replevin action. It is true that the attorneys for the bank, and who conducted the defense for the sheriff in the replevin action, were attorneys for Maggie Wishard and the Avery Planter Company in suing out their attachments, and the writs of attachment in these two cases were introduced on the trial; but there is no direct evidence that either of these parties authorized an appearance for them in that case, or directed that any action should be taken in their behalf. Our conclusion is that the bank has all, if not more than all, that it was entitled to, and that the judgment should be affirmed.

EPPERSON and GOOD, CC., concur.

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

AFFIRMED.

GEORGE MCCARTER, APPELLEE, V. CITY OF LEXINGTON, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,076.

1. **Licenses: INJUNCTION.** In 1904 the city of Lexington passed an ordinance imposing an occupation tax on the business of keeping billiard and pool halls. On May 26, 1906, a second ordinance went into effect requiring the keeper of billiard and pool halls and bowling alleys to apply to the mayor and city council for a license to conduct the business. *Held*, That a party who had paid the occupation tax required by the ordinance of 1904, prior to the ordinance of 1906 going into effect, was not entitled to an injunction to restrain the officers of the city from prosecuting him for conducting his business without a license.
2. **Cities: ORDINANCES: VALIDITY.** The motive governing a legislative body in passing a statute or ordinance is not a proper subject for investigation by the courts.

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

H. D. Rhea and *D. H. Moulds*, for appellant.

J. A. Sheean, H. M. Sinclair and *George C. Gillan, contra.*

DUFFIE, C.

In April, 1904, the city of Lexington passed an ordinance levying an occupation tax of $150 upon the business of conducting a billiard hall and pool room within the corporate limits of the city. The tax was made payable to the city treasurer for the purpose of municipal revenue on the 1st day of May of each year. On May 26, 1906, another ordinance was passed providing for the licensing and regulation of billiard and pool rooms and bowling alleys in the city of Lexington, which made it unlawful for any person or corporation to keep within said city any pool or billiard room or bowling alley with a view of gain, or where money was charged for playing or bowling

therein, unless a license to conduct said business was first obtained. The person desiring to engage in the business was required to make application in writing to the mayor or council of the city, asking for such license and describing the premises on or in which it was proposed to conduct the business, and thereupon the mayor and council might grant or reject said application, and, in case the application was granted, the clerk instructed to issue a license to the applicant upon his depositing with the clerk a receipt showing payment to the treasurer of the amount of the occupation tax required by the ordinance of the city. Section 3 of this act imposes a fine of not less than $5 nor more than $50 for the violation thereof, and authorizes the commitment of any party convicted of violating the ordinance until the fine and costs are paid. Each day that a billiard or pool room or bowling alley is kept open in violation of the provisions of the ordinance is made a distinct offense.

George McCarter, the plaintiff, filed his petition in the district court for Dawson county July 2, 1906, in which he alleges that on the 21st day of May, 1906, he paid to the treasurer of defendant city the sum of $150 as an occupation tax for the privilege of conducting a billiard and pool hall for the municipal year of 1906; that this sum was duly accepted by the treasurer as contemplated by the ordinance then in force. The petition further alleges the passage of the second ordinance above referred to, and alleges that said ordinance was passed for the express purpose of depriving the plaintiff of his constitutional rights under the ordinance in existence when he paid his occupation tax, and for the purpose of driving him out of business, and for the purpose of affording a rival in the same business protection against competition. He further alleges that on the 12th of June, 1906, the city, through its duly elected officers, filed a complaint against him charging him with eight violations of the ordinance last referred to; that he was prosecuted, fined and imprisoned, and again on the 21st of June, 1906, he

was arrested, charged with eight further violations, and upon trial was fined and imprisoned the second time; that he was compelled to furnish bond and appeal to the district court; and that he has perfected such appeals, and requested the city officers to refrain from filing further complaint against him until the question at issue can be determined by the district court. But the city through its mayor refuses to desist from prosecuting him, and threatens to keep on bringing new actions under said license ordinance until he shall close his business. The prayer was for an injunction against the city and its officers, restraining them from arresting, prosecuting or molesting the plaintiff in connection with the license ordinance above mentioned, and especially from bringing any further prosecution against him for a violation thereof until the further order of the court. A temporary injunction was issued upon filing this petition, which upon the final hearing was made perpetual, and from this judgment the defendant has appealed.

Section 8719, Ann. St. 1903, authorizes cities and villages to raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city or village, and to regulate the same by ordinance. Section 8723, authorizes cities and villages to make all such ordinances, by-laws, rules, regulations, and resolutions, not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this chapter granted, maintaining the peace, good government and welfare of the corporation, and its trade, commerce and manufactories, and to enforce all ordinances by inflicting fines or penalties for the breach thereof, not exceeding $100, for any offense recoverable with costs, and, in default of payment, to provide for confinement in prison, or jail, or by hard labor upon the streets, or elsewhere, for the benefit of the city or village. In *Morgan v. State*, 64 Neb. 369, it was held that the section last quoted gives village authorities ample power by ordinance to license and regulate billiard and pool rooms. The ordinance to license

billiard and pool halls now under consideration did not attempt to impose upon the plaintiff or upon any one engaged in the business any tax in addition to the occupation tax provided by the ordinance of 1904. The payment by the defendant of the occupation tax required by the ordinance of 1904 did not insure him against such rules and regulations for the conduct of his business as the city might thereafter think it expedient to impose. The right to enjoy a privilege under a municipal license is not property of such a character that a court of equity will protect it, after the implied revocation of the license, against the result of a criminal or other prosecution. *Littleton v. Burgess,* 14 Wyo. 173, 2 L. R. A. (n. s.) 631, and cases cited. The fact, if such be the case, as alleged by the plaintiff in his petition, that the city council was induced to pass the ordinance of May 26, 1906, to injure the plaintiff in his business, and to aid a rival in such business, is a matter with which we have no concern, and which we cannot investigate. The motives inducing action by a legislative body is not a proper subject of inquiry by the courts. Cooley, Constitutional Limitations (5th ed.), *186. The city had ample authority to pass the ordinance in question, and a court of equity will not enjoin prosecutions brought to enforce it.

We recommend the reversal of the judgment appealed from.

EPPERSON and GOOD, CC., concur.

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

REVERSED.

JOHN O. YEISER, APPELLANT, V. FRANK A. BROADWELL ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,300.

Jury, Trial by. In a law action a party is entitled to a jury trial as a matter of right.

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

John O. Yeiser, pro se.

Byron G. Burbank, S. R. Rush and *E. H. Scott, contra.*

DUFFIE, C.

Broadwell, one of the defendants, is clerk of the district court for Douglas county, and came into possession of the fund in controversy in this action through a garnishment proceeding instituted by the intervener, Cathers. Cathers had issued an execution upon a judgment which he claimed to hold against Phœbe Linton, and which he alleged was unsatisfied. He caused W. K. Potter, as receiver of the Omaha Loan and Trust Company, to be garnished, and Potter paid into court a sum in excess of $1,800, which he held as the property of Mrs. Linton, and which it is conceded was derived from the rents of real property which had once stood in the name of Mrs. Linton. Upon the final hearing of the garnishment proceeding, the court found that the judgment upon which such proceeding was based had been satisfied, and an order was entered directing the discharge of the garnishee, and that such judgment be canceled of record. No order was made disposing of the money paid into the court by Potter, and Broadwell continued in possession of the fund. Afterwards Cathers filed a motion requesting the court to direct the application of that money toward the satisfaction of a later judgment that he had obtained against Mrs. Linton.

Yeiser asserted a claim to the money under an assignment of the fund from Mrs. Linton and her husband, and moved the court for an order directing its payment to him. The court heard the parties and ordered the fund applied toward the satisfaction of Cathers' judgment against Mrs. Linton, from which order Yeiser appealed to this court, where the same was reversed, the opinion stating that the court should order the money repaid to Potter, the garnishee, unless in a proper proceeding to which all parties in interest should be made parties it was made to appear that one of the present claimants was entitled to the fund. See *Yeiser v. Cathers*, 73 Neb. 317. After this opinion was handed down Yeiser commenced the present action, making Potter, receiver, and Broadwell, both in his individual capacity and as clerk of the district court, parties defendant. In his petition it is alleged that Mrs. Linton was the owner of certain real estate in Douglas county, for which the Omaha Loan and Trust Company was agent in the collection of rents; that in March, 1897, she conveyed the same to Kate Remnant, and Kate Remnant immediately conveyed the same to Adolphus F. Linton; that at the same time Adolphus F. Linton executed and delivered an instrument declaring that he held said property in trust under an antenuptial agreement for his wife, Mrs. Phœbe Linton, and her children; that afterwards the court appointed W. K. Potter receiver of the Omaha Loan and Trust Company, and that the receiver thereafter collected the $1,860 as rents from the said real estate after the same was conveyed as above stated; that in May, 1902, he was employed as attorney to attend to numerous cases pending against the Lintons and their real estate in Nebraska under an agreement that the rents derived from their real estate should be devoted to the payment of his fee, and giving him authority to collect and apply said rents. The petition further set up certain writings and orders by way of assignment of the fund here in controversy from the Lintons to Yeiser, and alleges that the defendants refuse to recognize his right to the fund and refuse pay-

ment to him. Judgment is asked against the defendants for the amount of the fund, with interest.

By leave of court Cathers, who had on the 23d of March, 1905, garnished Broadwell and Potter on the later judgment against Mrs. Linton, intervened in this action and filed an answer to the plaintiff's petition. His answer admits the conveyance of certain real estate from Mrs. Linton to Kate Remnant, and from Kate Remnant to Adolphus F. Linton, and alleges that said conveyance was made with the purpose and intent of defrauding Cathers, who was then a creditor of Mrs. Linton, as well as other of her creditors. It is further alleged that the purported assignment of the fund in controversy and of other rents arising from the real estate of the Lintons was made for the purpose of defrauding Mrs. Linton's creditors, and that the same is fraudulent and void as against the intervener's claim. Other matters alleged in the answer it will be unnecessary to notice further than to state that it does not present or raise any equitable issue relating to this fund. Broadwell and Potter both answered, disclaiming any right to the fund, and Mr. and Mrs. Linton answered, affirming their purported assignment of the fund to the plaintiff, Yeiser. The trial resulted in a judgment for the intervener, Cathers, and an order was issued directing the clerk to pay the fund to him to be applied upon his judgment against Mrs. Linton. Prior to entering upon the trial Yeiser demanded a jury, which the court refused, and proceeded to try the case without a jury. One of the errors relied on for a reversal is the refusal of the court to submit the issues to a jury, and this assignment of error must, we think, be sustained. In a law action a party is entitled to a jury trial as a matter of right. Const., art. I, sec. 6. *Lett v. Hammond,* 59 Neb. 339, and cases cited. Upon what theory the court refused a jury trial is not disclosed by the record or made plain in briefs of counsel. Each of the parties were seeking to reach this fund, one claiming by a written assignment made prior to the garnishment of the intervener, the other by legal pro-

ceedings which entitled him to the money, if in fact it was the money of Mrs. Linton and had not previously been assigned to the plaintiff. Neither of the parties claimed the fund by reason of any fact which could not be asserted and protected in a court of law, and no circumstance is disclosed which required the equitable interposition of the court. It is true that this fund was derived from rents arising from land after Mrs. Linton had parted with her paper title, and that Cathers was burdened with the necessity of showing that her conveyance was fraudulent as to him, but this might be shown in an action at law, as well as in an equitable proceeding. He was not asking to reach the land itself and to set aside the conveyance made by Mrs. Linton, which a court of equity alone could do. He was only required to show the fraudulent nature of the conveyances, if it was fraudulent, in order to enable the court to say that, while the title rested in her husband, the rents and profits derived from the land were her property and subject to the payment of her debts. The alleged fraudulent character of the assignment of the fund to Yeiser might be established in a court of law, as well as in an equity proceeding, and these were all facts upon which the plaintiff was entitled to the opinion of a jury.

As the case will have to be remanded for another trial, it would be improper for us to examine or express any opinion on the evidence contained in the record. For the error of the court in denying a jury trial, we recommend a reversal of the judgment, and that the cause be remanded to the district court, with directions to proceed in accordance with this opinion.

EPPERSON and GOOD, 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 to the district court, with directions to proceed in accordance with this opinion.

REVERSED.

GEORGE WOOD, ADMINISTRATOR, APPELLANT, V. SCHOOL DISTRICT, APPELLEE.

FILED FEBRUARY 20, 1908. No. 15,067.

Intoxicating Liquors: DEATH OF LICENSEE: RECOVERY OF LICENSE MONEY. In the absence of a statute permitting it, the legal representatives of a deceased licensee cannot recover any part of the amount paid for the liquor license because of the latter's death before the expiration of the term of the license.

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

C. A. Rawls, for appellant.

D. O. Dwyer, contra.

EPPERSON, C.

The petition filed in the district court alleged in substance that on the 1st day of May, 1905, one Simon Metz was duly licensed by the board of trustees of the village of Louisville in Cass county, Nebraska, to vend malt, spirituous, vinous and intoxicating liquors in said village, for which he paid $500 license money, which was turned over to the defendant school district. That on June 20, 1905, the said Metz died, and later the plaintiff was appointed as administrator. Plaintiff prayed for judgment against the defendant for the unearned portion of the license money, to wit, $430.56. To this petition the defendant filed a general demurrer, which was by the court sustained. The plaintiff elected to stand on his petition, whereupon judgment of dismissal was entered, and plaintiff appeals.

Plaintiff contends that upon the death of the licensee the license was canceled by operation of law, and the administrator is entitled to recover *pro tanto* of the sum paid for the unexpired term of the license. Where a liquor license has been issued by a licensing board, and on appeal

canceled by the court, the law will permit a recovery *pro tanto* of the sum paid. *State v. Cornwell,* 12 Neb. 470; *Lydick v. Korner,* 15 Neb. 500; *State v. Weber,* 20 Neb. 467; *Chamberlain v. City of Tecumseh,* 43 Neb. 221; *School District v. Thompson,* 51 Neb. 857. The reason for the above rule seems to be that the licensing board either had no authority to grant the license or erroneously granted the same, on account of which the license was revoked. In the case at bar the license was rightfully issued. It was not terminated by any act of the licensing board, and the rule of the cases cited is not applicable. Neither the legal representatives of a deceased licensee nor any other person, can receive the benefits of a license. It is a personal privilege granted to the licensee. It cannot be assigned, devised, or transmitted to heirs. Plaintiff argues that these are reasons for permitting a recovery herein. Upon the oral argument I was favorably impressed with this proposition, for the reason that it seemed fair and just that the estate of a deceased person should recover unearned license money so long as it was impossible to continue the business under the license. But upon further consideration I am convinced that the law will not permit a recovery. The deceased paid the license fee voluntarily, and received all that the licensing board could give to him. The license was not rendered inoperative through any fault of the authorities. In the absence of a statute permitting it, the legal representatives of a deceased licensee cannot recover any part of the amount paid for the liquor license because of the latter's death before the expiration of the term of the license.

We recommend that the judgment be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

STATE, EX REL. JOHN W. HARRIS ET AL., APPELLANTS, V. JAMES F. HANSON ET AL., APPELLEES.*

FILED FEBRUARY 20, 1908. No. 15,511.

1. **Eminent Domain:** DRAINAGE. An act of the legislature, appearing as chapter 153, laws 1907, provides that, "whenever it will be conducive to the public health, convenience or welfare either to drain any wet land, or to drain any land subject to overflow by water, or any land which will be improved by drainage, or to build or construct any dyke or levee to prevent overflow by water, * * * a drainage district may be formed * * * for the purpose of inaugurating, constructing, controlling and maintaining said work or works of public improvement," and providing that such drainage district may be formed by a majority vote of the property owners interested, the boundaries of the district being determined by the county commissioners, who are required to fix the same "with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons," and further providing for the taxation of property benefited for the purpose of raising revenue to pay for such improvements, and that the district, when formed, may condemn private property for its use in constructing drains, dykes, or levees. Said act will not permit the organization of a corporation in furtherance of private interests, and will not permit the taking of property for private purposes.
2. ———: ———. The phrase, "with a view to promoting the interest of said drainage district," used in said act relative to the duties of the county commissioners in establishing the said district, means the public interest, and not the private advantage to be gained by any property owner.
3. **Elections:** DRAINAGE DISTRICTS. Section 22 of the bill of rights (Const., art. I), providing that "all elections shall be free, and there shall be no hindrance or impediment of the right of a qualified voter to exercise the elective franchise," does not apply to an election upon the formation of a drainage district, nor one for the election of officers therefor.
4. **Drains:** LEGISLATIVE ACTS. The constitution does not prohibit contemporary legislative acts providing different modes for the formation of drainage districts.
5. ———: ESTABLISHMENT. The establishment of the boundaries of a proposed drainage district is *prima facie* evidence that the county commissioners proceeded regularly in the establishment thereof and that all conditions precedent have been complied with.

* Rehearing allowed. See opinion, p. 738, *post*.

APPEAL from the district court for Dodge county: JAMES G. REEDER, JUDGE. *Affirmed.*

F. W. Button and *I. L. Albert,* for appellants.

Courtright & Sidner, contra.

T. F. A. Williams, amicus curiæ.

EPPERSON, C.

This action is one in the nature of *quo warranto* to determine whether or not the Farmland, Fremont & Railway Drainage District, of which the defendants are, or purport to be, the officers, is a legally existing corporation. The district was organized under the provisions of an act of our last legislature, published as chapter 153, laws 1907. The constitutionality of this act is questioned. It is in part as follows:

"Section 1. Whenever it will be conducive to the public health, convenience or welfare either to drain any wet land, or to drain any land subject to overflow by water, or any land which will be improved by drainage, or to build or construct any dike or levee to prevent overflow by water, or to construct, straighten, widen, deepen or alter any ditch, drain, stream, or watercourse, or to riprap or otherwise protect the bank of any stream or ditch, or to construct, enlarge, extend, improve or maintain any system of drainage, or to construct, enlarge, extend, improve or maintain any system of control of surface-water or running water, or to do any two or more of said things jointly, then a drainage district may be formed and may proceed as hereinafter provided, for the purpose of inaugurating, constructing, controlling and maintaining said work or works of public improvement.

"Section 2. When the district proposed contains real estate owned by less than twenty persons or corporations, one-fourth of said number shall be sufficient to petition for the formation of such district. When there are more

than twenty such owners, ten or more owners of real estate therein may sign a petition for the formation of such district, and file said petition with the county clerk of the county having the largest body of land within said proposed district. Said petition shall suggest the boundaries of said district, the number of directors that said district shall have, if formed, and the amount of bond each shall give."

"Section 4. Thereupon the board of supervisors or commissioners of such county shall take to their assistance the county surveyor of said county and shall determine whether or not the boundaries of said proposed district are reasonable and proper, and if said board find that the boundary line of said district should be changed, they shall change the same and fix the boundary line where the same, in the judgment of said board, should be fixed with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons. Any one asking shall be given a hearing as to the boundary. Said board shall also determine the number of directors that said district shall have, if formed, and the amount of the bond to be given by each, and shall make a record of their action.

"Section 5. Thereupon the county clerk of said county shall publish a notice once each week for three weeks in a newspaper published at the county seat of each of the counties having land within the proposed district, which notice shall state the filing of said petition; that it is filed under the provisions of this law, giving the title hereof in full; the boundaries of said proposed district as fixed by said county board; that an election will be held at the office of the county clerk between the hours of 8 o'clock A. M. and 6 o'clock P. M. on a day named therein; that at said election the question of the formation of said district shall be determined, and a board of directors elected, giving the number of such board, said board to take office contingently on the formation of said district."

Section 7 is in part as follows: "At all elections the

county clerk and such assistants as he shall choose shall constitute the election board and the canvassing board. Any person may cast one vote on each proposition to be voted on for each acre of land or fraction thereof and for each platted lot which he may own or have an easement in, as shown by the official records of the county where said land or lots may be. Any corporation, public, private or municipal, owning or having an easement in any land or lot may vote at said election, the same as an individual may. The executor, administrator, guardian or trustee of any person or estate interested shall have the same right to vote." It is unnecessary to further quote from the act at this time. Other provisions will hereafter be set forth as necessity requires.

It is contended by plaintiffs that by this act the legislature delegated to private individuals the power to determine the necessity of the improvement, and therefore it is special legislation prohibited by the constitution. And, again, it is argued that, inasmuch as a few individuals owning the greater acreage of a district could control the same against the wishes of the majority, the enforcement of the act would operate in the taking of property without due process of law, and would amount to taxation without representation, and is against public policy. It is argued that the act must fail because the right to vote for the establishment of the district and for officers is limited to property owners. Complaint is made that it provides for or permits the taking of property for private purposes; in other words, that there is no legal provision made for determining whether or not a proposed district would be conducive to the public health, convenience or welfare.

The most important question for determination is whether the act standing alone would permit the formation of districts solely for the advancement of private interests, or is it operative only in districts, the formation of which are by some legal means ascertained to be conducive to the public health, convenience or welfare. If

the former, then without doubt the law is defective; if the latter, it is not subject to this objection. The act in controversy provides for the reclamation and protection of lands by the organization of districts upon which corporate functions are imposed, and, if the act is valid, such districts become corporations. To meet the expenses of such improvements, funds are raised by the levy of taxes upon property benefited, and, moreover, the district may condemn private property for its use in constructing drains, dykes or levees. That an individual may become the beneficiary of the proposed improvement does not alone make the establishment of a drainage district a private instead of a public enterprise. And the fact that many individuals are interested from a pecuniary standpoint, that their property is increased in value, thereby adding to the wealth of the state and correspondingly contributing to the general revenues, go to establish such an enterprise as one of public welfare. That the power of the state exists to promote the public health, benefit and welfare by the construction of drains, dykes, levees and the making of other similar improvements can no longer be questioned. Public health, convenience and welfare, the promotion of which is ever essential, mean the effect upon the people of the particular vicinity concerned. In contrast to the benefits of the few, it means those things which benefit the many. It is within the power of the legislature to further the public health, convenience or welfare by the enactment of drainage laws or providing for the protection of property by dykes and levees. In *Neal v. Vansickle*, 72 Neb. 105, this court had before it for judgment chapter 116, laws 1903, which provided for the formation of drainage districts for the reclamation and protection of swamp, overflowed or submerged lands, etc. The body of the act provided that the district must contain at least 640 acres. The constitutionality of the act was questioned. So far as the question relating to the right of public corporations organized for the reclamation of lands by taxation for improvements and the exercise of eminent domain, that

case is similar to this, and reference is made to the opinion, which we need not quote. It was there held: "The drainage and reclamation of large tracts of swamp and overflowed or submerged lands is a matter of general public utility and concern, for which the legislature may provide by the creation of local administrative organizations or political corporations." It will be observed that in the act of 1903 no provision was expressed that it should apply only to districts wherein the public health, convenience or welfare would require it. Yet it was self-evident that the reclamation of large tracts of land would subserve the public welfare. That such is true has become a maxim —a public policy, which is recognized by all the courts. It would seem, therefore, that any act of the legislature which provides for the reclamation or protection of large tracts of swamp, overflowed or submerged lands could not be open to the objection that its enforcement would result in the taking of property for private purposes. The act of 1907 applies to any land, whether it be a large tract or small, the protection of which would be a public utility. But the fact that the tract is of small area does not necessarily make its reclamation any the less a public benefit. The act contains sufficient safeguards to prevent its being subservient to private interests. We cannot see the dangers which plaintiffs contend are liable to result from its enforcement. A few individuals cannot for their private purposes create a drainage district and impose the burdens thereof upon their neighbors. Neither can a few or many acting in their individual interests prescribe the boundaries of the proposed district. By their petition they only suggest the boundaries; whereupon the county commissioners, with the assistance of the county surveyor, shall determine the same. When we consider that the act expressly provides that such drainage district can be created only "whenever it will be conducive to the public health, convenience or welfare (sec. 1)," and, further, as provided in section 4 of the act, that in fixing the boundaries the board shall determine the same "with a view to

promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons," we can reasonably conclude that the formation of the district will in the opinion of the county commissioners be conducive to the public health, convenience or welfare. If the boundaries suggested in the petition of the promoters are not such as the law contemplates, the county board should change the same to include such additional or different territory, the protection of which would in their opinion serve public interest in contradistinction to private gain. And, if the county board find it impossible to establish the boundaries of a district, the interest of which would be promoted, it need proceed no further, and all proceedings would terminate. The phrase "the interest of said drainage district," used in section 4 of the act, means the public interest of the district, and not the private advantage to be gained by any property owner. As an additional safeguard the property owners are given a voice in the incorporation and establishment of the district. After the county board has fixed the boundaries an election is called in which the property owners vote for or against the incorporation thereof. Section 8 of the act provides: "If a majority of the votes cast at said election shall be in favor of the formation of said district it shall be conclusive that the formation of said district, and the work that may be done under the supervision of the board of directors, will be for the public health, convenience and welfare." The submission of the question to the property owners of a district established by a duly authorized tribunal is not a violation of any constitutional provision. That the legislature may delegate to administrative officers the power to determine whether a particular proposed improvement will be conducive to the public health, convenience or welfare is an established rule. The same function may be delegated to the electors of a municipality. We know of no reason why the property owners of a district established by the county board should not be competent to determine for themselves whether or

not they shall incorporate, and thereby at their own expense establish a system of drainage and dyking for the reclamation of land, the doing of which will be conducive to the public welfare.

It is argued under the provisions of the act that the vote provided for therein must be taken as conclusive of the question of public utility, when in fact the voters are not required to express themselves upon that question, but instead may vote as their individual interests dictate. If we were to consider the election alone decisive of the question of public utility, we could not say that the act was for this reason invalid. In *Board of Directors v. Collins,* 46 Neb. 411, this court, quoting from the opinion in *In re Bonds of Madera Irrigation District,* 92 Cal. 296, say in reference to the organization of an irrigation district: "We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the act. * * * Inasmuch as there is no restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization. * * * In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others." Granting that each person entitled to a vote would express himself as his private interests dictate, and the result of the election shows a

majority of the votes cast favorable to the formation of the district, we then have the established fact that the owners of the greater number of tracts or acres of land involved are each of the opinion that his own private interests will be best subserved by the formation of the district. This, in our opinion, establishes the fact that the organization thereof will be conducive to the public welfare. The public is but an aggregation of individuals, and it is unnecessary that the aggregation be composed of the people of an entire state, county, township or city. The common weal of a particular vicinity is a matter of public concern. The protection of land against floods and overflow and its reclamation from inundations, where an entire vicinity is benefited, is conducive to the public interests. In such cases the interests of many individuals amalgamates into and becomes a matter of general welfare, the promotion of which forms one of the purposes for which the government exists. The reciprocal influence which the improvement of each tract of land has upon the other is combined for the advantage which accrues to all; their being united is a matter of public utility when, were an individual alone affected, it would be considered but a mere private advantage. We are convinced that the formation of a reclamation district, the boundaries of which are fixed by county commissioners, upon the majority vote of the property owners of the district, is not in contravention of any constitutional provision, and does not contemplate or permit the furtherance of private interests. That part of section 8 quoted which declares that the formation of the district shall be conclusive that all the work that may be done under the supervision of the board of directors will be for the public health, convenience or welfare is not before us for consideration. Undoubtedly, were the board to undertake some work which in fact would not further the interests of the district, the provisions of the act would not prevent the granting of proper relief. But the possibility of such conduct on the part of the board does not require the annulment of the act.

Relative to this election, a further objection above referred to must be considered. The act in question provides that any person may cast one vote for each acre of land or fraction thereof, and for each platted lot which he may own or have an easement in. This it is argued is a violation of section 22 of the bill of rights, which reads: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Section 1, art. VII of the constitution provides: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First. Citizens of the United States. Second. Persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States, on the subject of naturalization, at least thirty days prior to an election." It is argued that the officers of the drainage district are public officers, and that the act is contrary to the sections of the constitution last above cited, in that the electors under section 1, art. VII, are barred from participating in the election for the establishment of the district, and for the officers thereof. In *State v. Cones,* 15 Neb. 444, it is held that the act allowing women possessing the qualifications therein prescribed to vote at school meetings is not in conflict with the constitution, and is valid. It is said in the opinion that an examination of the constitution will convince any one that the provisions in regard to elections were not intended to apply to school districts. In *Board of Directors v. Collins,* 46 Neb. 411, our Nebraska irrigation law was held to be constitutional. That law provides for the formation of irrigation districts by a vote of the people, and expressly limits the right to vote to those who own not less than ten acres of land within the proposed district. It is apparent that the constitutional qualification of electors was prescribed in that instrument for the purpose of determining who is entitled to vote for the

officers prescribed by the constitution itself. And, again, a reclamation district could be established and put into operation without the calling of an election. The legislature might have chosen some other mode for the formation of the district, which, if reasonable in its terms, would be effective without the calling of an election of property owners. It might have been left to an administrative body such as the county board. Because the legislature chose this particular mode, it cannot be said that the formation of the district was illegal because electors of the district owning no real estate were barred from participating therein, or because each property owner was given a vote for each acre or lot of land he owned. The legislature may provide for the election of officers not named in the constitution by means other than the popular vote of electors. The act seems to be somewhat deficient, in that it provides in section 4, with reference to the establishment of the boundaries of the district by the county commissioners, that "anyone asking shall be given a hearing as to the boundary." But it does not require a notice to be given to the property owners of the time when they may be heard. It would seem that the legislature intended that each property owner should be given a hearing, but neglected to provide an opportunity. This is not a defect which would permit us to declare the act unconstitutional. We cannot see wherein it affects one's property interests. The establishment of the district is not the taking of property. No rights are invaded by the failure of the act in this regard. Notice is given to the interested parties after the county board has established boundaries of the district, and an opportunity is given to all at that time to vote for or against the incorporation of the district.

It is suggested that the act is an attempt to amend existing law without repealing the same. By section 31 it is expressly stated: "None of the provisions of this act shall be construed as repealing or in anywise modifying the provisions of any other act relating to the subject of drainage." Thus we see that it expressly avoided an attempt

to amend or to repeal any part of any existing law pertaining to the question of drainage. We fail to see wherein this act contravenes section 11, art. III of the constitution, which forbids that any law shall be amended unless the law sought to be amended be repealed, as contended for by the plaintiffs herein. On the contrary, it seems that the legislature by this act and the act of 1905, ch. 161, have provided different modes for the organization of reclamation districts, but this is not prohibited by the constitution. The interested parties may in localities wherein either law is applicable choose whichever mode they desire for the organization of their district. Neither does the act by implication or otherwise repeal any of the provisions of the general corporation law. Indeed, it seems that the general provisions are inadequate to meet the needs of drainage districts, and the act of 1907 must be taken as supplemental and complementary to all other laws pertaining to the formation of corporations.

Plaintiffs' contention that the act authorizes the taking of private property for private use is incident to and based upon his other contention that the act permits the organization of a district for the furtherance of private interest. But, as shown above, the operation of the law will be consistent with the expressed intention of the legislature, and will not permit of the taking of property by private individuals or corporations for their own personal benefit. The organization under the act and the operation of the district once established will, as we have attempted to show, subserve public interests, and the property taken and taxes imposed by reason thereof will not be a violation of the constitution.

But it is contended that, if the act is constitutional, plaintiffs should prevail because of certain irregularities in the formation of this particular district. It is alleged in the petition "that the county commissioners made no finding that said district, if formed, would be conducive to the public health, convenience or welfare as required by law," and in the answer a conclusion of the pleader is

stated in effect that the county commissioners had no power to consider the matter; defendants' contention being that the law leaves to the voters the power to determine this jurisdictional question. The court is not bound by the conclusions of law pleaded by the defendants. Plaintiffs' allegation above quoted is not supported by the admission of defendants. If it was the purpose of the petition to allege that the county commissioners made no record of their findings, the plaintiffs' contention is subject to the further objection that none was required. The fixing of the boundaries of the proposed district is *prima facie* evidence that the same were regularly established.

By section 5 of the act, it will be observed that the notice of election is given by the county clerk, who "shall publish a notice once each week for three weeks." The notice here involved was published by the county clerk in a paper published in Dodge county, the first publication thereof being on May 23, 1907, and the last on June 5, 1907; and in Douglas county, the first on May 24, and the last on June 7. The election was held June 8, 1907. Plaintiffs contend that the notice of the election is defective, in that the first publication was not at least three weeks prior to the election. At first glance, there seems to be some confusion among the decisions of this court as to the notice necessary to be given under statutory provisions similar to that here considered. There are statutory provisions requiring notice of various proceedings to be made by publication for different periods of time, some of which have been considered by this court. In *Davis v. Huston*, 15 Neb. 28, it was held that the statutory provision, "the publication must be made four consecutive weeks," meant that the notice "should be printed or inserted in a weekly newspaper once each week for four weeks successively, and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion." In *Alexander v. Alexander*, 26 Neb. 68, an act providing for the publication of a notice three weeks successively previous to the time appointed is complied

with by a publication once each week for three successive weeks; in other words, three weekly publications, and the last publication need not necessarily be 21 days from the date of the first. In that case the hearing of which the publication in controversy gave notice was only 16 days later than the date of the first publication. In *State v. Cherry County,* 58 Neb. 734, this court had before it for consideration section 27, art. I, ch. 18, Comp. St. 1897, which provided that the mode of submitting certain questions to the people prior to an election "is to be published for four weeks in some newspaper published in the county." It was held that the word "for" means during and that the notice must be published for, or during, four weeks before the election. Section 497 of the code provides that notice of sales of land upon execution shall be given "for at least 30 days before the day of the sale by advertisement in some newspaper printed in the county." It was held in *Lawson v. Gibson,* 18 Neb. 137, that the notice is required to be published during the 30 days. It is required by statute that an application for license to sell intoxicating liquors shall not be considered until at least two weeks' notice thereof has been given by publication. This has been held to require the publication of the notice for two successive weeks, two weeks intervening between the first publication and the hearing of the application.

There is no conflict in the authorities cited. Where the time mentioned by the statute expresses the duration of the notice, the same must be published for and during the time mentioned. Where, however, the time mentioned indicates only the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned. It is apparent that the phrases, "shall publish a notice once each week for three weeks," and "a notice shall be given for three weeks by publication," have different meanings. In the first "for three weeks" limits the number of publications, and in the

other phrase "for three weeks" fixes the period of time during which the publication must be made. *Alexander v. Alexander, supra,* is in point, and should be followed. No valid objection to the constitutionality of the act has been presented.

The lower court found for the defendant, dismissing the plaintiffs' action, and we recommend that its judgment be affirmed.

DUFFIE and GOOD, CC., concur.

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

AFFIRMED.

The following opinion on rehearing was filed July 17, 1908. *Former judgment of affirmance adhered to:*

1. **Statutes:** CONSTRUCTION. In construing an act of the legislature, the court will give to it the meaning which it is apparent from the language used that the legislature had in mind when the act was passed.

2. **Drainage Districts:** DUTIES OF COUNTY BOARDS. Chapter 153, laws 1907, provides that, "whenever it will be conducive to the public health, convenience or welfare either to drain * * * any land which will be improved by drainage, or to build or construct any dyke or levee to prevent overflow by water, * * * a drainage district may be formed," the boundaries of which are to be fixed by the county board upon the filing of a petition by interested property owners, and providing that the county board shall fix the boundaries "with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons." *Held,* That it is a necessary inference from the language used that the board shall determine the public utility of the proposed district, and that it is not the imperative duty of the board to fix the boundaries if the reclamation and improvement of the district would not promote the public health, convenience or welfare.

3. ———: ———. From the language used it is apparent that the legislature intended that the provisions of the act should not be applied except that the county board should prescribe a district, which, if organized and improved, would in fact promote the public health, convenience or welfare.

4. **Elections:** DRAINAGE DISTRICTS. After the county board has fixed the boundaries of a district the reclamation or protection of which would be of public utility, it is competent for the legislature to permit the property owners within the proposed district to determine by vote whether or not they will avail themselves of the benefits of the act, and the provisions permitting none but property owners to vote, and authorizing each owner of real estate to cast a vote for every acre of land or town lot which he owns within the proposed district, and permitting nonresident owners and foreign corporations owning real estate therein to vote upon the question of organization and for the officers of the district are not unlawful, nor does such election call for the exercise of the elective franchise secured to all electors by section 22 of the bill of rights. Const., art. I.

5. **Eminent Domain:** DRAINAGE DISTRICTS. An act of the legislature providing for the organization of a drainage district whenever the same will promote the public health, convenience or welfare, funds for the improvement to be raised by special assessment of the property in proportion to the benefits received, and which provides that notice of assessment shall be served on the property owner giving him the right to appear and be heard and to appeal from the order of the assessing officers, does not amount to the taking of private property for private use, nor for public use without just compensation, nor is it the taking of property without due process of law.

6. **Former opinion** in this case, *ante*, p. 724, adhered to.

EPPERSON, C.

Our former opinion herein is published, *ante,* p. 724, to which reference is made for a statement of the case and for certain parts of an act of the legislature, the constitutionality of which is questioned. Desiring to further consider certain questions presented by this appeal, relators' motion for a rehearing was granted, and those questions were submitted to counsel. The third question related to estoppel of relators, and does not require a discussion here. It would be pertinent only in the event that we found against respondents upon all of the other propositions considered. The other questions are as follows: (1) Does the fact that each owner of real estate may cast a vote for each acre of land or town lot which he owns within the proposed district affect the validity of the act? (2)

Does the fact that nonresident owners, whether they be natural persons or corporations, are given voice in the election affect the validity of the act? * * * (4) Does the act by inference give to county boards the power to determine whether the proposed district and improvements will be for the benefit of the public health, convenience and welfare? (5) Is any discretion vested in the county board as to the formation of a drainage district, or must it fix the boundaries for a district when demanded in accordance with the provisions of the act, if it did not deem it wise to form any district in the vicinity?

We will first consider the fourth and fifth questions presented. The two may be disposed of together. It is well established by the great weight of authority that the drainage of swamp lands, and the construction of dikes and levees for the reclamation and protection of real property, may be provided for by legislation, and that the authority to make such improvements may be conferred upon municipal corporations, upon county boards, upon specially appointed officers, or upon districts which may be organized for that purpose. It is equally well settled that the machinery of the government will be thus placed in operation only when the contemplated reclamation or protection by drainage, or by the construction of dikes and levees and other similar improvements, are necessary in order to promote the public health, convenience or welfare, and that individuals cannot through the agency of the government thus improve their own property when the public health, convenience or welfare will not be promoted thereby. As a general thing, and with very rare exceptions, the government, by thus promoting the public health, convenience or welfare, will incidentally cast special benefits upon the property of individuals which is reclaimed or protected by such drainage or diking or other similar improvements, and it is the consensus of judicial opinion that for this reason the cost and the expense of such improvement may be taxed to the property thus receiving special advantage. Although the reclamation and

protection against flood waters, inundations and overflows are matters to which the government lends protection by the taxation of property and by the condemnation of property, yet it is necessary that some governmental agency must be invoked for the purpose of determining whether or not any proposed improvement will in fact promote the public health, convenience and welfare. That any such proposed improvement is one of public utility is a jurisdictional fact, and without its existence the government should refuse to lend its aid, and a law which will permit such improvement in any other case is unconstitutional and void, because it would permit the taking of private property to further private interests. Various legislative bodies have provided different laws and created various means for determining the question as to whether or not any proposed improvement by drainage or by the construction of dikes and levees would in fact be of public utility. More frequently this duty is conferred upon county boards of supervisors, occasionally upon officers specially provided for that purpose, referred to usually as "drainage commissioners"; but such matters are within the discretion of the legislature, and if it has prescribed a rule whereby the jurisdictional question may fairly be determined by a competent administrative body the law must be upheld, and proceedings had in conformity thereto will not be disturbed by the courts. Reference to our former opinion will disclose that the act of the legislature, which is assailed by the relators, recognizes that the improvements for which the act provides may be made only "whenever it will be conducive to the public health, convenience or welfare." The act provides for the presenting of a petition signed by the requisite number of freeholders who own land within the boundaries of a suggested district. Upon the presentation of such petition, the county board of supervisors shall take to its assistance the county surveyor, "and shall determine whether or not the boundaries of said proposed district are reasonable and proper, and, if said board find that the boundary line of said district

should be changed, they shall change the same and fix the boundary line where the same in the judgment of said board should be fixed with a view to promoting the interest of said drainage district, if formed, and with a view to doing justice and equity to all persons."

The fourth and fifth questions above quoted must be answered by an interpretation of this provision of the act in controversy. It is evidently the intention of the legislature that such improvement should not be brought about, except that it be for the public health, convenience or welfare. But is it possible that the specific provisions of the act may be complied with and the expressed intention of the legislature defeated? The county board itself views the property, taking to its assistance the county surveyor. It is not required to take testimony, but upon an examination of the vicinity of the suggested district determines the boundaries thereof. The board is not permitted to take into consideration the private advantage which would be gained by any individual; but, on the other hand, it shall fix the boundaries with a view to promoting the interest of the drainage district, and with a view to doing justice and equity to all persons, and this must necessarily be done with a consideration for the public health, convenience or welfare. Although drainage laws are liberally construed, yet we are of the opinion that a strict construction placed upon this act would not permit us to arrive at any other conclusion. The inference that the county board shall determine the public utility of the proposed improvement is not only permissible, but a necessary construction to be placed upon the language used. It is the board's imperative duty to act upon the presentation of a proper petition. It is not its imperative duty to fix the boundaries if the organization of the district would not promote the public health, convenience or welfare. Counsel for respondents argues, as also does counsel for relators, that the county board has no discretion in the matter; that it is required to fix the boundaries of the district regardless of the public health, convenience and

welfare; and that the question of public utility is to be determined by the owners of the property within the district. Were we to take his view of this proposition, we could not in all probability support the conclusion we have reached. Yet he admits that, acting under the provisions of the statute, it would be the duty of the county board to change the boundaries of the suggested district so as to include land the reclamation or protection of which would be of public utility, and that it would be the duty of the board to exclude such land, in the suggested district, the reclamation or protection of which would not promote such public interest.

The legislature is the author of the act. It appears from the arguments that the act was promoted by the respondents, their constituents, and their counsel. Their counsel drafted the bill for which the act was introduced, and, although he places a construction upon this provision inconsistent with ours, yet we must give to the act the meaning which it is apparent from the language used that the legislature had in mind when it passed it. We adhere to the construction set forth in our former opinion. The legislature might well have said in express terms that the county board should make a finding that the organization of the proposed vicinity would be of public utility; but the inference is strong, from the language actually used, that it was the intention of the legislature that the district should not be organized, except that the county board could prescribe such boundaries for the proposed district, which, if organized and promoted under the provisions of the act, would in fact promote the public health, convenience or welfare. The supreme court of Minnesota in *State v. Board of County Commissioners,* 87 Minn. 325, 60 L. R. A. 161, had before it for consideration a drainage act which contained no express provision making it the duty of the board to find whether the proposed ditch would be of public benefit, nor is there any express declaration in the act itself that such fact must exist before a ditch may be ordered constructed. In the opinion we find the

following: "From a very careful and painstaking examination of this act, we are satisfied that but one construction should * * * be given it, and that to the effect that the legislature intended to provide exclusively for the public welfare. It provides that the county commissioners may construct a ditch or drain, when they find the necessity therefor and that the other provisions of the act have been complied with. It provides that the petition shall state the necessity for the ditch, and this must necessarily refer to and mean the public necessity, for only public ditches are authorized to be laid out by the act. No assessments upon lands benefited can be made, except toward the payment of a public ditch; and the theory that a private ditch may be ordered constructed under its provisions is impliedly negatived by almost every section of the statute. Section 31 was undoubtedly embodied therein for the very purpose of indicating that the legislature intended it to apply exclusively to cases where the public health, convenience, or welfare will be advanced. This section provides 'This act shall be liberally construed, so as to promote the public health and the drainage and reclamation of wet or overflowed lands.'" In *Oathout v. Seabrooke*, 159 Ind. 529, it is said: "The seizure of private property by the state, through county commissioners, for the construction of highways and ditches, is an assertion of the right of eminent domain, which can be exercised only in cases where some public benefit is to be subserved. The commissioners have no power to enter upon lands, lay out and construct roads and ditches, when only private interests are involved, and no power to act upon such subject until they have first ascertained, by the means provided by law, that some public benefit is to be promoted thereby."

The act confers upon the property owners of the district the privilege of organizing the district for the purposes of improvement, but, as we view it, the election is not held to determine the question of public utility. The county board does that. The result of the election could

not change this fact. It is true that the act says: "If a majority of the votes cast at said election shall be in favor of the formation of said district it shall be conclusive that the formation of said district, and the work that may be done under the supervision of the board of directors, will be for the public health, convenience and welfare." Laws 1907, ch. 153, sec. 8. Were it not for the action of the county board in fixing the boundaries with a view of forming a district, the improvement of which would promote the public welfare, we would quite agree with relators' counsel that the act is fatally deficient. The election is called only after the jurisdictional question of public utility is determined, and for this reason alone can the election be considered as conclusive that the reclamation or protection of the district will be for the public health, convenience or welfare. It would not stand for this even, unless all jurisdictional provisions had been in good faith complied with. The only purpose for requiring an election is, first, to give to the property owners the privilege of availing themselves of the statute, and thereafter to select officers of the district. The legislature might have provided for the organization of a district without an election. As will be seen by authorities hereinafter cited, legislatures of some states have conferred upon county commissioners the power to construct drains without giving to interested property owners any vote whatever, either by petition or by ballot, and such legislation has been enforced by the courts. Our legislature could constitutionally confer upon the county board the power to create a drainage district upon a petition of the property owners, who represent the greater portion of the property within the district, if upon investigation the board find that the public welfare would be subserved. It is immaterial that the act now before us failed to provide for this expression from the property owners before the determination of the jurisdictional question by the county board. The county board had authority to consider the question by reason of a petition filed by comparatively a few of the interested

property owners. And acting upon this it proposed a district, the improvement of which would be of public utility.

Then it was that the question of organization was submitted to the interested property owners. Nor is it fatal to the act, nor can we even say that it was unwise legislation, to permit all the property owners, regardless of their location, and although they might be foreign corporations, to have a voice at the election. In fact, it seems fair and reasonable, when the public interest, and not private, is to be promoted by improvements to be paid for by special taxation according to benefits, that all persons, regardless of their place of residence, should have a voice, and their influence be determined by the amount of their holdings. Section 22 of the bill of rights provides: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." Const., art. I. The act under consideration does not call for an exercise of the elective franchise such as is provided for in the constitution. It prescribes a manner by which the property owners may determine what persons shall have charge of the intended improvements. The directors provided for by the act are not public officers, in the sense that they have charge and control of the political affairs of their constituents. This is one of several modes resorted to by the different legislatures in providing a manner for the organization of drainage districts. The formation of the district is not for the purpose of government, but for the purpose of constructing a public improvement, after the proper governmental body has determined that the same would be of public utility. As heretofore said, the law might have provided for the improvement of the district at the expense of the benefited property, without giving to the property owners any vote whatever. Such being possible, it seems immaterial what manner of voting is prescribed, when the legislature sees fit to give that privilege. By an act of the general assembly of Iowa it was provided

that the drainage of land subject to overflow or too wet for cultivation could be established upon a petition of 100 voters of the county. It was not required that any of the petitioners should be the owners of, or interested in, the land in controversy, nor did the act provide that the wishes of the landowners should be considered in the establishment of the proposed drain. *Seibert v. Lovell,* 92 Ia. 507; *Butts v. Monona County,* 100 Ia. 74. In *Roberts v. Smith,* 115 Mich. 5, the act made no provisions for notice and hearing to the persons within the assessed district or the property owners liable to assessment, and it was held that this omission from the act did not violate the constitutional requirement against the using of private property for public improvements without the consent of the owner, unless compensation shall first be determined by a jury of freeholders, and it was further held that said act did not authorize the taking of property without due process of law, in that it makes no provision for such notice and hearing. In *Mound City Land & Stock Co. v. Miller,* 60 L. R. A. 190 (170 Mo. 240), it was held: "Basing the voting power in a drainage district on acreage, rather than on membership, is not unlawful." In *People v. Reclamation District,* 48 Pac. 1016 (117 Cal. 114), it was held: "That the law creating reclamation districts provides that those who are interested in the land and who must pay for the improvements shall determine by an election whether the improvements shall be made, does not constitute an exercise of the elective franchise, so as to render it void because requiring a property qualification." In the opinion it is said: "The district, as already said, was part of a scheme for conducting a public work, and not for self-government. In regard to street work and other local improvements, it has often been provided that the work shall only be done upon the application of the owners of a majority of frontage, or of a certain proportion of the owners of land; and, if the law had provided that the owners could elect a committee of their number to superintend the work, I do not see how it could change the principle.

This could not constitute an exercise of the elective franchise, which is the matter to which the constitutional provisions have reference. The general public has an interest in the reclamation of swamp and overflowed land. Nevertheless, it is one of those public enterprises which results in a benefit to private lands, and therefore the costs are made a charge upon such land. That those who are specially interested and who must pay for the improvement are heard upon the question as to whether it shall be done, and are permitted to appoint those who shall superintend it, is not unusual, nor would it constitute an exercise of the elective franchise." 117 Cal. 114.

The act here in controversy, instead of providing a notice and hearing to the property owners for the purpose of determining the jurisdictional question as to public utility, provided another manner by which the county board should ascertain that fact—by personal examination and investigation, with the assistance of the county surveyor. It is not necessary for this court to determine which plan is the better. The one adopted is adequate. The mere establishment of a drainage district does not deprive any property owner of his property, does not impose taxes against his property, and in no way does it violate his constitutional rights. The question of taxation and assessment is determined by the officers of the district, when it is once organized. They are required by the act to levy the necessary taxes upon the property benefited in proportion to the benefits received, and of this assessment each property owner has notice—is granted a hearing, with the right to appeal. In this system of taxation, and in this only, is there an opportunity to do an injustice to any person concerned; and, if the invasion of any rights is threatened, he has an opportunity to correct it, as other wrongs done in violation of the revenue laws of the state are corrected.

There was a sixth proposition argued upon the rehearing; but, in view of the conclusion we have reached, a discussion thereof is unnecessary. It would be important

only in the event that the court should find that the property owners had the power to determine the jurisdictional question of public utility.

We are convinced that our former conclusion is right, and we recommend that the opinion heretofore filed be adhered to and the judgment of the lower court affirmed.

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

AFFIRMED.

JAMES G. WHITE, APPELLANT, V. NICHOLAS RESS, SHERIFF, ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,075.

1. **Judgment: REVIVOR.** Section 462 of the code is applicable to the revival of a dormant judgment, and authorizes the revival of such a judgment against a nonresident upon service by publication.

2. ———: ———: **CONSTITUTIONAL LAW.** Section 462 of the code, authorizing the revival of a dormant judgment upon service by publication, is not repugnant to either the state or federal constitutions.

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

A. J. Sawyer and *Joseph Wurzburg,* for appellant.

O. B. Polk and *H. J. Whitmore, contra.*

GOOD, C.

This action was brought to enjoin the sale of real estate upon execution. A demurrer to the petition was sustained, and the cause dismissed by the trial court, and the plaintiff has appealed to this court.

The petition discloses that the plaintiff is the owner of

certain real estate in Lancaster county, that one of the defendants is the sheriff of said county, and the other two are the owners by assignment of a certain judgment. The judgment was originally obtained in Gage county on the 26th day of March, 1897. Thereafter it was assigned to one of the defendants, and was permitted to become dormant. The assignee of the judgment caused a transcript of the same to be filed in Lancaster county on July 22, 1905, and on the same day made and filed in the office of the clerk of the district court for said county an affidavit alleging the facts necessary to entitle him to a revival of the judgment. Thereupon a conditional order of revivor was made by the court. An ineffectual attempt was made to serve this order upon the judgment debtor in the state of Illinois. On the 24th day of July, 1905, the attorney for the assignee filed an affidavit for service by publication. On the 11th day of September, 1905, the conditional order of revivor was made absolute upon this constructive service. In April, 1906, the judgment debtor, being then the owner of certain real estate in Lancaster county, conveyed the same by warranty deed to the plaintiff and appellant in this action. Execution was issued and levied upon the real estate so conveyed, and it was advertised for sale. Thereupon the plaintiff instituted this action to enjoin the sale.

It will be observed that the plaintiff became the owner of the real estate after the revivor procedings, and, if they were effectual, the judgment was a lien upon the real estate. Appellant contends that the revivor proceedings were ineffectual, because no personal service of the conditional order was had upon the judgment debtor, that service by publication was ineffectual to authorize the court to make the order reviving the judgment, and that, therefore, the judgment was not a lien upon the realty levied upon. The real point in controversy is as to whether or not a judgment of revivor can be rendered against a nonresident upon service by publication. Section 473 of the code provides that, "if a judgment become dormant, it may

be revived in the same manner as is prescribed for reviving actions before judgment." The mode of reviving actions before judgment is prescribed by sections 459 to 462, inclusive. Section 462 is in the following language: "When the plaintiff shall make an affidavit that the representatives of the defendant, or any of them in whose name the action may be ordered to be revived, are nonresidents of the state, or have left the same to avoid the service of the order, or so conceal themselves that the order cannot be served upon them, or that the names and residence of the heirs or devisees of the person against whom the action may be ordered to be revived, or some of them, are unknown to the affiant, a notice may be published for four consecutive weeks, as provided by section seventy-nine, notifying them to appear on a day therein named, not less than ten days after the publication is complete, and show cause why the action should not be revived against them; and, if sufficient cause be not shown to the contrary, the action shall stand revived." Appellant contends that this section is not sufficient to authorize service by publication in the revival of a dormant judgment, and that it is necessary to read into this statute other language in order to make it apply to the revival of a dormant judgment. It is contended that the section is not applicable, because it requires the affidavit to be made by the plaintiff, that service by publication is conditional upon the filing of the affidavit, the contents of which are prescribed by the statute, and that they deal with the representatives of the defendant, heirs and devisees; and it is urged that, if the judgment had been obtained by a defendant upon a counterclaim or set-off, he could not come within the provisions of the section because he was not the plaintiff. So far as these objections are concerned, we think they are purely technical and without merit. Section 473, as above quoted, provides for the revival of a dormant judgment, and that it shall be in the same *manner* prescribed for the revival of actions before judgment. It is the manner of doing it that is prescribed, and the manner prescribed is that,

where the persons against whom the revivor is sought are nonresidents of the state, or have left the same to avoid the service of the order, or so conceal themselves that the order cannot be served upon them, a notice may be published for four consecutive weeks, as provided by section 79, notifying them to appear on a day therein named and show cause. We are of the opinion that the legislature clearly intended that this section should apply to the revival of dormant judgments, and that service by publication might be made upon a nonresident judgment debtor.

The appellant further contends that, even if this was the intention of the legislature, still it was nugatory because it is contrary to the provisions of both the state and federal constitutions, in that it deprives a party of his property without due process of law. The basis of this contention is that the proceeding to revive is an action *in personam,* and that the order of revivor is a personal judgment, and that a personal judgment cannot be rendered except where the court has jurisdiction of the person of the defendant, either by appearance or by personal service upon him within the state. The appellee contends that the order of revivor is not the entering of a personal judgment. In the determination of this question, it is, perhaps, well to consider the nature of a dormant judgment and the nature of revivor proceedings. In *Draper, Matthis & Co. v. Nixon,* 93 Ala. 436, 8 So. 489, it is said: "A judgment not satisfied, or barred by lapse of time, but temporarily inoperative, so far as the right to issue execution is concerned, is usually called a dormant judgment." The validity of the judgment for the purpose of having execution upon it is not impaired by lapse of time whereby it has ceased to become a lien upon real estate. Such an execution is only voidable. *Yeager v. Wright,* 112 Ind. 230. Our own court has held that a sale upon execution issued upon a dormant judgment is not subject to collateral attack. Without citing further authorities, it is apparent that a judgment does not become extinct by the lapse of time, but is only temporarily inoperative. It may

well be doubted whether under our statute dormancy has any more effect than to cause the judgment to cease to be a lien upon real estate. The proceeding to revive the judgment in this state is not a new action, nor an original suit, but is a continuation of another action. The object to be sought by the revivor is to affect the status of the judgment theretofore properly rendered. It will not be doubted that the legislature might have provided that a judgment should never become dormant, or that it should never cease to be operative until satisfied. It has provided the means whereby the holder of a judgment might prevent its becoming dormant, without the consent of or notice to the judgment debtor, by the simple expedient of having an execution issued within five years of the date of the judgment, or within five years of the issuance of a previous execution. It would seem to us that it would have been entirely competent for the legislature to determine that a judgment would become dormant after the lapse of a certain time, and should remain so until the judgment creditor should file in the court an affidavit setting forth that the judgment was unpaid, and that this would entitle him to have the judgment revived, and that such proceeding might be wholly *ex parte*. The effect of dormancy, at most, raises only a presumption of payment, and does not extinguish the debt or extinguish the liability of the defendant upon the judgment. No one questions that the judgment might be kept alive by the issuing of executions as provided for by our statute, and by simply issuing successive executions the judgment might be kept in full force for an indefinite length of time. Therefore, upon reason, it seems to us that it was proper for the legislature to provide for the revival of dormant judgments upon service by publication, and that such provisions are not repugnant to the provisions of either the federal or the state constitutions. We have not been favored with the citation of, nor have we been able to find, any authority that is expressly in point. Appellant has cited us, however, to the

case of *Bickerdike v. Allen,* 157 Ill. 95, in which there is a dictum to the effect that a proceeding in *scire facias* to revive a dormant judgment was not one *in rem,* and that constructive service upon a nonresident is insufficient to sustain an order of revivor in such a proceeding. Upon the other hand, constructive service is held valid in such a case in *Bertron v. Stuart,* 43 La. Ann. 1171, and there appears a dictum in the case of *Neal v. Le Breton,* 14 Okla. 538, to the effect that service by publication upon a nonresident is sufficient in proceedings to revive a dormant judgment. The statute of Oklahoma is almost identical with our own. A similar dictum also appears in *Bartol v. Eckert,* 50 Ohio St. 31. Many of the states have statutes similar to our own for the revival of dormant judgments upon service by publication as against nonresidents. While these authorities are not conclusive, they, at least, show the trend of the judicial mind in the consideration of the subject.

We are therefore of the opinion that the judgment was properly revived, and was a lien upon the land when purchased by the appellant. It follows that the judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

WILLIAM W. STEPHENS, ADMINISTRATOR, APPELLANT, V. HOSMER H. HENDEE ET AL., APPELLEES.

FILED FEBRUARY 20, 1908. No. 15,085.

1. **County Judges: BONDS: LIABILITY OF SURETIES.** Sureties on the official bond of a county judge are not liable for money which did not come to the possession of their principal by virtue of his office.

2. ———: ———: ———. Where a county judge receives and takes possession of personal property belonging to the estate of a deceased person prior to the appointment of an administrator, his act in receiving and taking possession of the personal property is not done or performed by virtue of his office; and the sureties upon his official bond are not liable if their principal subsequently converts the property so received and taken to his own use.

APPEAL from the district court for Saline county: LESLIE G. HURD, JUDGE. *Affirmed.*

R. M. Proudfit, F. I. Foss and *R. D. Brown,* for appellant.

Hall, Woods & Pound, George H. Hastings, Norval Bros. and *J. E. Addie, contra.*

GOOD, C.

Plaintiff, as administrator, brought this action against Hosmer H. Hendee, former county judge, and his official bondsmen, to recover certain funds and the value of a certificate of deposit belonging to plaintiff's intestate, which, it was alleged, said Hendee had received by virtue of his office as county judge and had converted to his own use. Hendee made default. His bondsmen answered, denying that the fund and certificate were received by Hendee in his official capacity as county judge. The trial court directed a verdict for the defendant bondsmen, and for the plaintiff against the defendant Hendee, and rendered judgment accordingly. From that judgment the plaintiff has appealed.

From the record it appears that one Smith died intestate, possessed of a small sum of money and a certificate of deposit for $3,300. The coroner was called to investigate the cause of his death, but found no occasion for holding an inquest. It appears that Smith had no relatives in that community, and the coroner took possession of the money and certificate, which he found upon the person of the deceased. The coroner then wrote to the county judge asking his advice as to the disposal of the property. In

response to this inquiry Hendee informed the coroner that the property should be turned over to the county judge, that he, as county judge, was the proper custodian of the property, and procured the possession of it from the coroner. A few days later application was made for the appointment of an administrator of the estate of Smith. Pending this application Hendee indorsed the certificate as county judge, and attempted to deposit it to his credit as county judge in one of the banks of Friend. The banker observed that Hendee's indorsement was insufficient, and informed Hendee that it would be necessary to have the certificate indorsed by the administrator. A few days later the plaintiff was appointed administrator of Smith's estate, and upon the same day that he qualified as such administrator Hendee fraudulently procured him to sign an indorsement of the certificate of deposit. It appears that at the time the administrator signed the indorsement he did not know what he was signing, and that he had no intention or purpose of transferring the certificate to Hendee as county judge. Very shortly afterwards the plaintiff learned that he had indorsed the certificate of deposit, and that the same had been deposited in the bank to the credit of Hendee as county judge. He thereupon made demand upon Hendee for the money, and subsequently brought this action to recover it.

The appellant urges that Hendee received the money and certificate by virtue of his office as county judge, or, at least, under color of office, and that in either event, upon his failure to account for the property so received, his bondsmen would be liable. He further urges that the act of Hendee in procuring the administrator to indorse the certificate was in effect an official act, directing the disposition of the estate of a decedent which was being administered in the county court. Appellant grounds his contention upon the theory that the county court has exclusive jurisdiction of probate matters, and the county judge is the only person who has any authority to order or direct the disposition of the personal property of decedents, and

that in some way the county judge had control over and was exercising an official function in directing the indorsement of the certificate to himself, and that, therefore, the bondsmen are liable for the failure of the county judge to account for and pay over the proceeds of the certificate of deposit. Upon the other hand, the appellees contend that the circumstances under which the county judge came into possession of the money and the certificate were not sufficient to constitute a receiving by virtue of his office, and that, as the administrator never had possession of the personal property and no order was ever made by Hendee as county judge, Hendee received the money and property as an individual, or, at most, under color of office, and his bondsmen are not liable. Appellant contends that the bondsmen are liable, even though the money was received only under color of office, and that the distinction that has heretofore existed between acts done under color of office and those done by virtue of office is no longer considered sound in law. *Hall v. Tierney,* 89 Minn. 407, particularly lends support to this view. But the rule prevailing generally, and particularly in this state, is different. In this state the rule is that sureties on official bonds do not undertake to answer for acts done by their principal under color of office, but only for such acts as are done by virtue of his office. *State v. Porter,* 69 Neb. 203; *Ottenstein v. Alpaugh,* 9 Neb. 237; *State v. Holcomb,* 46 Neb. 612; *State v. Moore,* 56 Neb. 82; *Comstock-Castle Stove Co. v. Caulfield,* 1 Neb. (Unof.) 542; *Snyder v. Gross,* 69 Neb. 340. "Where an officer goes out of the line of his official duty, and acts without the scope of his authority, this action, though done *colore officii,* is not a breach of his bond for the faithful performance of his duty." *State v. McDonough,* 9 Mo. App. 63. In *Wilson v. State,* 67 Kan. 44, it is said: "As a general proposition, the obligation of a surety is *strictissimi juris.* The surety has the right to stand upon the letter of his obligation. That defendants, as sureties upon the official bond of Wilson as county attorney of Rawlins county, are liable only for such sums

of money as he might lawfully receive by virtue of his office as county attorney is too well settled to admit of argument." In Meachem, Public Officers, sec. 284, is clearly pointed out the distinction between acts done by virtue of office and those done under color of office, in the following language: "Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him; whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them."

The condition in the bond which is particularly relied upon for a recovery in this case, and which, we think, is the only one under which the bondsmen could be held under any circumstances, is in the following language: "Now, if the said Hosmer H. Hendee * * * shall promptly pay over to the person or officer entitled thereto, all money which may come into his hands by virtue of his said office," etc. It is a rule universally recognized that sureties on official bonds can only be held for such liability as comes within the letter of their contracts. The bond in this case holds the sureties only for acts done by virtue of office, and not under color of office, and they are not liable in this case, unless it can be said that Hendee received the money and certificate of deposit by virtue of his office. Under no circumstances that we can conceive of is the county judge entitled to the custody of the personal effects of a decedent prior to the appointment of an administrator. The record clearly discloses in this case that Hendee obtained possession of the money and the certificate prior to the application for the appointment of the administrator. Under no circumstances could he have had any jurisdiction as county judge to compel or require the property to be placed in his hands. He had obtained possession of the money and certificate by misrepresentation of the law to the coroner, and, while this act may have been under color of his office, yet it was not by virtue of his office.

Appellant further contends, however, that the procuring of the administrator's indorsement upon the certificate of deposit after he had qualified was an official act of the county judge, done by virtue of his office, and that the sureties are liable for the proceeds of the certificate of deposit. We think this contention ill-founded, because the record shows that no order was made by the county judge, and, in fact, the indorsement of the administrator was procured by fraud; he at the time not knowing that he was indorsing the certificate, and not intending thereby to transfer it to the county judge. Hendee already had possession of the certificate, and did not obtain possession by this act, and, even if he had obtained possession of it by this fraud, it was not by any act or purported act as an officer. The language used in *State v. Cottle,* 26 Cir. Ct. Rep. (Ohio) 238, is applicable here. It is there held that the sureties on an official bond are not liable for moneys unlawfully appropriated by him to his own use after it has improperly come into his possession. The money and certificate both improperly came into the possession of Hendee in this case, and a subsequent conversion of the funds to his own use would not render his sureties liable.

Some complaint is made that the court directed a verdict, instead of submitting the facts to a jury for its determination; but this is not strenuously urged, nor do we see how it could be, because the verdict directed was the only one that could be sustained. The facts were not in dispute, and there was no question of fact to submit to the jury, and the court directed a verdict as a matter of law, because the sureties were not liable.

It follows that the judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

JOHN SEBESTA ET AL., APPELLEES, V. SUPREME COURT OF HONOR, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,412.

1. Evidence examined and *held* sufficient to sustain the verdict.
2. Insurance: ACTION ON BENEFIT CERTIFICATE: DEFENSES. In an action to recover upon a benefit certificate issued by a fraternal insurance association, whose constitution contains a clause making the certificate incontestable after two years, except for violation of the constitution or laws of the order, and wherein the death of the assured member did not occur within two years of the issuance of the certificate, in order to sustain a defense on the ground that the assured committed suicide, it is necessary to allege and prove that death by suicide is a violation of the constitution or laws of the order in force at the date of the assured member's death.

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

W. B. Risse and *A. L. Tidd,* for appellant.

Matthew Gering, contra.

GOOD, C.

This action was brought against the Supreme Court of Honor, a fraternal insurance association, by the beneficiaries of a certificate of membership issued by said association to Anton Sebesta. The defendant alleged that Sebesta committed suicide by eating the heads of parlor matches, and that under the constitution of the defendant association it was not liable when the assured member committed suicide. Plaintiffs had judgment for the amount of the certificate, which was afterwards reversed by this court. 77 Neb. 249. Upon a second trial of the cause in the district court the beneficiaries again recovered a judgment for the amount of the certificate, with interest, and the defendant has appealed to this court.

Although there are numerous assignments of error, they

relate principally to the sufficiency of the evidence to sustain the verdict, and to the instructions given and refused by the trial court. The record discloses that Sebesta became a member of the defendant association and received his membership certificate in May, 1898, and that he came to his death on the 14th day of July, 1903. It discloses that he was of a cheerful disposition, and had no apparent cause or desire to take his own life. About a month previous to his death he had suffered an injury, from which he had apparently nearly recovered. He had been making his home with friends, whose home he left about a week before his death, when he went to a near-by neighbor. At this time he was ill, and complained of a headache and pains in his abdomen. After he left his home a box of parlor matches was found near the barn with the heads off. At the neighbor's, where he stayed for a day or two, in the room which he had occupied, was found a box of matches with the heads partly missing. This neighbor asked Sebesta about the matches, but he neither admitted nor denied eating them, but looked down and said: "I am just so well off now as on top of the ground." This neighbor advised him to see a doctor, which he did. It appears that he consulted three different physicians, and made every effort to get relief from his illness, and expressed a great desire to recover and live. The physician who last attended him testified that, in his opinion, Sebesta died of phosphorus poisoning. The evidence shows that Sebesta exhibited a number of symptoms of phosphorus poisoning, while, on the other hand, a number of symptoms that usually attend phosphorus poisoning were entirely absent. The first physician who treated Sebesta after the match episode diagnosed his case as the first stage of typhoid fever. There was no direct evidence that Sebesta ate any of the match heads. The record does not disclose that Sebesta knew that the heads of parlor matches contained phosphorus, or that they were poisonous. From a consideration of all the evidence in the case, we think that a jury might have been justified in finding

that Sebesta died of phosphorus poisoning, but we do not think the evidence is such as to compel such a finding. It certainly falls far short of conclusively showing that, even if Sebesta did eat the match heads, he thereby intended to commit suicide, and the court did not err in refusing to direct a verdict upon that ground.

Section 2, art. X of the constitution of the Supreme Court of Honor, in force at the time Sebesta became a member of the association, is as follows: "This order will not pay the benefits of members who commit suicide, whether sane or insane, except it be committed in delirium resulting from illness, or while the member is under treatment for insanity, or has been judicially declared to be insane; but, in all cases not within said exceptions, the amount of money contributed to the benefit fund by such member, shall be returned, and shall be paid to the beneficiaries out of said fund in lieu of the benefit."

Section 13 of the constitution then in force is in the following language: "After two years certificates of membership shall be incontestable for any cause except fraud, violation of the constitution or laws of this order, or a failure to pay the assessment for the benefit and general funds as provided by the laws."

From a consideration of the section first quoted, it would appear that the beneficiaries would not be entitled to recover, if Sebesta committed suicide within two years of the date of his membership certificate, for it was stipulated that he was not in a delirium resulting from illness, that he was not under treatment for insanity, and that he had not been judicially declared insane at the time he was supposed to have eaten the match heads. His death occurred more than five years after he became a member, and, under section 13 above quoted, it is extremely doubtful whether or not the defense of death by suicide was eliminated. It is not necessary to decide that question, for a reason which we will now state.

It appears that this constitution had been superseded by a new constitution which became effective in the year

1900, and which, so far as appears from the record, was in force at the time of Sebesta's death. By the adoption of the new constitution, the old one was abrogated and annulled. The record discloses that section 13, containing the incontestable clause, was carried forward in the newly adopted constitution, but the record is silent as to whether or not section 2, art. X, above quoted, was contained in the new constitution. Upon this state of the record, the membership certificate would be incontestable after two years, save in those cases falling within the exceptions designated in the incontestable clause. There is no evidence in the record that any clause in the constitution in force at the time of Sebesta's death was violated, or that any of the laws of the order were violated, and it was stipulated that all assessments for the benefit and general funds had been paid as provided by the laws of the order. For the appellant to avail itself of any defense that might exist by reason of the exceptions in section 13 of the constitution, it would be necessary for it to allege and prove that Sebesta had violated some of the provisions of the constitution or some of the laws of the order. Appellant has assumed that, because the constitution in force at the time the certificate was issued contained the suicide clause, as above quoted, the defense of suicide was available to it under the exceptions contained in the incontestable clause. In this we cannot concur. When the old constitution was abrogated by the adoption of the new one, it was the same as if it had never existed, and we are not at liberty to presume, in the absence of any evidence, that the suicide clause was carried forward or re-enacted into the new constitution. It therefore follows that, upon the state of the record as it existed, suicide did not constitute a defense.

The instructions complained of relate to the alleged misdirection of the court in defining suicide, and in the refusal to instruct the jury with reference to the defense of suicide as requested by the appellant. We have examined these instructions, and think that they properly state the law. But in the view that we have heretofore expressed,

that suicide did not constitute a defense, as shown by the record, it is not necessary to further consider the instructions.

There is no reversible error in the record, and the judgment of the district court should be affirmed.

DUFFIE and EPPERSON, CC., concur.

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

AFFIRMED.

T. G. NORTHWALL COMPANY, APPELLEE, V. MARY K. OSGOOD, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,050.

1. **Husband and Wife:** MARRIED WOMAN'S CONTRACTS. The syllabus in *Farmers' Bank v. Boyd*, 67 Neb. 497, reaffirmed, and *held* to be the settled doctrine of this court.
2. ———: ———: The construction placed by this court upon the married woman's act, in *Grand Island Banking Co. v. Wright*, 53 Neb. 574, reaffirmed and *held* to be the settled doctrine of this court.
3. ———: NOTES: INNOCENT PURCHASER. A purchaser for value, before maturity, of a promissory note, signed by a married woman, cannot invoke the rule of innocent purchaser, as against the defense of coverture, by showing simply that he had no notice or knowledge of such coverture at the time he purchased such note.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Reversed.*

D. F. Osgood, for appellant.

E. R. Hitchcock, contra.

FAWCETT, C.

Plaintiff, T. G. Northwall Company, sued upon a combination chattel mortgage note, executed May 22, 1902,

and payable on or before April 1, 1903, to W. P. Atkins, or bearer, at his office in Sterling, Nebraska. The petition alleges that on the 19th day of January, 1903, Atkins indorsed said note, and for a valuable consideration, in the usual course of business, delivered the same to plaintiff, and that plaintiff became the owner of said note before maturity, without notice, and is an innocent owner of said note. To this petition, defendant, Mary K. Osgood, filed her answer, in which she alleges, among other things: "(2) This defendant alleges that she is a married woman, living with her husband, Daniel F. Osgood, and has been for the 19 years last past. (3) Defendant alleges that she did not sign the note sued on with the intention of binding her separate property or estate, nor was the consideration for said note used for the benefit of her separate property or estate. (4) Defendant alleges that the note sued on was signed at the request of her husband, above named, for the payment of one gasoline engine purchased by him of one W. P. Atkins." Then follow a number of other allegations to which it is not necessary to refer. No reply whatever was filed to this answer. Such being the state of the record, then, under the well-settled practice in this state, defendant was entitled to a judgment on the pleadings. No motion for such a judgment was interposed, however, but the parties proceeded to trial to the court, a jury having previously been waived. After hearing the evidence and arguments, the court found in favor of the plaintiff, and entered judgment against the defendant for the amount of the note and interest, aggregating the sum of $105. A motion for new trial was duly filed and overruled, and the case is here for review.

Even if we give plaintiff the benefit of a reply denying generally the allegations of defendant's answer, on the theory that defendant went to trial without raising the question of the absence of such reply, we must still reverse the judgment of the trial court. It is no longer an open question that "it is the settled doctrine of this court that the signing of a promissory note by a married woman

does not raise the presumption that she intended thereby to render her separate estate liable for its payment, nor that it was given with reference to her separate property, trade, or business, or upon the faith and credit thereof; and to an action upon such note coverture is a complete defense, unless the plaintiff shall establish by a preponderance of the evidence that the note was made with reference to, or upon the faith and credit of, the wife's separate estate or business, or with an intention on her part to charge her separate estate with its payment." *State Nat. Bank v. Smith*, 55 Neb. 54; *Grand Island Banking Co. v. Wright*, 53 Neb. 574; *Farmers Bank v. Boyd*, 67 Neb. 497.

The evidence contained in the bill of exceptions shows that the note in controversy was given by defendant in payment of a gasoline engine that had been sold by Atkins to defendant's husband. Defendant testified that she was a married woman, and living with her husband; that, when she signed the note, she did not intend to bind her separate property any further than as it was written in the note, which could mean nothing more than that the gasoline engine named in the mortgage clause of the note might be held as a pledge for the payment of the same. Plaintiff places great reliance upon two questions propounded to defendant by the court, and her answers thereto, viz.: "Q. By the Court. Who bought the gasoline engine? A. Mr. Osgood bought it. Q. Whose was it after it was bought; was it yours or his? A. I suppose it was mine, my name was attached to the note." There is nothing in the record to show where the engine was used, or for whose benefit. This is all of the evidence in any manner tending to show that defendant was dealing with reference to her separate estate. In our opinion it falls far short of being sufficient to establish that fact.

The uncontradicted evidence shows that before plaintiff purchased the note in suit, one of its representatives took it, with other notes, to the Farmers & Merchants Bank, and inquired of the cashier, the witness Boatsman, as to the responsibility of the makers of such notes. Mr. Boats-

man told him that the note in suit was good, but that Mr. Osgood (husband of defendant) claimed that Atkins, the original payee, owed him something, and that there was a dispute between them. The evidence also shows that plaintiff did not become the holder of the note by an ordinary purchase, but took it from Atkins in payment of an open account, and gave him credit on account for the amount of the note. There can be no doubt but that plaintiff's representative was trying to collect a claim which plaintiff held against Atkins, and that he knew when he took the note in suit that the maker was a married woman and the wife of D. F. Osgood, who was disputing with Atkins the payment of it. Under these circumstances, we do not think plaintiff can be held to be an innocent purchaser without notice.

Conceding that plaintiff purchased the note, for value, before maturity, and without notice of any defenses, we must still hold that such facts cannot overcome the defense of coverture interposed and established by defendant. In *De Gaalon v. Matherne,* 5 La. Ann. 495, it is said: "The plaintiff insists that, though this note might not have been good in the hands of the original holder, yet in those of a subsequent holder for a valuable consideration the wife cannot resist the payment. This question came before the supreme court in the case of *Sprigg v. Boissier,* 5 Mart. (n. s.) 54, and was decided in favor of the wife. Conceding that the consideration of a negotiable note transferred before maturity cannot be gone into in an action by the indorsee, the court in that case correctly held that, when the objection to the contract arose from the incapacity of a party to enter into it, that which had not a binding effect when it was made cannot acquire it by indorsement. The note showed upon its face that the maker was a married woman. This was sufficient to put the plaintiff upon inquiry before he discounted it, and it was incumbent upon him to ascertain that the separate estate of the wife could be charged with it." If plaintiff's representative, at the time he took the note from Atkins, knew that plaintiff

was a married woman, plaintiff would be bound by such knowledge as effectually as if the note showed upon its face that the maker was a married woman, and would therefore come within the rule announced in the above case.

We think the defense of coverture is analogous to that of minority. It will not be claimed that a purchaser for value, before maturity, of a promissory note signed by a minor, could evade the defense of minority by showing want of knowledge of the maker's age; and it seems to us that the defense of coverture should be governed by the same rule. In each case, the infirmity in the note is the want of capacity of the maker. In the one case, the note is voidable under the settled law of this state, and, in the other, it is void as at common law, the statute not having enlarged a married woman's capacity to contract generally. *Grand Island Banking Co. v. Wright*, and *Farmers Bank v. Boyd, supra*. In *Englebert v. Troxell*, 40 Neb. 195, 212, we said: "And besides there is no such thing as an innocent purchaser of a minor's property." The reason for that rule rests in the absolute right of the minor to disaffirm all contracts, other than for necessaries, made while under the disability of infancy. In like manner there can be "no such thing as an innocent purchaser of a married woman's note," because of the absolute right of a married woman to disaffirm all contracts executed while under the disability of coverture, which are not made with reference to, and upon the faith and credit of, her separate business or property. We therefore hold that a purchaser for value, before maturity, of a promissory note, signed by a married woman, cannot invoke the rule of innocent purchaser, as against the defense of coverture, by showing simply that he had no notice or knowledge of such coverture at the time he purchased such note.

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

AMES and CALKINS, CC., concur.

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

REVERSED.

OMAHA FURNITURE & CARPET COMPANY, APPELLEE, V. MORRIS MEYER, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,068.

Parties: SUBSTITUTION. Plaintiff H. J. A., sole proprietor of a business which he conducted under the name of "Omaha Furniture & Carpet Company," commenced an action in replevin in justice court under said name. Before trial in the justice court his request to substitute his individual name as plaintiff was denied. On appeal to the district court the request was renewed and the substitution permitted. *Held* proper practice. Code, sec. 144.

APPEAL from the district court for Douglas county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

W. S. Shoemaker, for appellant.

G. W. Shields, contra.

FAWCETT, C.

This case is here for the second time. On its first appearance in this court it appeared under the title of *"Morris Meyer, Plaintiff in Error, v. Omaha Furniture & Carpet Company, Defendant in Error."* 76 Neb. 405. Meyer was defendant and the Omaha Furniture & Carpet Company plaintiff in the court below. In the briefs filed by both sides on this hearing the parties are again designated as *"Omaha Furniture & Carpet Company v. Morris Meyer,"* but in the assignments of error, and in the præcipe filed on this hearing by defendant Meyer, the case is entitled *"Omaha Furniture & Carpet Company and Henry*

J. Abrahams, Substituted Plaintiff, v. Morris Meyer." An examination of the petition of plaintiff in the court below discloses the fact that the title as given by defendant in his præcipe is substantially correct; but a literally correct statement of the present parties would be "*Henry J. Abrahams v. Morris Meyer.*"

This was an action in replevin instituted originally in the name of the *Omaha Furniture & Carpet Company v. Morris Meyer et al.* before a justice of the peace in Douglas county. In the justice court the point was made by defendant that plaintiff was not the real party in interest, and had no legal capacity to sue. Plaintiff asked leave to substitute the name of Henry J. Abrahams as party plaintiff, claiming that he was the real party in interest; that he was doing business in the name of the Omaha Furniture & Carpet Company, and was the sole owner and proprietor of the business conducted under such name. This request was denied in the justice court, and judgment rendered for the defendant. Plaintiff appealed to the district court, in which court a petition was filed in which it was attempted to state facts sufficient to show the authority of the plaintiff under the name of the Omaha Furniture & Carpet Company to maintain the action. Defendant filed a motion to strike the petition from the files upon the ground that it showed on its face that plaintiff was not the real party in interest. This motion being overruled, defendant was given leave to demur instanter, and he did so, alleging as grounds of demurrer that plaintiff had no legal capacity to sue; that the petition showed upon its face that it was not prosecuted in the name of the real party in interest, and that the petition failed to state a cause of action against the defendant. The demurrer was overruled, and judgment entered in favor of plaintiff, from which judgment the defendant appealed. This court reversed the judgment of the court below, and remanded the case "for further proceedings according to law." In the opinion by OLDHAM, C., it is said: "When the cause was removed by appeal to the district court,

plaintiff did not ask leave to substitute Abrahams as the plaintiff in the cause of action, but, on the contrary, filed a petition in which he plainly attempted to state facts sufficient to show the authority of the Omaha Furniture & Carpet Company to maintain the action in its own name." When the case was remanded to the district court, defendant moved the court to sustain the demurrer which he had interposed prior to the former appeal, and for judgment of the district court in his behalf, "based on the mandate and opinion of this court on file in the case." Before this motion was disposed of, plaintiff moved the court to substitute Henry J. Abrahams as plaintiff. The district court overruled defendant's motion for judgment, and granted plaintiff leave to make the desired substitution. Plaintiff thereupon, by leave of court, filed an amended petition in the name of Henry J. Abrahams as plaintiff, in which he alleged "that for many years last past he has conducted, and still conducts, his business under the name of the Omaha Furniture & Carpet Company, and that said Henry J. Abrahams and Omaha Furniture & Carpet Company are one and the same person; that he is sole owner and proprietor of said Omaha Furniture & Carpet Company; that said business is the buying and selling of furniture, carpets, draperies, and all sorts of household furnishings; that said Omaha Furniture & Carpet Company is not incorporated, and consists solely of the said plaintiff, Henry J. Abrahams; that at the commencement of this suit he was, and ever since has been, and still is, the owner of the following described goods and chattels, to wit" (naming the articles set out in the replevin suit). The defendant moved the court to strike out of the amended petition the name of Henry J. Abrahams as party plaintiff, and to affirm the judgment entered in the justice court against the Omaha Furniture & Carpet Company, and also to strike from the files the amended petition filed in the name of Henry J. Abrahams, for various reasons stated in said motion. The district court overruled the motion, whereupon defendant refused

to plead further, electing to stand upon his motion. Judgment was thereupon entered in favor of the plaintiff, and from that judgment defendant prosecutes the present appeal.

Defendant rests his right to a reversal of the judgment of the court below on *Flanders v. Lyon & Healy,* 51 Neb. 102, on the strength of which case this court reversed the case on the former hearing. We do not think *Flanders v. Lyon & Healy* is in point on the present hearing. In that case an attempt was made to substitute an entirely different party plaintiff, the motion being for leave to substitute P. J. Healy as plaintiff in place of the firm of Lyon & Healy, "for the reason that the note and mortgage on which this action is based have been assigned to said P. J. Healy, who now owns the same." This court very properly held that "in a replevin suit, where the plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff over defendant's objection." On the former hearing of this case no question of the right of substitution was raised. The point in controversy then was that plaintiff's petition on its face failed to show the capacity of the Omaha Furniture & Carpet Company to sue. The question now before the court is: Did the court err in permitting the substitution of Henry J. Abrahams as plaintiff in lieu of the Omaha Furniture & Carpet Company? The amendment allowed simply permitted the correction of the name of the plaintiff; the name "Omaha Furniture & Carpet Company," under which Abrahams did business, having been used as the name of the plaintiff instead of Mr. Abrahams' individual name. This was not permitting the substitution of a stranger, but was simply permitting the correction of the name.

Section 144 of the code reads: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a

party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto, by amendment." Under this statute we think the district court would have the right to permit an amendment, such as was made in this case, at any time, either before or after judgment. In *Brandt v. Albers,* 6 Neb. 504, this court said: "Where, upon the death of a plaintiff, there is an order of revivor in the name of the administrator duly entered, the failure of the clerk to change the title of the case accordingly is not fatal to the judgment subsequently rendered. This is a mistake that may be remedied on motion, even after judgment." And in *Pekin Plow Co. v. Wilson,* 66 Neb. 115, it was held that "in this state the right to amend is as liberally accorded in replevin actions as in other causes." In *McDonald v. State of Nebraska,* 101 Fed. 171, it is said: "There is no such thing as a vested right in a technical error or defect in the pleadings or the parties to the action. No error or defect can be regarded which does not affect the substantial rights of the adverse party. * * * At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded." The amendment permitted by the district court certainly did not affect the substantial rights of the defendant. Henry J. Abrahams was the Omaha Furniture & Carpet Company, and *vice versa.* The lease under which plaintiff was claiming the right to take the property was executed in the name of Omaha Furniture & Carpet Company, but the parties all well knew that the Omaha Furniture & Carpet Company was really Henry J. Abrahams. The substitution of Henry J. Abrahams as plaintiff, therefore, was no more a change of the real parties than if the suit had been commenced in the name of J. Henry Abrahams, and, upon

discovery of the clerical error after the suit was commenced, plaintiff had been permitted to change the name to Henry J. Abrahams. Henry J. Abrahams commenced the suit, had prosecuted it from the beginning, and was the sole owner of the property and cause of action, but, by inadvertence or mistake, had commenced the suit under a wrong name. The court did not err in permitting the amendment.

If what defendant states in his brief as to the character of plaintiff and the merits of the controversy in this action, if they had been gone into, is true, it is to be regretted that defendant did not file his answer and proceed to trial upon the merits; but, having elected to stand upon what he believed to be his technical rights, and having permitted judgment to go against him, we do not see how we can relieve him from the situation in which he has permitted himself to be placed.

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

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

NATHAN C. GOODRICH, APPELLEE, V. UNIVERSITY PLACE ET AL., APPELLANTS.

FILED FEBRUARY 20, 1908. No. 15,083.

1. **Cities:** CARE OF STREETS: LIABILITY. The making, improving and repairing of streets by a municipal corporation relate to its corporate interests only, and it is liable for its failure to perform its duty.

2. ———: PRIVILEGES: OBLIGATIONS. By accepting the special privileges and powers of taxation, supervision and local government, cities of the second class and villages assume the duties, responsibilities and liabilities flowing therefrom and incident thereto in the same manner and to the same extent as any other muni-

cipality; and such special privileges and powers constitute a sufficient consideration for the obligations and liabilities thus assumed.

3. ———: CARE OF STREETS: LIABILITY. A city of the second class or village has the exclusive control of its streets, and ample means are placed under the control of its constituted authorities to maintain the streets in a safe condition. Under these circumstances, it is liable for its failure to perform its duty.

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

T. M. Wimberley and *Wilson & Brown,* for appellants.

R. D. Stearns and *Billingsley & Greene, contra.*

FAWCETT, C.

The petition in this case alleges substantially that University Place is a city of the second class and Bethany Heights a village, each duly organized and existing as such under the laws of this state, and that under the laws of this state it was the duty of appellants to keep the streets of such city and village in good order, and at all times to keep the bridges in good repair, and to place barriers and railings along dangerous embankments and declivities along the streets within their corporate limits; that Vine street or the Vine street road lies within the corporate limits of said defendants, and as a part of said road there was a bridge which was allowed to get out of repair and so remain; that there was a dangerous embankment near the bridge without barriers or railings or other protection, which was permitted to remain in such dangerous condition, and that plaintiff, while driving along and over said street and bridge, by reason of the defective and dangerous condition of the bridge and embankment, was thrown out of his wagon and down the embankment, and injured. There was a trial to a jury, which returned a verdict in favor of plaintiff for $500. From a judgment on the verdict this appeal is prosecuted.

Counsel for appellants in their brief state: "We wish

to submit this case in this court upon the single proposition of the liability of cities of the second class and villages in this state for negligence in failing to keep their streets and bridges in repair. * * * If the law imposes such a liability the appellants are content with the verdict and judgment; but they contend that under the law the facts stated in the petition impose no liability upon them, and for this reason they ask that the judgment be set aside and the cause of action dismissed." Counsel for appellants plant themselves squarely upon the doctrine that the common law imposes no liability upon either counties, townships, school districts, or municipalities for injuries to individuals growing out of defective highways, and that, such being the fact, no such liability exists unless imposed by statute; that such right in the individual as against the public is in derogation of the common law, and does not exist unless it is conferred by express terms of the statute, or by necessary implication from the terms of such statute, and that in this state there is no statute granting any such right in express terms as to cities of the second class and villages, nor any statute concerning them from the terms of which it can be said that such liability may be implied. The law governing cities of the second class and villages, in force at the time of the injury complained of, is found in article I, ch. 14, Comp. St. 1905. The sections of that chapter bearing on the question under consideration are as follows:

Sections 21 and 67*b*. "The overseer of streets shall, subject to the orders of the mayor and council (board of such village), have general charge, direction, and control of all work on the streets, sidewalks, culverts, and bridges of the city (or village), and shall perform such other duties as the council (board) may require (direct)."

"Section 69. In addition to the powers hereinbefore granted cities and villages under the provisions of this chapter, each city and village may enact ordinances or by-laws for the following purposes: * * * Subd. III. To provide for the grading and repair of any street,

avenue or alley, and the construction of bridges, culverts and sewers. * * * Subd. IV. To construct sidewalks; to curb, pave, gravel, macadamize and gutter any highway, street, avenue or alley therein (to grade from lot line to curb line of its streets and highways for sidewalks and parks; to park any highway, street, avenue or alley, and to maintain parks thereon); and to levy a special tax on the lots and parcels of land abutting on such highway, street, avenue or alley, to pay the expenses of such improvements. But, unless a majority of the resident owners of the property subject to the assessment for such improvements petition the council or trustees to make same, such improvements shall not be made until three-fourths of all the members of such council or board of trustees shall by vote assent to the making of the same."

"Section 77. The city council or board of trustees shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city or village, and shall cause the same to be kept open and in repair, and free from nuisances."

We are unable to discover any substantial difference between the powers and privileges given to, and obligations and liabilities imposed upon, cities of the second class and villages, and municipalities of any other class. The same rules of law must therefore be applied to all. In their brief counsel for appellants rely upon *Goddard v. City of Lincoln,* 69 Neb. 594; *Schmidt v. City of Fremont,* 70 Neb. 577; *City of Detroit v. Blackeby,* 21 Mich. 84, together with the quotation therein from *Eastman v. Meredith,* 36 N. H. 284, and *Roberts v. City of Detroit,* 102 Mich. 64. We do not think either of the Nebraska cases cited is in point here. In *Schmidt v. Fremont* the only questions considered were whether a party who had been injured by a defective sidewalk was required to give notice to the mayor or city clerk within 30 days after the occurrence of the accident or injury; and, second, whether incapacity, caused by his injury, to give the notice would be a sufficient excuse for noncompliance. We decided the for-

mer of those two questions in the affirmative, and the latter in the negative. Nothing else was considered or decided in that case. In *Goddard v. City of Lincoln* the question was whether, under section 110, art. I, ch. 13, Comp. St. 1901, the city of Lincoln could be held liable for injuries unless a notice in writing of the defect causing the injury had been filed with the city clerk at least five days before the injury occurred. We held that the legislature had a perfect right to thus limit a person's right to recover against a city. In the first paragraph of the syllabus it is said: "The liability of a city, for injuries resulting from defective streets or sidewalks, rests exclusively upon express or implied provisions of the statute, and it is competent for the legislature to limit such liability or remove it entirely." That such power is vested in the legislature there is no room for doubt; but that case does not decide that a municipality is not liable to one who is injured by reason of the negligence of such municipality in keeping its streets and sidewalks in reasonably safe condition for travel, unless such liability is imposed by statute. Indeed, we think there is force in the argument of counsel for appellee that "the language of the court implies that there is a liability now, as a liability could not be 'limited' or 'entirely removed' if it did not exist." We have read the opinion with great care, and are unable to find anything in it to sustain the position of appellants in this case. On the contrary, on page 597, the opinion cites *City of Omaha v. Olmstead,* 5 Neb. 446, and says: "The principle announced in that case has since been frequently applied." An examination of *City of Omaha v. Olmstead* shows that the question under consideration in this case was squarely before us in that. In the opinion we say: "It will not be denied that an act providing for the incorporation of a city must be accepted as a whole, and that the city in accepting the benefits derived therefrom must perform the duties required by law. The corporate franchise is a valuable privilege, and is a sufficient consideration for the duties which the law imposes. The state

grants to the municipality a portion of its sovereign authority, in greater powers of self-government than are given to *quasi* corporations, in increased facilities for the acquisition and control of corporate property, and in the special authority over, and control of, the streets, and their adaptation to the wants and convenience of the citizens of the municipality. The acceptance of these privileges is considered as raising an implied promise on the part of the city to perform its corporate duties; and this implied agreement made with the sovereign power inures to the benefit of every individual interested in the proper performance of such duties (citing a number of cases). The city has the exclusive control of its streets, and ample means are placed under the control of its constituted authorities to maintain the streets in a safe condition. Under these circumstances, the city is liable for its failure to perform its duty." The opinion then considers *City of Detroit v. Blackeby, supra,* and the quotation which the Michigan court therein makes from *Eastman v. Meredith, supra,* upon which appellants chiefly rely. In this connection the opinion states: "In *Detroit v. Blackeby,* 21 Mich. 84, 114, it was held (Cooley, J., dissenting) that the city was not liable. The court say: 'In the case of *Eastman v. Meredith,* 36 N. H. 248, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies.' While it is true that in particular instances property and valuable franchises of a profitable nature were conferred upon municipal corporations as a condition for the performance of certain acts, yet it will not be contended that all, or any considerable portion, of such corporations were thus endowed. Nor will it be claimed that liability for neglect of duty was restricted to corporations thus benefited. I think it will be found on examination

that, as a rule, as valuable privileges and benefits are conferred by our laws providing for the incorporation of cities as were conferred by ancient charters."

The above, then, is "the principle announced," which, in *Goddard v. City of Lincoln, supra,* we say "has since been frequently applied." Our dissent from the rule announced in *City of Detroit v. Blackeby, supra,* and the other Michigan cases cited, does not stand alone. The supreme court of the United States in *Barnes v. District of Columbia,* 91 U. S. 540, 23 L. ed. 440, say: "It is denied that a municipal corporation (as distinguished from a corporation organized for private gain) is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such a work is a judicial act, and, if injury arises from the mere execution of that plan, no liability exists. *Child v. City of Boston,* 4 Allen (Mass.), 41; *Thayer v. City of Boston,* 19 Pick. (Mass.) 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation cannot be charged. *City of Detroit v. Blackeby,* 21 Mich. 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair. The authorities establishing the contrary doctrine that a city is responsible for its mere negligence are so numerous and so well considered that the law must be deemed to be settled in accordance with them." Mr. Justice Hunt, who wrote the opinion, then gives a long line of English and United States authorities sustaining his position. It will be seen, therefore, that *City of Detroit v. Blackeby, supra,* is not only discredited by this court in *City of Omaha v. Olmstead, supra,* but is declared by the supreme court of the United States to be contrary to the great weight of authority. In *Burke v. City of South Omaha,* 79 Neb. 793, we again had occasion to consider *City of Omaha v. Olmstead, supra,* and *Barnes v. District of Columbia, supra,* and, upon such consideration,

the rule announced in *City of Omaha v. Olmstead* was reaffirmed. In the opinion in that case DUFFIE, C., very clearly draws the distinction which is decisive of this case, in these words: "When the state imposes upon an incorporated city the absolute duty of performing some act which the state may lawfully perform, and pertaining to the administration of government, the city, in the performance of that duty, may be clothed with the immunities belonging to the mere agent of the state; but, when the city is merely authorized by way of special privilege to perform such an act in part for its corporate benefit and the benefit of its inhabitants, the city is not clothed with these immunities, and is liable to be sued for injuries inflicted through its negligence in the performance of such an act." The syllabus of that case states the rule thus: "The making, improving and repairing of streets by a municipal corporation relate to its corporate interests only, and it is liable for the wrongful or negligent acts of its agents in performing such duties." Adapt the phraseology of that syllabus to the facts in the case at bar, and we have the rule: The making, improving and repairing of streets by a municipal corporation relate to its corporate interests only, and it is liable for its failure to perform its duty. In that case the negligence of the defendant consisted of the negligence of its foreman while repairing one of its streets; in the case at bar the negligence consisted of the failure of defendants to repair the street. As will be seen, the rule is the same in either case.

While the exact question of the liability of cities and villages, without an express statute creating such liability, and the rule at common law in relation thereto, has, so far as we have been able to discover, never been considered in this court except in *City of Omaha v. Olmstead, supra,* we have in numerous cases held such cities and villages liable in the absence of such express statute. In *City of Ord v. Nash,* 50 Neb. 335, it is said: "Where a city or other municipality grades or otherwise improves

any portion of a street for the purpose, and with the result, of inducing public travel thereon, there is a resulting duty to keep such portion of the street in repair and a consequent liability for the failure to do so." In *Wahoo v. Reeder,* 27 Neb. 770, we say: "A person passing over a public sidewalk in a village, which sidewalk was elevated from one to three feet above the ground, stepped into a hole in such walk and was permanently injured. *Held,* That a village was liable for such injury in the same manner as a city." In *Village of Ponca v. Crawford,* 23 Neb. 662, the village was held liable for an injury sustained by a stranger who, while passing along one of its streets between the post office and one of the principal hotels, was injured by reason of a break in the sidewalk. In *City of Plattsmouth v. Mitchell,* 20 Neb. 228, where the sidewalk from which the injury resulted was constructed on a public street by an abutting property owner, without any direction or order by the officers of the city, we held: "The fact of such construction by the property owner without authority will not relieve the city from liability for damages to persons injured thereon without fault, if after the construction of such walk the city assumes jurisdiction over it and orders repairs to be made prior to an accident. Nor will such city be relieved from liability, even though it does not assume such jurisdiction, if the walk is in a public street in constant use, and in a line of other sidewalks constructed by direction of the city, or over which it has control." As late as March 21, 1907, in *Brown v. Village of Pierce,* 78 Neb. 623, we reversed a judgment for defendant for errors in the instructions, and remanded the case for another trial, thereby sustaining plaintiff's right to maintain an action for injuries received by reason of a defect in the sidewalk. In none of the above cases was there any express statute making the cities and villages liable for their negligence in the care of their streets to persons injured by reason thereof. The rule in harmony with the weight of authority seems to be as stated by MAXWELL, J., in *City of Omaha v.*

Olmstead, supra, that a corporate franchise is a valuable privilege and is a sufficient consideration for the duties which the law imposes; that an act providing for the incorporation of a city or other municipality must be accepted as a whole, and that a city or other municipality in accepting the benefits derived therefrom must perform the duties required by law; that acceptance of these privileges is considered as raising an implied promise on the part of the city or other municipality to perform its corporate duties, and that this implied agreement made with the sovereign power inures to the benefit of every individual interested in the proper performance of such duties; that the city or other municipality has the exclusive control of its streets, and ample means are placed under the control of its constituted authorities to maintain the streets in a safe condition, and that under these circumstances the city is liable for its failure to perform its duty. Tersely stated, we hold that, by accepting the special privileges and powers of taxation, supervision and local government, cities of the second class and villages assume the duties, responsibilities and liablities flowing therefrom and incident thereto in the same manner and to the same extent as any other municipality, and that such special privileges and powers constitute a sufficient consideration for the obligations and liabilities thus assumed.

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

CALKINS and ROOT, CC., concur.

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

AFFIRMED.

EMMA HOSKOVEC, APPELLANT, V. OMAHA STREET RAILWAY COMPANY, APPELLEE.

FILED FEBRUARY 20, 1908. No. 15,037.

1. **New Trial:** MISCONDUCT OF JUROR. Where a question as to the operation of physical laws is involved in a case, and a juror seeks the opinion of a person specially skilled in such matters, but not called as a witness, and communicates such opinion, when obtained, to his fellow jurors, such action of the juror is misconduct, for which the trial court may properly set aside the verdict.

2. **Trial:** INSTRUCTIONS. In a case where the defendant had the greater number of witnesses upon a material point, the court instructed the jury that the weight of evidence did not necessarily depend upon the number of witnesses who testified for the respective parties, but that it might consider the interest, intelligence, means of knowledge of the witnesses, the reasonableness of their statements, and the extent to which they were corroborated by other witnesses, and twice told it that the plaintiff must establish her issues by a preponderance of the evidence. *Held*, That it was improper to afterwards submit two additional instructions, in one of which the jury's attention was again called to the rule regarding a preponderance of evidence, and in the other of which it was told, without repeating the caution first given, that it might consider the number of witnesses.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Weaver & Giller and *F. T. Ransom,* for appellant.

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

CALKINS, C.

The plaintiff was a passenger on one of the defendant's cars going north on Thirteenth street, in the city of Omaha, September 22, 1902. She alighted at Dodge street, and in doing so she was seriously injured, and brought her action against the defendant, alleging that after the car was stopped, and while she was in the act of descending therefrom, the defendant's servants negligently started

the car, suddenly throwing her to the pavement and causing the injuries complained of. The defendant denied these allegations, and alleged that in fact the plaintiff negligently stepped from the car before it was stopped, and thereby received her injuries. The cause has been seven times tried in the district court. On the sixth trial there was a verdict for the plaintiff, which was set aside, and the seventh trial resulted in a verdict for the defendant. From a judgment rendered upon this verdict, the plaintiff appeals.

1. On the sixth trial the defendant produced several witnesses who testified that the plaintiff attempted to alight from the car by stepping from the running board with her face to the rear, while holding on with her right hand. It was claimed by the plaintiff that the character of her injuries demonstrated that she must have fallen forward, while she would naturally have fallen backward if the statements of defendant's witnesses were correct. One of the jurors, anxious, no doubt, to ascertain the truth, and probably unconscious of the impropriety of his undertaking an *ex parte* investigation upon his own initiative, interrogated one of the defendant's conductors as to how a person leaving a car in the manner described by defendant's witnesses before the same had been brought to a stop would probably fall; and, having received the answer that such person would sit down or fall backward, he communicated the result of his inquiry to his fellow jurors. This conduct of the juror being complained of by the defendant in a motion for a new trial, the district court on that account set aside the verdict, and its action in that regard is here assigned as error.

It will no doubt be conceded that a juryman may not investigate any fact in issue on his own motion and communicate the result to his fellows. In this case the opinion of the conductor was placed before the jury without his having been produced or sworn as a witness, and without the defendant's having any knowledge of its

having been so submitted, and without giving it an opportunity to cross-examine the witness or controvert his testimony. This method of placing facts before the jury violates several fundamental principles of the law regulating the trial of issues of fact; but it is urged that the fact so brought to the cognizance of this jury, to wit, that a person leaving a street car under such circumstances would fall backward, is one concerning the ordinary course of nature, of which the jury might take notice without its being brought to its attention by the evidence. The facts of nature which may be so considered are those which are so plain that there can be no difference of opinion about them. The fact that the juror in this case desired and sought for the opinion of a person having special opportunities for observation of such instances tends to show that he felt unable to satisfactorily determine the question out of his own experience, and that he therefore might, and probably did to some extent, depend upon the information which he acquired in this irregular way. We are therefore of the opinion that the court did not err in granting a new trial upon this ground.

2. The trial court upon its own motion gave instructions which very fully and fairly presented the issues in this case to the jury. In the first instruction, the rule requiring the plaintiff to establish her allegations by a preponderance of the evidence was stated in a manner of which the defendant could not complain. In the second instruction, the jury were told that the only question for it to consider was: "Did the servants of the company in the charge of the car, after having brought the car to a stop at Thirteenth and Dodge streets, and while plaintiff was in the act of alighting therefrom, start said car forward, and thereby throw plaintiff upon the pavement and cause the injuries complained of, and was she injured thereby according to some of the claims made by her in her petition?" and the rule requiring a preponderance of the testimony was repeated to the jury in connection with this instruction. The third instruction was as fol-

lows: "The weight of evidence does not necessarily depend upon the number of witnesses who testify for the respective sides. In determining the question, you are at liberty to take into consideration the interest of the witnesses or any of them in the result of your verdict, their relationship to the parties in interest, if any, their intelligence, their means or opportunity of knowing the truth of the matter about which they testify, the reasonableness or unreasonableness of their statements, and the extent to which they are corroborated by other witnesses, if at all; you may consider the appearance and demeanor of the several witnesses while giving their testimony, and observe the candor and fairness with which they testify, or the want of those qualities, and determine for yourself the weight or credit to be given to the testimony of the several witnesses. If you believe any witness has knowingly or wilfully testified falsely, you are at liberty to disregard the whole of such witness' testimony, except such portion as may have been corroborated by other credible witnesses or evidence. You should not arbitrarily reject the testimony of any witness without just cause, but should seek to harmonize the testimony of all the witnesses on the hypothesis of truth, unless for good cause you are compelled to do otherwise."

The court also gave, at the request of the defendant, instructions numbered 2 and 5 as follows: "(2) You are instructed that it devolves on the plaintiff in this action to prove by a preponderance of the evidence that, while she was in the act of alighting from the car of the defendant, after it had been brought to a full stop, the car was suddenly started forward, and she was thereby thrown to the pavement and injured; and in that behalf you are further instructed that, if you find that the evidence in this case preponderates in favor of the defendant with regard to this allegation of negligence, or that the evidence as to whether or not the plaintiff was thrown from the car by the sudden starting forward of the same after it had stopped, or was caused by the plaintiff stepping or

voluntarily going down from the car just before it came to a full stop, is evenly balanced, or does not preponderate either way, it will be your duty to return a verdict in favor of the defendant. (5) While it is true that the weight of evidence does not necessarily depend upon the number of witnesses who testify for the respective sides, yet it is proper for you to take into account and consider in determining any matter in controversy the number of witnesses giving testimony, and you should not arbitrarily reject the testimony of any witness without just cause."

It is contended by the plaintiff that these last two instructions repeated, emphasized, and brought into undue prominence the fact that the burden was upon the plaintiff to establish her case; and that the giving of the instruction numbered 5 was erroneous, as tending to lead the jury to ignore the quality of the evidence and consider only its quantity. The court in its instructions given upon its own motion had twice stated the rule requiring the plaintiff to maintain the issues by a preponderance of the evidence. In its third instruction it had properly cautioned the jury as to the matters it might consider in determining the weight of the testimony of the different witnesses. In reference to the number of witnesses, the jury were told that the weight of evidence did not necessarily depend upon the number of witnesses who testified for the respective parties; that it was at liberty to consider the interest, intelligence, means or opportunity of knowing the truth, and the reasonableness or unreasonableness of their statements, and the extent to which they were corroborated by other witnesses. The giving of the caution that the weight of evidence does not necessarily depend upon the number of witnesses has been frequently approved, and it is well settled that a court should not tell the jury that a preponderance of the evidence is to be determined by count of the witnesses. 2 Thompson, Trials, sec. 2422; Blashfield, Instructions to Juries, sec. 271. The justification for the rule permitting this caution to be given to the jury is to be found in the

disposition of the lay mind to settle disputes of fact by a mere count of witnesses, rather than by the more painstaking and laborious method of applying to the evidence the tests which human experience has found necessary to the discovery of the truth. When the jury were told that it was entitled, in weighing the testimony of any witness, to consider the extent to which it was corroborated by other witnesses, the defendant was given all the advantage to which it was entitled by the preponderance in number of its witnesses. The giving of the instruction numbered 5 was not only an unnecessary repetition, but in the form in which it was given it was calculated to neutralize the effect of the caution which the court had already given that the jury were not to determine the preponderance of the evidence by a count of the witnesses. The giving of this instruction in the form in which it appears was likely to disturb the operation of the minds of the jurors in judging the evidence, and to give them the impression that they might after all determine the weight of evidence by mere numbers. It is no doubt abstractly true that, everything else being equal, consideration should be given to the number of witnesses, but we doubt the propriety of introducing such language into the instructions. It is sufficiently brought to the attention of the jury when it is told that it may consider, in weighing the testimony of any witness, the extent to which such witness is corroborated by other witnesses. We are satisfied that the instruction should not have been given without the jury's attention being again called to the caution contained in instruction numbered 3, given by the court on its own motion. The giving of the instruction numbered 2, requested by defendant, was an unnecessary and erroneous repetition of the rule requiring the plaintiff to establish her case by a preponderance of the testimony. While, perhaps, not of itself sufficient to require a reversal of the case, it was improper; and, taken in connection with defendant's instruction numbered 5, was likely to

mislead the jury. For the error in giving these two instructions, the case should be reversed.

As the other errors urged by the plaintiff are not likely to arise upon another trial, we do not deem it necessary to consider them.

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

FAWCETT and AMES, 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.

EMIL SCHWANENFELDT, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 20, 1908. No. 15,182.

1. **Second Appeal:** LAW OF CASE. The decision of this court upon a former hearing of the same case is controlling only as to the actual point then determined.
2. **Trial:** NEGLIGENCE: QUESTION FOR JURY. Where the existence of a state of facts is undisputed, and where from such facts different minds might honestly draw different conclusions as to whether or not such facts established negligence, the question is for the jury to determine.
3. **Railroads:** INJURY AT CROSSING. A traveler by wagon approaching a point where it will be necessary to cross a railroad track laid in a public street has a right to anticipate that trains upon such track will be operated according to law, and without negligence on the part of the railroad company.
4. ———: STREET CROSSINGS. A railroad company operating a train upon a city street, used in common by it and by pedestrians and vehicles, may be required to take precautions against collisions which are not necessary when it is operating trains upon its own right of way.
5. **Evidence** examined, and found to present questions proper to be submitted to the jury.

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

F. E. Bishop and *Fred M. Deweese,* for appellants.

Field, Ricketts & Ricketts, contra.

CALKINS, C.

The defendant owned and used a railroad track along Eighth street in the city of Lincoln, a street running north and south, and along the east side of block 52. The track in question was a switch put in for the accommodation of wholesale houses, and was connected with the company's yards at the south end only. At the point where the accident occurred, the west rail of the track was 17 feet east of the lot line. An alley 16 feet in width extended east and west through block 52, and was paved with stone. On the east side of the block, and immediately south of the alley, a lumber yard, inclosed with a high board fence, with an office building at the east end of the lot, obstructed the view, so that it was impossible for a person passing through the alley from west to east to see a train approaching from the south, except at the point at or near the east end of the alley where it intersects Eighth street. Between the buildings on the east side of block 52 and the railroad track there was nothing to obstruct the view to the south, except some telegraph poles. The plaintiff was driving a butcher's delivery wagon, drawn by a gentle horse, city broke. The seat on the wagon was at the front, flush with the end of the box, so that the driver occupying the same would sit with his feet resting on the foot-board extending out from the bottom of the box. The plaintiff was hauling meat from the supply house of a packing establishment, and had a companion who occupied the seat on the wagon with him. He drove through this alley from west to east at a jog trot. As he emerged upon Eighth street from the alley he was struck by a freight car, one of a train of 8 or 10 cars being

backed north upon the track in question. As a result of this collision he sustained injuries on account of which this action was brought. There was a judgment for the plaintiff upon the first trial, which was reversed by this court. *Chicago, B. & Q. R. Co. v. Schwanenfeldt,* 75 Neb. 80. A second trial was had, which resulted in another verdict for the plaintiff; and, from a judgment rendered upon this verdict, the defendant again appeals.

1. The defendant urges that the former decision of this court has become the law of the case and controls its determination upon this hearing. The record of the case before this court at the former hearing failed to show that the plaintiff looked as he emerged from the alley to see if a train was approaching; and the court held that, no excuse being offered for his failure to so look, he was guilty of contributory negligence as a matter of law. The record now before us shows that at the second trial the plaintiff testified that he expected a man to be there if a train was approaching, and that he looked to see if there was one as he approached the track, but discovered no one. He also testified that he saw the train as soon as he came from behind the lumber yard. A decision of this court at a former hearing is controlling only upon the actual point decided. In this instance the former determination was based upon the one fact that the plaintiff did not look for the approaching train. The evidence now shows that he did so look, and that decision is not applicable to the facts as now presented.

2. The question of negligence and contributory negligence is frequently a complex and difficult one, which can only be established by inference drawn from primary facts. The proneness of human minds to differ in the observation of primary facts increases in geometrical ratio when it becomes necessary to draw inferences therefrom; and whether certain conduct constitutes negligence is usually held to be a question peculiarly suitable to be submitted to a jury. The rule established by a multitude of cases is that, when the existence of a set of facts is un-

disputed, and where from such facts different minds might honestly draw different conclusions as to whether or not such facts established negligence, the question is one for the jury to determine. *City of Lincoln v. Gillilan*, 18 Neb. 114; *American Water Works Co. v. Dougherty*, 37 Neb. 373; *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27; *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37; *Chicago, B. & Q. R. Co. v. Pollard*, 53 Neb. 730.

3. Where, however, the facts are undisputed, and are such that reasonable minds can draw but one conclusion therefrom, it is a question for the court to decide, and it should do its duty fearlessly, not for the purpose of asserting its own prerogative, but in justice to the parties and the jury, which is put in a false position where it is directed to deliberate upon evidence from which it can reach but one possible conclusion. That the facts presented by the record in this case show such contributory negligence on the part of the plaintiff that a verdict should have been directed for the defendant is most insistently urged. In determining that question the first inquiry which presents itself to us is: What should the plaintiff have done in approaching the point of danger which he failed to do; or what did he do that he should not have done? That the degree of caution to be exercised by the plaintiff should have been proportioned to the degree of danger he should have anticipated will be generally admitted. In approaching this track the plaintiff was charged with taking account of the extent and character of the danger; but we think he was not required to anticipate that the defendant would operate a train upon this track in a negligent manner, considering all the surrounding conditions, nor fail to give such warnings of its approach as ordinary prudence demanded. *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. ed. 403; *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848; *Evansville & T. H. R. Co. v. Marohn*, 6 Ind. App. 646; *Crumpley v. Hannibal & St. J. R. Co.*, 111 Mo. 152; *Bunting v. Central P. R. Co.*, 14 Nev. 351; *Ernst v. Hudson River R. Co.*, 35

N. Y. 9; *Russell v. Carolina C. R. Co.*, 118 N. Car. 1098; *Stegner v. Chicago, M. & St. P. R. Co.*, 94 Minn. 166; *Sights v. Louisville & N. R. Co.*, 117 Ky. 436.

4. Since the degree of care to be required of the plaintiff depended upon the character of the danger he had to meet, it becomes necessary for us to inquire as to the manner in which ordinary prudence demands the defendant should use the track in question. A railroad company operating a train upon a city street, used in common by it and by pedestrains and vehicles, should exercise greater care to prevent collisions than when operating the same over its own right of way. *Norfolk & W. R. Co. v. Burge*, 84 Va. 63; *Cleveland, C., C. & I. R. Co. v. Schneider*, 45 Ohio St. 678. This is especially true where the use of such track is only occasional, and the distance to be traversed over the same is so short that there is no necessity for speed. If it is necessary to give warning by bell and whistle of the approach of trains regularly passing over its own right of way, it is certainly as important for the railroad to give such warning when operating its trains in a street used by it in common with the public; and if, as in this case, it is engaged in operating a train by backing, so that the engine is so far away that the ringing of the bell is useless, it would at least be a question for the jury whether some other means should not be adopted to give the necessary warning of the approach of its cars.

5. It appears from the evidence that the city ordinances restricted the speed of trains on this track to four miles an hour, and required warning to be given of the approach of trains by the ringing of the engine bell and the blowing of its whistle; that the train in question was being backed at the rate of five or six miles an hour; that the engine was so far away from the car that became the front of the moving train as to make a signal of its approach therefrom of little advantage; that no such signal was heard by the plaintiff or his companion; and that nothing else was done to warn travelers of the approach of the train. The

plaintiff was approaching on an up grade at a jog trot, and at a speed estimated by the witness Drake of four miles an hour. It was not possible for him to see an approaching train until he passed the lot line and was within 17 feet of the track, so that his horse's head would be very nearly at the point of contact with a passing car at the earliest instant at which the train became visible to him. To say that this evidence establishes the contributory negligence of the plaintiff as a matter of law, we must hold, first, that the plaintiff should, in the exercise of ordinary prudence, after the moving train came into view, have stopped his horse or jumped from his wagon in time to avoid the collision; or, second, that it was incumbent upon him to stop and look for an approaching train before he drove into the street. It seems to us that the question whether he might have stopped his horse in time, or jumped from the wagon or otherwise avoided the collision after coming in view of the train, was one about which different minds might honestly disagree, and therefore proper to be submitted to the jury. If the cars were moving at the rate of six miles an hour, and the horse at the rate of four miles an hour, the cars were approaching the south line of the alley at the rate of 8.8 feet a second, and the horse was approaching the defendant's track at the rate of 5.86 feet a second, and the plaintiff had probably less than one second to act upon the warning given him by the sight of the cars. It is a matter of common knowledge that the time required to respond to such warnings varies in different individuals and under different circumstances. Dr. Bolton, professor of psychology at the university of Nebraska, was sworn as a witness, and his evidence showed that by actual measurement from one-eighth to one-half a second is required to respond to an expected warning by those possessing the quickest mental and physical action; that response to an unexpected warning takes much longer; that response to a warning through the eye is slower than when the warning is through the ear; that if the warning threatens danger it may produce

temporary paralysis of the muscles and delay action; and that the quickest persons only require about one-third of the time to respond to a warning demanded by those of slower perception. We think that different minds might honestly draw different conclusions as to whether the plaintiff was guilty of any negligence after arriving at a place from which he could see the approaching train. We are not prepared to hold as a matter of law that it was incumbent upon the plaintiff to stop and look before entering upon the street. The rule that a traveler must stop and listen and look before crossing when approaching a railroad at an ordinary crossing has not been adopted in this state; and it certainly should not be applied to the crossing of a railroad switch laid in a public street. We think the plaintiff was justified in relying upon the lack of warning of an approaching train, and that a jury might well hold that ordinary diligence, as well as a due regard for human life and limb, requires a railroad company while using the public streets of a city to give adequate notice of the approach of its trains; and that it would not be unreasonable to say that, in a case where it was backing trains so that the signal from the engine would be ineffective, such trains should be preceded by a flagman, or other means taken to warn the passers-by of their approach.

In the defendant's assignment of error complaint is made of certain instructions, but these objections were not discussed upon the argument, the case being submitted upon the questions hereinbefore considered. We have, however, examined the instructions complained of, concerning which it is only necessary to say that they seem to us to be in accord with the views at which we have arrived.

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

FAWCETT and ROOT, CC., concur.

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

AFFIRMED.

EUGENE C. KENDRICK ET AL., APPELLEES, V. HOWARD G. FURMAN, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,044.

1. **Evidence:** OPINIONS OF WITNESS. Where it is claimed that the construction of a dam has caused the bed of a river to fill in with silt and the water of the river to back up, so as to interfere with the operation of a water-wheel, a question calling for the opinion of the witness upon the very matter in issue is improper, and the answer thereto should be excluded.
2. ———: DAMAGES. Where one claims his property has been damaged by certain acts of the defendant, it is not proper to ask the witness in what manner he has been damaged, but he should state the facts, and the jury will then in the exercise of its functions find whether the litigant has been damaged.
3. **Evidence** examined, and *held* to entitle appellees to an injunction against appellant.

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

A. W. Crites, for appellant.

J. E. Porter, contra.

ROOT, C.

This was an action brought to the district court for Dawes county by appellees for an injunction and judgment for damages against appellant. It seems that A. J. Palmer and another in 1887 acquired title to a tract of land bisected by the Niobrara river. In 1892 and 1893 Palmer constructed an irrigation plant and water power mill upon his land, so as to receive the water from the said river to supply both his power for the mill and water

for his ditches. The state board of irrigation in 1898 made an order stating that Palmer & Company were entitled to seven and one-seventh cubic feet of water a second for irrigation purposes, dating by way of priority from August 1, 1887, and to 10 cubic feet a second of water for power purposes from August 1, 1893. Appellant owns land on each side of the Niobrara, and just immediately east of and below the land owned by Palmer. In January, 1894, appellant posted a notice of his proposed diversion of the water of said river for irrigation purposes, filed a copy thereof with the county clerk in February following, and on the 2d day of January, 1895, filed his claim with the state board of irrigation, which board thereafter passed upon and allowed said claim to the extent of three and nine-fourteenths cubic feet of water a second of time. In the spring of 1894 appellant and said Palmer conferred about the construction of a dam to enable appellant to divert water for an irrigation system. Palmer desired that the dam be constructed above the outlet of his (Palmer's) tailrace, but appellant refused, for the admitted reason that he wanted the dam and head gate on his own land, and further desired the benefit of the water returned to the river through Palmer's tailrace. Appellant then selected a site, and requested Palmer to survey for the ditches, dam and head gate. This point, following the thread of the stream, was about one-half mile below the mill, but in a direct course was considerably less. It seems to have been the mutual desire of appellant and Palmer that the dam be so constructed as not to interfere with the operation of the mill. The water for the mill was diverted something over a mile above the mill site, and was conducted thereto in a ditch or race so constructed that at the mill a very considerable fall was produced by permitting the water to flow down, upon, and over a turbine wheel, and thence through a draft tube to the tailrace, whence it escaped back to the river. The water-wheel was firmly attached to a shaft upon which a belt-wheel was affixed. On the ground at the head of the

tailrace, under the penstock, was a platform foundation of timber, the floor of which was 12 inches higher than the bed, and this floor seems to have been the initial point from which Palmer took his levels in surveying for appellant's dam. It was apprehended by Palmer that the dam constructed below his mill would back the water up so that, instead of the waste water flowing free from the water-wheel, and thence into the river through the tailrace, it would be retarded in its flow, back up and collect so as to interfere with the action of the water and the pulley-wheel. Palmer then, so he claims, indicated a level to which appellant might raise his dam and still leave a fall of 18 inches from the initial point to the top of the water flowing over the dam, which Palmer deemed sufficient. The dam, ditches and head gate were constructed, and for a time the mill was operated without interference from backwater or ice. In 1890 appellees purchased the mill, irrigation and other water rights from Palmer, and it is claimed by appellees that subsequently thereto appellant raised his dam, and in consequence thereof the waters of the river were backed up so that they submerged the lower part of the water-wheel and pulley, caused the belt to slip, interfered with the free discharge of the water through the draft tube and tailrace, and brought about such a condition as that the mill could not be operated. Furman denied raising his dam to a greater height than indicated by Palmer's survey, and claims that he has a license from Palmer, which is binding on appellees, to maintain the dam in the situation it was at the time the suit was commenced. He also claims that the piling of a wagon bridge constructed across the river at a point between the water wheel and the dam, the existence of a bend in the river, and the washing down from the canyons of debris into the river just above the bridge, caused the condition now existing. The cause was submitted to a jury, which returned a general verdict for the appellees, awarding them $250 damages. Ten special findings were returned, and thereafter the court made special findings

upon which it entered an injunction perpetually restraining appellant from maintaining the top of his dam to a greater height than 18 inches below the top of the floor of appellees' penstock. Judgment was rendered on the verdict, and Furman appeals.

1. Upon the trial to the jury, the witness Hazard, over appellant's objections, was permitted to answer the question: "Now, what causes this sand, if you know, Mr. Hazard, to back up there?" He answered: "Well, there is only one thing I could reasonably account for; that is, the dam preventing the flow of the water carrying the sand off." The witness Poole, over appellant's objections, was permitted to answer the question: "Now, do you know what caused this water to back up this way?" He said: "From Mr. Furman's dam." The questions include the very substance of the issue to be determined by the jurors, and the acceptance by them of those answers relieved the jurors from ascertaining from competent evidence the very fact at issue in the case. The testimony invaded the province of the jury, and should not have been permitted. *Combs v. Agricultural Ditch Co.*, 17 Colo. 146; *In re Estate of Cheney*, 78 Neb. 274.

Over appellant's objection, one of the appellees was permitted to answer the question: "Now, you may tell the jury what damage you have suffered by reason of this water being backed up the way you have described during these three years?" The response was: "Why, it has been considerable damage from our grinding, and in getting across back and forth during the winter, *and it has ruined our water place, which is a great deal.* We have lost several head of cattle; the water would rise up over the ice and then go down again, and we have lost several head of cattle, which was no small loss." Appellant moved to strike out the answer as incompetent, irrelevant, immaterial, remote and speculative. The court sustained the motion only as to the loss of the cattle. Further in the witness' examination he was permitted to say appellees had suffered damage by reason of the water submerging the

public road and the land between their house and the road, and, further, over objections as to competency, materiality and relevancy, he was permitted to answer the question: "Now, in what way did you suffer damages?" And in answer said: "We had the school teacher boarding there, and from time to time we had to carry her across so she could go to school." Appellant moved to strike out the answer as not a proper measure of damages, which was overruled, and the witness continued that the teacher "left and went to boarding some place else," and this answer the court refused to suppress. Not only did these questions permit the witness to assume he had been damaged, an issue of fact for the jury to determine, but their language was so general that opposing counsel could not possibly anticipate the answer that might follow, and thereby interpose an objection to answers responsive to the question, and yet incompetent and immaterial. The answers well illustrate the possibilities lurking in that class of interrogations—that their water place had been ruined; that they had lost several head of cattle, and a school teacher had gone elsewhere to board. The court eliminated the loss of the cattle and permitted the remainder of the answers to stand, and thereby permitted the jurors to believe that the loss of the teacher's society and the injury to the watering place were elements of damage in the case, notwithstanding they are not mentioned in the itemized statement of damages, and their questionable cause for recovery in any event. When we consider the rather meager basis for the support of the verdict for $250 damages, the prejudice to appellant from this class of testimony seems fixed and certain. *City of Omaha v. Kramer,* 25 Neb. 489; *Jameson v. Kent,* 42 Neb. 412; *Combs v. Agricultural Ditch Co., supra.* Appellees produced testimony to show that by virtue of the loss of power they had been compelled to run a hand separator for some five months from May to September in 1903; that the work could have been done in from one to two hours less

time each day by the use of the water-power; that a man cost them 12 cents an hour, and thereby the jury might have included some $27 for this item of damages; that the submerging of their land destroyed certain strawberry plants, pie-plant and currant bushes of the value of $25; that they were deprived during two winter seasons of the revenue they would have earned from sawing wood and grinding feed. They mention two instances of persons who desired to have feed ground, and one of appellees states that he estimates that they lost the grinding in each season of from 400 to 500 tons of feed, for which they were charging 10 cents a hundred, but there is not a particle of evidence in the record to show what expense appellees would have incurred in grinding this grain for feed, and it is beyond the power of any person to ascertain from the record the net loss accruing to appellees by virtue of their inability to grind grain, or saw wood, either for themselves or the public. The same condition exists relative to the grinding of sickles. The missing facts could have been produced, and the jury advised of every material fact essential for a logical and just deduction of appellees' damages in the loss of the use of their water-power, if any they suffered. It will be kept in mind that the mill was situated distant from town, and did not enjoy a continuous run of trade.

2. We are satisfied from a careful reading of the entire record that the findings of the court and its judgment of injunction should be affirmed. The sole issue presented on this branch of the case is one of fact, and we have reached our conclusion independently of the findings of the jury and those of the trial court. It is not disputed that the mill was constructed and water for its use appropriated prior in time to the construction of appellant's dam. It is also admitted and conceded all around that appellees' grantor surveyed and staked out the location of appellant's dam, head gate and ditches. Appellant states: "I told him (Palmer) I would like to have him run my ditch and set the stake of my head gate, and that I

wanted—that we should figure on 18 inches of water under a 4-inch pressure, and I wanted to get up as high as I could without interfering with the mill; and I told him, if possible, I would like to get it up on the ground down there at the house, and for him to get it just as high as he could without interfering with the mill. And he suggested that I should go above the mill, but I told him that I wanted the water he used in the mill to irrigate with, and for him to put it down there so it wouldn't interfere with the mill." Now, Palmer was not only the mill-owner, but a surveyor as well, and it seems reasonable to hold that Palmer fixed, as he says he did, the initial point upon the top of the floor of his penstock; that from that point he estimated the levels and the height to which the dam might be constructed so that the backing of the water would not attain a point where it would interfere with the operation of his wheel. Appellant insists that the head gate, and not the floor of the penstock, was the basis from which the parties must work out the agreement, but the head gate is so constructed that the dam may be raised a considerable additional height and still the head gate furnish an outlet into the ditch for the water of the Niobrara. Palmer testifies that he ran the level from the foot of his wheel to the top of the proposed dam. "Q. You took the foot of your wheel or the floor of the race as your starting point, did you not? A. The top of the water; yes. Q. Did you take the top of the water or the floor of the race? A. I took the top of the water as the water would flow out from the wheel. Q. And you didn't start from the floor of the race? A. Yes; that would be the floor of the race, the top of the water when the wheel was open. There was a timber there, and when the wheel was running the water started right at the top of that, and I set the instrument on that timber. Q. Now, how much was his dam below—how much lower was the top of his dam, as you located it? A. I don't know anything about the top of his dam. I know where I gave him the top. Q. How much lower was that level than the floor

of your race, 15 inches below the wheel? A. It was 18 inches that I gave him from the top of this timber; that is where I started my bench, and run my level from there, and where I showed him the top of the water would be 18 inches below that." Witness says he preserved his field notes, and inspected them shortly before testifying. The fact seems to be that Furman's improvements did not interfere with the water-power from 1894 till some time about 1900, so it would seem that, if Palmer's survey was followed in the construction of the Furman dam, he had provided a margin of safety for the use of the dam so far as the water-wheel was concerned. Palmer, Eugene C. Kendrick and Humphrey Kendrick testify that Furman has raised the dam since its original construction. Eugene C. Kendrick says that the first summer they owned the mill the water stood but 16 inches in Furman's head gate, and in the fall of 1903 it was 33 to 34 inches. Both Eugene and Humphrey Kendrick testify that Furman admitted to them he had raised the dam. One witness says he said he had raised it a foot. Appellant does not deny these statements. Both Furman and his son testify the dam has not been raised higher than it was originally constructed, but that every year the dam would sink down by reason of the decay of material used in its construction, and because of the quicksand in the bottom of the river. There is testimony tending to show that appellant's ditch has filled with silt and sand, and that the ditch has not been cleaned out, so that the water must be raised higher in order to flow into and through the ditch than at the time it was first constructed; and that proper construction of a dam, in position like Furman's, calls for a sluiceway to permit the water to be drawn off in the winter time when not used for irrigation, and to assist in carrying off the silt and sand that accumulate above the dam. On the other hand, there is testimony to show the Furman dam is constructed in the same way as most of the dams built for irrigation purposes, and this we do not doubt, but in none of the other instances was it necessary to guard

against damage to an upper mill-owner, as in the instant case. Various measurements were taken and testified to by as many surveyors, but the trial court did not seem satisfied with their results, so he, with the co-operation of the parties, secured Paige Francis, a civil engineer and under-secretary of the state board of irrigation, to run the levels and report the facts to the court, and Francis testifies that the water below Furman's dam was two and eight-tenths feet lower than the floor of appellees' penstock, and that the crest of the water as it fell over the dam was eight-tenths of a foot lower than said initial point. There is testimony in the record establishing the fact that between the water-wheel and the dam a bridge has been constructed, and that the pilings supporting the superstructure thereof obstruct the free flow of ice floating in the water; that there is a horseshoe bend in the river below the bridge and above the dam; also that canyons empty storm-water and debris into the river above the dam and below the water-wheel, and particularly that a quantity of sand, gravel and other debris was forced down through one canyon and into the river just above the bridge. There is also testimony to the effect that the floor of the tailrace is considerably lower than the surface of the water in the river opposite both the head and exit of the tailrace, and lower than the bed of the river just above the bridge. Appellees, however, contend that, with the Furman dam maintained not to exceed 18 inches below the floor of their penstock, the action of the water from the tailrace would scour a path from the tailrace down stream, and thereby an exit would be furnished for the escape of the water used to operate the water-wheel.

The evidence to us seems to preponderate in favor of appellees on the issues of the license granted appellant by Palmer, the height of the dam and the effect of present conditions upon the operation of appellees' water-wheel, and we find they were entitled to the injunction granted by the trial court.

We therefore recommend that the judgment of the lower

court awarding appellees damages be reversed and remanded, and that in all other things the judgment of said court be affirmed.

FAWCETT, C., concurs in the conclusion, but not in all of the reasoning.

CALKINS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the lower court awarding appellees damages is reversed and remanded, and in all other things the judgment of said court is affirmed.

JUDGMENT ACCORDINGLY.

JENKINS LAND AND LIVE STOCK COMPANY, APPELLEE, V. GARWOOD H. ATTWOOD, APPELLANT.

FILED FEBRUARY 20, 1908. No. 15,071.

1. **Mortgage Foreclosure:** REQUEST FOR STAY. Where a request in writing for stay of order of sale is on file with the clerk of the court within 20 days of the rendition of a decree foreclosing a mortgage, the court is without power to sell the mortgaged premises within nine months of the entry of the decree.

2. ———: ———. A request filed as aforesaid before the entry of the decree is effective to act as a stay equally as though it had been filed within 20 days thereafter, and constitutes a continuing request for such stay.

3. ———: ———. The owner of the equity of redemption, notwithstanding he has sold and conveyed his interest in the mortgaged premises subsequently to his appearance as defendant in the action, may continue to act for the benefit of his grantee, and file a request for a stay.

4. **Confirmation** will not validate a void sale.

5. **Evidence** examined, and *held* not to sustain the appellant's defense of title by adverse possession.

APPEAL from the district court for Dundy county: ROBERT C. ORR, JUDGE. *Affirmed.*

Charles W. Mecker, David G. Hines, Mockett & Mattley and *J. C. McNerney,* for appellant.

W. S. Morlan and *Charles T. Jenkins, contra.*

ROOT, C.

This was an action to cancel a sheriff's deed, whereby appellant claims title to 474 acres of land in Dundy county. The facts, as we glean them from the evidence, and the admissions in the pleadings, are: That one Warner in 1889, being the owner of the fee of said lands, executed a mortgage thereon to secure the payment of his promissory note. Soon thereafter Warner sold and conveyed his equity to the Nebraska Real Estate and Live Stock Association. Appellant became the owner of the note and mortgage, and on the 30th day of September, 1892, commenced his action to foreclose the mortgage, making Warner and wife, Warner's grantee, and other persons, defendants. December 20, 1892, The Nebraska Real Estate and Live Stock Association and Alonzo L. Clark, trustee, filed their joint answer in said action, admitting all the facts alleged in the petition, and stating that the defendant corporation was the owner of the equity of redemption of all of said real estate, "and request that whatever decree may be rendered here it may be stayed for a period of nine months from the rendition of said decree." March 14, 1893, said corporation filed a simple request for a stay of execution and order of sale in said case. April 19, 1894, a decree of foreclosure was rendered. March 31, 1893, the Nebraska Real Estate and Live Stock Association sold its interest in said real estate to Alma E. Jewett. May 28, 1894, the clerk of the court issued an order of sale on said decree, and July 9, 1894, appellant purchased the real estate at sheriff's sale for the amount of his mortgage plus accrued interest.

July 14, 1894, the sheriff made return to his order of sale. March 19, 1896, an entry was made on the journal of the district court in said case that "this case came on on the motion of plaintiff to dismiss said action. On due consideration whereof the court doth sustain said motion, and it is ordered that said action be, and hereby is, dismissed at plaintiff's costs." The journal entry does not recite the appearance of any party to the suit, nor that of any attorneys for plaintiff or defendants. The court's trial calendar discloses the name of an attorney for appellant, but it is not claimed he requested the entry of the dismissal. March 27, 1900, appellant by his attorney moved the court "to reinstate the above entitled cause of action and place the same on the trial docket, for the reason that it was dismissed by mistake, after decree and sale had been obtained." That same day, without notice to, or the presence of, any party adversely interested, the court found that the action had been dismissed upon the motion of certain attorneys claiming to represent appellant; that said attorneys were without authority in the premises, and that said case was wrongfully dismissed; and "it is therefore considered by the court that said case be reinstated and redocketed." Immediately thereafter the court affirmed the sale and ordered the then sheriff to execute a deed to appellant, which was done. The sheriff's deed was recorded April 9, 1900. January 28, 1905, appellee purchased from Mrs. Jewett the real estate. Appellant claims title by virtue of his sheriff's deed, and also by adverse possession. The district court canceled the sheriff's deed, the order of sale, and confirmation of said sale, and held that the decree of foreclosure was valid and unsatisfied. If the court had power through the sheriff to make the sale, or if appellant has secured title by adverse possession to the land in question, he should prevail.

Had the court power to sell the land within nine months of the decree, a request for the stay being on file within 20 days of the entry of the decree? It is our opinion that

it did not. Section 477*b* of the code provides: "The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of said decree, whenever the defendant shall within twenty days after the rendition of the decree, file with the clerk of the court a written request for the same: Provided, that if the defendant make no such request within said twenty days, the order of sale may issue immediately after the expiration thereof." We are aware that some courts, notably Illinois, consider the sale of property on execution issued on a judgment that has been stayed a mere irregularity, to be cured by confirmation; but the trend of judicial thought in Nebraska has been to uphold and make effective the evident legislative will to furnish the debtor absolute immunity from the sale of his property when he has complied with the statutes relating to a stay of execution or order of sale. Says Chief Justice MAXWELL, in *State Bank v. Green,* 8 Neb. 297: "Upon the bond being filed and approved, the power of the court below to proceed in the case is suspended until the bond is set aside, modified, or the appellant fails to perfect his appeal within the time required by the statute." Construing the cited decision, Mr. Justice LAKE, in *State Bank v. Green,* 10 Neb. 130, says: "The effect of that decision was to declare invalid the execution and all that was done under it." We recognized the principle and adhered thereto in *Kountze v. Erck,* 45 Neb. 288, and it may now be said to be a long and well-established rule in Nebraska that, pending the stay of a judgment, the power of the court to execute that judgment is suspended. It is true that the stay in the cases cited followed the giving and approval of supersedeas bonds, and in the instant case a technical supersedeas in the sense that the judgment was vacated did not occur, but a stay of the judgment came about as a consequence of the request. We consider that the principle applies in either case. *August v. Gilmer,* 53 W. Va. 65; *O'Donnell v. Mullin,* 27 Pa. St. 199, 67 Am. Dec. 458;

Hopkins v. Sears, 14 Vt. 494, 39 Am. Dec. 236. To hold otherwise would permit the mortgagee to induce the sheriff to sell the land included in a foreclosure decree and secure a confirmation and deed without the knowledge of the holder of the equity of redemption. The sheriff is not required to levy upon the land, nor the appraisers to make entry thereon, so that a sale and confirmation might easily be brought about while the mortgagor was depending on his request for a stay.

2. The court being without power to sell the land at the time it was sold, it is immaterial whether the sale was confirmed or not, or whether or not the plaintiff actually dismissed his case, or whether the order vacating that dismissal and reinstating the case was properly made. The trial court held the decree of foreclosure was still effective. No appeal was taken from that part of the decree, and the legality and effect thereof cannot be questioned by appellee or any one holding under it. The confirmation could not cure a void sale. "The sale being void, there was no subject-matter upon which the order of confirmation could act. If the court had no jurisdiction to order the sale, it had none to confirm it. Where there is no power to render a judgment, or to make an order, there can be none to confirm or execute it." *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609; *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617.

3. Appellant argues that the request for a stay was not filed after, but before, the entry of the decree; that one to receive the benefits of the statute must adhere strictly thereto, and that filing a request before is not equivalent to filing one after the entry of the decree, and cites *State v. Laflin*, 40 Neb. 441, and *Hoyt v. Little*, 55 Neb. 71. The effect of these decisions is that, as the statute plainly limits 20 days subsequent to the decree as the time within which the stay may be filed, a stay filed thereafter is inoperative, and that it is not within the power of the courts to enlarge that time. In the instant case the request was filed, not only before the twentieth day from the rendition

of the decree, but before the decree was rendered, and in our opinion the request was a continuing solicitation effective the day the decree of foreclosure was rendered.

4. Appellant says that, as the Nebraska Real Estate and Live Stock Association subsequently to the time it filed request for a stay, and before the entry of the decree, sold and conveyed its interest in the property, the stay was not filed by a defendant so situated as to be entitled to ask therefor. The trial court evidently was not advised that there had been any transfer of title from the defendant corporation to Mrs. Jewett, and the suit continued, as it properly could, against the defendants who represented in that suit, not only themselves, but the interests of their grantees. Code, sec. 45. Under the facts, we are satisfied the stay was effective to protect the rights of Mrs. Jewett.

5. It is claimed appellant has acquired title by ten years' adverse possession. We have read the record over carefully, and are satisfied the evidence does not sustain this contention. Part of the land has been used for meadow, a part thereof for pasture, and a small tract has been cultivated on occasions, but not during ten succeeding years. In August, 1893, appellant leased the land to Norman J. Allen, who also leased it for the years 1894, 1895 and 1896. Fences were constructed on the land, but it does not seem to have been inclosed. During part of the time it was included in a larger tract, and cattle, not controlled by appellant or his tenant, grazed upon the pasture land. The witness Larned leased the land to various parties for appellant in 1897, and he says continuously since. He says the land was inclosed, but on cross-examination he was not certain as to the location of the fences, and finally admitted the land formed part of a larger and inclosed tract. Larned leased the land in August, 1905, from appellee. He says the leasing was the result of compromise, but the instrument evidencing his arrangement is a plain lease. Appellant resides in Connecticut, and has never been upon the land. The testimony does not establish that connected, continuous and adverse possession

for ten years essential to vest appellant with title to the land; *Hoffine v. Ewings,* 60 Neb. 729.

We are satisfied that the judgment of the lower court was right and should be affirmed.

FAWCETT and CALKINS, CC., concur.

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

AFFIRMED.

CHARLES M. CHAMBERLAIN V. STATE OF NEBRASKA.

FILED MARCH 5, 1908. No. 14,755.

1. **Criminal Law:** INSTRUCTIONS. Instructions must be predicated on the evidence; and in the prosecution of a bank officer for embezzlement it is error to submit to the jury the fact of his having overdrawn an account with the bank as proof of guilt, unless the evidence is sufficient to establish every element necessary to make the transaction criminal in its nature.

2. ———: ———: BURDEN OF PROOF. In a criminal prosecution the burden is upon the state to establish every element of the crime charged beyond a reasonable doubt; and an instruction which shifts the burden of proof to the defendant, and informs the jury that the evidence must show beyond a reasonable doubt that the defendant in doing the act complained of acted in good faith, and was not actuated by improper motives, is erroneous.

3. ———: EVIDENCE. Under an indictment charging a bank officer with embezzling its funds on a certain date, evidence tending to show embezzlement of different amounts at different times before that date, and the manner in which he conducted the business of the bank, is admissible for the purpose of assisting the jury in determining the defendant's guilt or innocence of the charge set forth in the indictment.

4. **Embezzlement:** INDICTMENT. An indictment for embezzlement is sufficient if it sets forth the crime in language equivalent to that contained in the statute creating and defining that crime, without averring the particular acts in which the offense consists.

ERROR to the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Reversed.*

Halleck F. Rose, W. B. Comstock and *Neal & Quackenbush,* for plaintiff in error.

W. T. Thompson, Attorney General, George A. Adams and *Jay C. Moore, contra.*

BARNES, C. J.

At the February, 1903, term of the district court for Johnson county a grand jury returned 18 indictments against Charles M. Chamberlain, who was the defendant in the court below, each of which charged him with a specific act of embezzlement of funds of the Chamberlain Banking House of Tecumseh, in that county. On a change of venue he was tried in the district court for Nemaha county on one of the indictments, which reads as follows: "That Charles M. Chamberlain, late of the county aforesaid, on the 25th day of August, in the year of our Lord 1902, in the county of Johnson, and state of Nebraska, aforesaid, then and there being, and then and there being the cashier of the Chamberlain Banking House, a corporation then and there engaged in banking, did then and there embezzle, abstract and wilfully misapply of the moneys and funds of the said Chamberlain Banking House, to wit, the sum of $10,000 in money, with intent then and there to injure and defraud said Chamberlain Banking House out of said money, and each and every part thereof, he, the said Charles M. Chamberlain, then and there having received and obtained the said money as such cashier of the said Chamberlain Banking House, and having then and there said money in his possession, control and management as such cashier of said banking house." On motion of the defendant, and by order of the trial court, the words "abstract and wilfully misapply" were eliminated from the indictment, and so the single specific charge on which defendant was placed on trial was the embezzle-

ment of $10,000 on the 25th day of August, 1902. The trial resulted in his conviction. He was sentenced to hard labor in the state penitentiary for the period of five years, and has prosecuted error to this court.

1. To establish the charge contained in the indictment, the state, over defendant's objection, introduced evidence of a certain transaction, in substance, as follows: On April 5, 1895, the defendant and his brother Clarence executed a demand note for $2,000 payable to Louis Stull, cashier, which came into the possession of the Industrial Savings Bank. Suit was brought on the note in the district court for Lancaster county, and a judgment was obtained thereon against the makers. In payment of that judgment the firm of Chamberlain Brothers, of which the defendant was a member, and which at that time had a deposit account with the Chamberlain Banking House, drew its check on that institution for $2,500, which was presented to, and paid by, the bank on the 29th day of March, 1902. The payment of the check caused an overdraft of the account of Chamberlain Brothers amounting to $1,765.15. The item was charged to the deposit account of the drawers of the check, and not to any of the general accounts of the bank. We find no proof in the record tending to show that the check causing the overdraft was paid without the assent of the directors of the bank, or a majority of them. No proof was offered by the state to show the pecuniary irresponsibility of the firm of Chamberlain Brothers, or its members, at the time the check was cashed, or prior or subsequent thereto. The check, which was drawn by defendant, was charged to the account of the makers of the note, which it paid, and it was left openly on file in the bank to evidence the debt which its payment created. Payment by a bank upon a check of a sum in excess of the credit balance of an ordinary depositor in the usual course of business, if done with the assent of a majority of directors, is a loan to the depositor of the amount of the overdraft created by the payment. Zane, Banks and Banking (1st ed.), sec. 160; *Potter v.*

United States, 155 U. S. 438; 5 Cyc. 583. The banking act of this state does not make such a transaction unlawful, even where the loan is made to an officer of the bank, except it be done without obtaining the approval of a majority of the directors. Comp. St. 1907, ch. 8, sec. 26. By this statute a substantive element of the offense described therein is that the funds must have been borrowed by the officer without having first obtained the approval of a majority of the directors of the bank. So, in order to make the transaction above described criminal in its nature, it was necessary for the state to allege and prove that the overdraft in question was made without the consent of a majority of the directors of the bank, or with the intention of cheating and defrauding that institution. Notwithstanding this fact, the court gave the ninth instruction requested by the prosecutor predicated on the transaction above described, and which is now assigned as error, by which the jury were told, in substance, that, if the check in question was drawn for, or in payment of, an individual debt or obligation of the defendant, or of Chamberlain Brothers, or of C. M. and C. K. Chamberlain, that the banking house, upon the authority of the defendant, or by his direction, cashed or paid the check out of its own money and charged the same to the account of Chamberlain Brothers, and by so doing overdrew that account with the bank in the sum of $1,765.15, and that such payment was made under such circumstances as were liable to imperil the interests of the bank and cause it to lose the amount of the overdraft, then the payment of the check by him, or at his direction as cashier, if done with intent to injure or defraud the bank, would be embezzlement. It may be conceded that this instruction, if based upon sufficient evidence, is a correct statement of the law; but it must be remembered that the state produced no evidence showing or tending to show that the payment of the check was made under circumstances liable to imperil the interests of the bank, or cause the loss of the amount of the overdraft, or that it was done with intent to injure and

defraud that institution. It is a well-established rule that instructions must be predicated upon the evidence; and in a criminal prosecution an instruction which submits to the jury the question of the defendant's guilt or innocence of a criminal offense, where the state has produced no evidence tending to prove an element necessary to be shown to make the particular transaction in question criminal in its nature, is prejudicial, and calls for a reversal of a judgment of conviction. As above stated, we find no evidence in the record relating to the matter of the overdraft in question which shows, or tends to show, that at the time the defendant drew the check which created the overdraft it was his intention to cheat and defraud the bank, or that Chamberlain Brothers were insolvent. It is but fair to say that at the time when the bank closed its doors the greater part of the overdraft was unpaid; yet this alone is not sufficient to establish the fact, beyond a reasonable doubt, that the defendant when he drew the check intended to cheat and defraud the bank, for he, or the firm of Chamberlain Brothers, may have fully intended to repay the amount of the overdraft and have had the ability to do so. Indeed, in the absence of evidence direct or circumstantial to the contrary, the presumption is that his intention was that the overdraft would be paid either by himself or the firm. It follows that for the giving of this instruction the judgment of the district court should be reversed.

2. It is strenuously urged that the district court erred in giving the fourth instruction requested by the state. In this connection it is necessary to state the facts on which this instruction was predicated. The evidence discloses that on the 13th day of August, 1902, the bank teller credited the individual deposit account of the defendant with an item of $4,600 salary; that the teller made a computation to determine the accuracy of the credit; that in so doing he took the general ledger of the bank and ran back through the expense account until he found the date upon which the defendant had received his last credit for

salary. He testified that he knew the amount per month to which the defendant was entitled, and that the defendant had not drawn any salary for 46 months prior to that date. The evidence of the teller on this point was corroborated by several other witnesses for the state. In fact there seems to be no dispute about this matter. It also appears that after the entry of the credit, and before the date of the alleged embezzlement, the defendant checked out the deposit in question for various purposes. It was the contention of the state that this transaction constituted embezzlement, because the defendant had so managed the affairs of the bank that he was largely indebted to that institution at the time the credit was given, and that he obtained the credit and withdrew the funds for the purpose of injuring and defrauding the bank.

The first clause of the instruction reads in part as follows: "If you find from the evidence, beyond a reasonable doubt, that the defendant while he was cashier of the said Chamberlain Banking House kept an individual account of his own, and in his own name, in said banking house, and that on or about the 13th day of August, 1902, he credited his said individual account with an item of $4,600 as salary for 46 months, and that at said time he in good faith believed he had a right to so credit his said account with said amount, or that he in good faith believed said bank was owing him said amount, then you are instructed that the placing of such credit to his individual account, and afterwards drawing the money out on his checks or otherwise, would not be embezzlement of such money." By the second clause of the instruction the jury were told, in substance, that, if they should find from the evidence, beyond a reasonable doubt, that the defendant at said time was owing said banking house as much as or more than $4,600, and that he knew the said banking house was not owing him said amount, or any part thereof, or if he was largely indebted to said banking house for money he had taken from the same and wrongfully appropriated to his

own use, or to the use of himself and others, and that he placed said amount to his credit, or caused it to be placed there in order that he might thereafter draw that sum from the bank under an apparent right to do so, but with the intent to convert it to his own use, and that the placing of the credit to his own account was intended by him as a scheme to cover or better enable him to wrongfully convert the same to his own use, and that he did thereafter wrongfully draw said money or any part thereof from the bank and convert it to his own use, with intent to injure and defraud the bank, then he was guilty of embezzling the same. It seems clear that by the first clause of the instruction the court directly and unequivocally stated to the jury that before the defendant could escape responsibility for embezzlement of the item in question the proof must be such as would satisfy them, beyond a reasonable doubt, that the defendant in good faith believed he had a right to so credit his account, or that in good faith he believed that the bank was owing him said amount. It seems plain that this not only denied the accused the benefit of reasonable doubt, and precluded the jury from considering whether the credit was made for a debt in fact owing by the bank, but it also limited the defendant's right to escape criminal punishment by the narrow issue as to whether he believed, though erroneously, there was a legal liability for the debt upon the part of the bank, and on this issue the court imposed upon him the burden of proof to show that he entertained such belief beyond a reasonable doubt. That it was error for the court at any stage of the proceedings to impose upon the defendant the burden of proof to establish his innocence of the crime charged, or any particular element of it, there can be no question. It is contended by the state, however, that the error, if any, in the first clause of the instruction is cured by the second portion of it, the substance of which is above stated; and it is insisted that the whole paragraph should be read and construed together, and when thus considered it is a correct statement of the law. We cannot give it

such a construction. It clearly informed the jury that if they should find, beyond a reasonable doubt, that at the time the credit in question was made the defendant in good faith believed that he had a right to it, that the bank was owing him that amount, then the placing of the item to his individual credit, and afterwards drawing the money out on his checks or otherwise, would not be embezzlement, when they should have been told that if they entertained a reasonable doubt as to whether the money represented by the item of $4,600 salary was actually owing by the bank to the defendant, or that the defendant honestly believed it to be due, and caused the credit to be entered to his personal account in that belief, then the transaction in question should not be considered by them in determining the guilt or innocence of the defendant of the crime charged against him. So we are of the opinion that the giving of this instruction requires a reversal of the judgment of the trial court.

3. The record of the trial discloses that the state, over the defendant's objections, was allowed to introduce evidence of his manner of conducting the business of the bank, and of many of his transactions with that institution occurring at different times, many of them long prior to the time when the offense for which he was on trial is alleged to have been committed; and it is contended that this was reversible error. This contention cannot be sustained, for it has often been held, on principle and precedent, that the state in such cases may introduce evidence of separate and distinct acts or transactions, which may be embezzlement in themselves, tending to prove the substantive offense charged. *State v. Reinhart,* 26 Or. 466; *Brown v. State,* 18 Ohio St. 496; 1 Bishop, New Criminal Procedure, sec. 397; *State v. Dale,* 8 Or. 229; *Jackson v. State,* 76 Ga. 551; *State v. Pratt,* 98 Mo. 482, 11 S. W. 977; *Campbell v. State,* 35 Ohio St. 70. In *Ker v. People,* 110 Ill. 627, 646, it is said: "The body of the crime consists of many acts done by virtue of the confidential relations existing between the employer and

the employee, with funds, moneys or securities over which the servant is given care or custody, in whole or in part, by virtue of his employment. The separate acts may not be susceptible of direct proof, but the aggregate result is, and that is embezzlement." This doctrine is not only supported by reason and authority, but is proper and just. The rule contended for by the defendant in this case would render it exceedingly difficult, if not impossible, in many cases to secure a conviction of a confidential agent or servant of a firm or corporation or a bank officer intrusted with the custody and control of its funds. The trust and confidence reposed in such employee or officer affords him the amplest opportunity to misappropriate the funds intrusted to his care, and makes it almost, if not quite, impossible to prove just when and how it was done. But the ultimate fact of embezzlement is susceptible of proof, and that is the act against which the statute is directed. The crime, as in the case at bar, may consist of many acts done in a series of years, and the fact at last be discovered that the bank's funds have been embezzled, and yet it may be impossible for the prosecution to prove the exact time and manner of each or any separate act of conversion. In such a case, if the state should be compelled to rely for conviction upon a single act, the accused, although he might be guilty of embezzling large sums of money in the aggregate, would probably escape conviction. The law should not afford exemption from just and merited punishment on mere technical grounds which do not in any way affect the guilt or innocence of the defendant or the merits of the case.

It appears, however, that in the prosecution of this case the state treated the separate and distinct acts introduced in evidence as substantive crimes; and it is contended that the court erred in instructing the jury, in substance, that if they should find that the defendant committed such acts, beyond a reasonable doubt, they should then find him guilty of the crime charged in the

indictment on which he was being tried. We think there is much force in this criticism. Where the state is permitted to introduce evidence of separate and distinct transactions not set forth or described in the indictment, each of which in itself may amount to a criminal offense, the court should instruct the jury that evidence of such transactions is received and should only be considered by them for the purpose of assisting them in determining the defendant's guilt or innocence of the particular crime charged in the indictment. We find from an examination of the record that the state was allowed in this case to introduce in evidence a great many of the defendant's transactions with the bank occurring at different times, some of them being prior to the 25th day of August, 1902, similar to those above described, and the record contains numerous assignments of error therefor. To discuss and determine all of them would extend our opinion to an unreasonable length, and serve no useful purpose. What we have already said disposes of all similar questions, and such assignments will receive no further consideration. Again, it appears that the case was treated by the prosecuting attorney as though the defendant was an officer on trial for embezzling public money, instead of an agent or cashier of a bank charged with the embezzlement of private funds, and it is proper to observe that much more must be shown in a case like the one at bar, in order to procure a conviction, than is necessary to be proved to sustain a charge of embezzlement of public funds.

4. Finally, it appears that the defendant has, at all times, challenged the sufficiency of the indictment, and now contends that it is insufficient in form and substance to charge him with the crime of embezzlement. It is not only proper but necessary for us to determine this question before concluding our opinion. The principal criticism of the indictment is that it does not contain an averment that the money in question was converted by the defendant to his own use, "without the assent of the

bank," and it is claimed that the omission of that allegation renders the indictment fatally defective. We find, however, that the charge follows the language of section 135 of the criminal code, under which the indictment was drawn. The rule is that it is generally sufficient, in charging a statutory crime, to follow the language of the statutes defining it, and we are not convinced that the present instance is within any of the exceptions to that rule. The word "embezzle" is defined by section 121 of the criminal code, and wherever that word appears in the subsequent sections of the act it should be construed to mean and include the elements of that definition. In *Bartley v. State,* 53 Neb. 310, it is said: "An information for embezzlement is sufficient if it sets forth the crime in the language of the statute creating it, without averring the particular acts in which the offense consisted." In *Mills v. State,* 53 Neb. 263, and in *Jackson v. State, supra,* it was held that the word "embezzle" includes within its import the conversion to his own use of the money alleged to have been embezzled by the accused. Again, it is alleged in the indictment in this case that the defendent did embezzle of the funds of the said Chamberlain Banking House the sum of $10,000 in money, with intent to injure and defraud said Chamberlain Banking House out of said money, and each and every part thereof; and it would seem that the words "with intent then and there to injure and defraud" are broad enough and amply sufficient to include the charge that the act was done without the consent of the bank. Indeed, they may be said to be the equivalent of such an allegation. So we are of opinion that the indictment is sufficient to charge the defendant with the crime of embezzlement.

As above stated, the record contains many other assignments of error. Some of them, without doubt, are substantial in their nature. But what we have already said is sufficient to prevent a recurrence of similar errors in case of another trial. For the errors above men-

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

REVERSED.

STATE OF NEBRASKA V. PACIFIC EXPRESS COMPANY.

FILED MARCH 5, 1908. No. 15,307.

1. **Statutes:** EMERGENCY CLAUSE. An act which merely provides "this act shall take effect on and after its passage and approval" does not "express an emergency," under the requirements of section 24, art. III. of the constitution, and does not take effect until three months after the adjournment of the legislative session.

2. **Carriers:** STATE CONTROL. Express companies operating over the lines of railroad corporations exercising a public franchise in this state are equally subject to state control and regulation with the railroad companies over whose lines they operate, within the limited field of the business of transportation which they occupy.

3. ———: UNLAWFUL RATES: INJUNCTION. The attorney general may, on behalf of the state, maintain an action in equity to enjoin common carriers whose rates are fixed by law from violating the terms of the statute and exacting unlawful and excessive rates and charges.

4. **Supreme Court:** JURISDICTION: ACTION BY STATE. The jurisdiction conferred upon this court by the constitution "in all civil cases in which the state shall be a party" is not confined to cases in which the state has a mere pecuniary interest, but may extend to all cases in which the state, through its proper officers, seeks the enforcement of public right or the restraint of public wrong.

5. ———: ———: PUBLIC WRONGS: INJUNCTION. A wrong of a nature which affects the rights and interests of people living in almost every city, town and village in the state, as well as persons living in the country, when committed by a public service corporation, is a public wrong. An action to restrain such a wrong by the state is within the jurisdiction of this court.

6. **Carriers:** RATES. Until otherwise prescribed by competent authority, by the provisions of sections 2, 3, ch. 92, laws 1907, express companies doing business in this state after the law took effect may charge for the transportation of merchandise within

this state any sum not exceeding 75 per cent. of the rate in force on the 1st day of January, 1907, and 30 days were allowed after the act was in force for such companies to file with the state railway commission the schedule of rates and classifications in force on that date.

ORIGINAL action by the state to enjoin defendant from putting into effect charges or rates other than those established by law. Defendant filed plea in abatement. *Overruled.*

W. T. Thompson, Attorney General, Grant G. Martin and *Halleck F. Rose,* for the state.

Charles J. Greene and *Ralph W. Breckenridge, contra.*

LETTON, J.

On July 5, 1907, the attorney general filed in the name of the state of Nebraska petitions against the Adams Express Company, and four other express companies doing business in this state, alleging in substance: That the defendants are common carriers engaged in carrying on an express business over various lines of railroad in the state of Nebraska; that the legislature of 1907 passed the following act (laws 1907, ch. 91), known as "Senate File No. 355":

"An Act to provide for the filing of schedules of rates charged by express companies for the transportation of money or merchandise within the state of Nebraska; to fix a maximum charge for such service; to provide for the enforcement of the provisions of this act; and for penalties for failure to comply with its provisions.

"*Be it Enacted by the Legislature of the State of Nebraska:*

"Section 1. (Express company Defined.) All persons, associations or corporations engaged in the transportation of money or merchandise for a money consideration in cars other than freight cars and on trains other than

freight trains shall be deemed an express company within the meaning of this act.

"Section 2. (Schedule of Rates.) Within thirty days after the passage and approval of this act, all express companies doing business in this state shall file with the railway commission a complete schedule of the rates and classifications charged for the transportation of money or merchandise within this state by such company, which was in force on the first day of January, A. D. 1907.

"Section 3. (Rates.) Express companies may charge and receive for the transportation of merchandise within the state of Nebraska any sum not exceeding seventy-five per cent. of the rate as shown in the schedule provided for in section 2 of this act until after the state railway commission shall have provided a greater rate.

"Section 4. (Same, Minimum.) Provided that nothing in this act shall be construed to change the prepaid rates on merchandise weighing one (1) pound or less; and provided, further, that no provision of this act shall reduce any special contract rate in force for the transportation of cream, milk or poultry or any charge to a sum less than fifteen cents; and provided, further, that nothing in this act shall abridge the authority of the railroad commission to make a reduction in any rate provided for in this act.

"Section 5. (Violation of act.) If any express company should fail to comply with the provision and conditions of this act, they shall be fined on conviction a sum not less than ten dollars or more than one thousand for each offense.

"Section 6. (Enforcement of Act.) The Nebraska state railway commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act.

"Section 7. (Emergency.) This act shall take effect on and after its passage and approval.

"Approved April 5, 1907."

That it is the duty of the defendant to obey the statute and put in force the rates fixed by the legislature in said act, but that the defendant has put in force unlawful charges and rates for intrastate transportation of merchandise within the state of Nebraska, and is exacting from the people of the state of Nebraska unlawful, exorbitant and unconscionable rates and charges; that individual citizens who are interested are unable to cope with the defendant, and that it is the duty of the state to protect the people from the unlawful, exorbitant rates and charges exacted by the defendant. The prayer is for an injunction to prevent the defendant from making or putting into effect any other or different charges from those prescribed in the act, or from interfering with or attempting to change the rates and charges established by law for its services.

An answer was filed, which contained, among other things, an allegation that the law was not effective on July 5, 1907, on account of not having been passed with an emergency clause. The attorney general filed a motion to strike this part of the answer, on the ground that, under the provisions of section 7 of the act, which provides: "This act shall take effect on and after its passage and approval"—the act took effect as soon as passed and approved by the governor upon April 5, 1907. The motion to strike was overruled, the court being of the opinion that the act failed to comply with that part of section 24, art. III of the constitution, which provides: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct"—and that the act, therefore, did not take effect until three calendar months after the adjournment of the session. By consent this answer of the defendant company has been withdrawn, and an answer in the nature of a plea in abatement has been filed, in order to present

certain preliminary questions which, if the contention of the defendant is upheld, would abate the action. In substance it is pleaded that the state of Nebraska has no power or authority under the constitution and laws of the state to maintain the action; that the supreme court has no jurisdiction; that the petition does not show whether the defendant is a person, association, or corporation; that the rates charged at the time the suits were begun were those in force prior to the 1st day of January, 1907, and that the rates provided for in the act were not in force and effect at the commencement of the present suit, and that the defendant was under no duty under the terms of the act to charge the rates therein provided for.

1. For convenience, we will consider the first and second points together. The defendant asserts that the state of Nebraska has no power or authority under the constitution and laws of this state to maintain the suit, and that this court has no jurisdiction; while the attorney general maintains that the state may maintain a suit in equity in this court to protect the general welfare by protecting the public from oppressions, extortions and other injuries, though the state of Nebraska has no pecuniary or property interests in the suit. Section 22, art. VI of the constitution, provides: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought" —and section 2, art. VI, relating to the supreme court, provides: "It shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." Referring to that clause of section 22, *supra,* which provides that "the legislature shall provide by law in what manner and in what courts suits shall be brought," it was held in *State v. Moores,* 56 Neb. 1, and, also, in *In re Petition of Attorney General,* 40 Neb. 402, that, even though the provisions of section 2 may not be self-executing, still that they have already been sufficiently

supplemented by legislation, so that the legislature has actually provided by law in what manner suits by the state should be brought, as required by section 22, art. VI.

But it is contended that the state is not properly a party in this case, and it is argued that no suit can be instituted by the state in the exercise of its constitutional powers or "sovereign capacity," except such suit is expressly provided for by statute; that the act in question has by its terms imposed upon the executive department the duty of its enforcement, and that it is therefore beyond the power of the attorney general to shift the burden of executing the law from the executive to the judicial department; that section 6 of the act provides: "The Nebraska state railway commission, and if there be no commission, then the governor with the assistance of the attorney general, are hereby empowered to enforce the provisions of this act"—and therefore that the railway commission is the only body vested with authority to enforce the provisions of the act. It is to be noticed, however, that no powers are conferred upon the railway commission by the statute with respect to the enforcement of the law other or greater than those given to private individuals. There is no procedure specified by which that body may act directly on the offending carrier. The railway commission, if it seeks to enforce the law, must travel the same road as any private citizen—appeal to the courts for relief, or for the punishment of the carrier who violates the law.

The main question presented by defendant's argument is whether the state of Nebraska, in behalf of its citizens concerned with the transportation of merchandise, may apply to this court in an original suit in which it has no pecuniary interest for relief from unjust exactions and extortionate charges made by express companies engaged as common carriers within the state. It is alleged in the petition that the defendant is carrying on its business over various lines of railroad in the state of Nebraska for hire,

and is continually transporting money and merchandise for a money consideration in cars other than freight cars and on trains other than freight trains between stations and between towns and places in the state of Nebraska. The defendant, then, is a public service corporation engaged in transacting business for the public over the public highways of the state of Nebraska. The railroad companies over whose lines of railroad its business is transacted have had conferred upon them a certain portion of the sovereignty of the state of Nebraska—the right of eminent domain—so that they might exercise it for public purposes. Such railway companies may carry on in their own corporate capacity the carriage of goods and chattels, money, merchandise, or any other articles which are susceptible of carriage by railroad transportation, or they may permit subordinate agencies, either personal or corporate, to engage in the transportation of money or merchandise over their lines under special care and in a more expeditious manner than if carried upon ordinary freight trains. The rights, the liabilities and the duties of the defendant, therefore, as a common carrier are measured by the rights, liabilities and duties of the railroad company over whose lines it operates and within the boundaries of the limited field of transportation within which the express company carries on its energies. The express company cannot be held liable for any violation of the duties of the original carrier in a department or sphere with which it is not concerned in the conduct of its business; but, within the limited scope of the field of transportation which is now occupied exclusively by express companies, their relation to the public as common carriers is the same as that of the railroad company. The fountain cannot rise higher than its source, and the express company and the railroad company are both subject to state control and reasonable regulation. The right of regulation by the state of the business of common carriers, especially of those to whom has been granted the right of eminent domain, is beyond discussion. The doctrine has now become so well estab-

lished as to become one of the fundamentals of the law. *Wisconsin, M. & P. R. Co. v. Jacobson,* 179 U. S. 287; *Atlantic C. L. R. Co. v. North Carolina Corporation Commission,* 206 U. S. 1. The grant of the right of eminent domain implies the consideration that the tolls, rates and charges to be made to the public for the use of the railroad shall be just and reasonable, and not extortionate, and that no unjust discrimination shall be made. The power and authority which granted the franchise to the railroad company to become a corporation, and to exercise the right of eminent domain and take private property for public use, even against the will of the owner, is the same power which is exercised to promote the public safety by requiring the lines to be fenced, road crossings to be made, and cattle guards constructed, which regulates the transportation of live stock, and prohibits the exaction of unreasonable and exorbitant charges for the carrying of passengers and freight. In granting the franchises the state did not surrender or abdicate its sovereignty, nor set in operation a power or agency which it thereby lost the right to control. This idea was firmly planted in our constitution at its birth, and the courts have consistently preserved its benefits to the people of this state. *State v. Republican V. R. Co.,* 18 Neb. 512; *Chicago, B. & Q. R. Co. v. State,* 47 Neb. 549; *State v. Missouri P. R. Co.,* 81 Neb. 15.

The defendant says: "It is only permissible to the state, in any jurisdiction, even in the absence of constitutional or legislative authority, to litigate in its sovereign capacity cases involving the jeopardy of the public health or the public peace. No well considered case can be found holding the contrary." Elsewhere in the brief of counsel it concedes that the state may maintain actions in which it has a pecuniary interest. But we think the state has not thus abrogated its powers, or denied itself one of the most powerful agencies for the ascertainment of fact and the application of a remedy, if needed, in matters that affect the regulation and control of public fran-

chises. A sufficient answer to this contention is found in the following quotation from the opinion of Justice Brewer in *In re Debs,* 158 U. S. 564, 39 L. ed. 1092: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court." In *Stockton v. Central R. Co.,* 50 N. J. Eq. 52, it is said: "The next inquiry is, whether the attorney general may invoke the power of this court to restrain further operations under, and in pursuance of, the lease. It is well settled that, where a corporate excess of power tends to the public injury or to defeat public policy, it may be restrained in equity at his suit. In *Attorney General v. Delaware & B. B. R. Co.,* 12 C. E. Green (N. J.), 631, in pronouncing the opinion of the court of errors and appeals, Mr. Justice Dixon said: "In equity, as in the law court, the attorney general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and invoking the judgment of the courts on such questions of public moment." Professor Pomeroy, in his work on Equity Jurisprudence (3d ed.), sec. 1093, states the rule in this language: "When the managing body are doing or are about to do an *ultra vires* act of such a nature as to produce *public* mischief, the attorney

general, as the representative of the public and of the government, may maintain an equitable suit for preventive relief. In *Trust Co. of Georgia v. State*, 109 Ga. 736, though the court held that under the facts the lower court erred in granting the injunction, it carefully reviewed the authorities, and said upon this point: "Our conclusion, therefore, both from reason and a decided weight of authority, is that the state, in her sovereign capacity, can appeal to the courts for relief by injunction, whenever either its property is involved, or public interests are threatened and jeopardized by any corporation, especially one of a public nature like a railroad company, seeking to transcend its powers, and to violate the public policy of the state." See, also, *Louisville & N. R. Co. v. Commonwealth*, 97 Ky. 675. In *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361, it was held by the supreme court of Massachusetts that an information in equity in the name of the attorney general will lie against a *quasi* public corporation doing and contemplating acts which are *ultra vires* and illegal, the necessary effects of which are to impair public rights. The case was decided on the point that the illegal acts created a public nuisance; but the court recognizes the principle that if the threatened act would injuriously affect or endanger the public interests the action will lie, citing a number of English cases to support the proposition. In *Attorney General v. Great Northern R. Co.*, 1 Drew. & Sm. (Eng.) 154, it was said by Vice Chancellor Kindersley: "The only remaining question is this: whether, if the interests of the public are injured or endangered by the practice complained of, it is competent for the attorney general, *ex officio* or on relation, to file an information to prevent it. On this point I entertain no doubt whatever. Wherever the interests of the public are damnified, by a company established for any particular purpose by act of Parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and duty of the attorney general

to protect the interests of the public by an information; and that where, in the case of any injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers, for purposes not warranted by the act creating it, it is competent for the attorney general, in cases of injury to public interests from such a cause, to file an information for an injunction. The cases in which the attorney general comes forward on behalf of the public to ask this court to restrain a nuisance are an illustration of this principle. A nuisance may be detrimental to the public or to an individual; and it is very usual for the attorney general to come forward for an injunction to restrain it, so far as it affects the public, just as an individual may apply for an injunction to restrain it, where it affects himself. It is true that every injury is not a nuisance; but the right of the public to be protected against injury by the information of the attorney general is not confined to those injuries which come within the strict definition of a nuisance. Where it is the interest of the public to prevent an illegal act, such as this, being committed, it is competent for the attorney general to file an information to restrain it." The whole subject of the power of the state to maintain an action such as this in the supreme court of a state having similar constitutional provisions to those of this state is considered in a learned and exhaustive opinion by Chief Justice Ryan—which is one of the landmarks of modern jurisprudence—in *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425, and both the right of the state to maintain the action and the jurisdiction of the court to entertain it are clearly demonstrated. The subject is also discussed in Brice (Green), Ultra Vires, p. 706, where the authorities are collected. While there are cases announcing doctrines which may not be in entire harmony with these, we believe that, if for no other reason, the marvelous development of franchised public service corporations during the present generation

demands that of two opposing policies that one should be adopted which leaves the state most unfettered in its powers of regulation and control, and most free in adopting speedy and adequate means of safeguarding the public interest by direct action, if necessary, in the court of last resort.

But it is said that under the terms of the act the state railway commission, and not the attorney general, has been designated as the officer to enforce the law, and that the attorney general is not authorized to maintain the suit. The petition recites, however: "Comes now the state of Nebraska, by its attorney general, William T. Thompson, *by and with the consent and authority of * * * the Nebraska state railway commission, and for cause of action,*" *etc.* This allegation is not denied, and must be taken as true. It therefore appears that the action is brought by the attorney general, by the authority of the Nebraska state railway commission, the particular officers connected with the executive department of the state government who are specially empowered by the act itself to enforce its provisions. It may be said, further, that under the provisions of the statute specifying the power and duties of the attorney general it is the duty of the attorney general to appear for the state and prosecute all actions in the supreme court in which the state shall be interested or a party, and he may on his own motion bring and prosecute for the state any suit, matter or thing, civil or criminal, in which the state is interested, or relating to any matter connected with the executive department. Irrespective of what the powers of the attorney general might have been at common law, as the law officer of the crown, under this provision the power and the duty of determining when an action shall be brought by the state or in the interests of the state in this court devolves upon the attorney general as fully and to as great an extent as upon the governor or any other officer of the executive department. When, in the exercise of the powers thus conferred upon him by the constitution

and the law, the attorney general determines that the interests of the state require an action to be brought in this court, no question can arise as to his authority to institute or maintain the suit, if it is a matter in which the state is interested, or relating to the executive department. If, in his judgment, there is good cause to believe that any public service corporation, the regulated and fixed charges of which for services rendered to the public under its franchise have been disregarded, or that unreasonable, extortionate and excessive charges have been made for public service, it becomes his duty as a member of the executive department of the state to institute proceedings before the judicial department of the government whereby the rights of the state, exercised in behalf of all the people, may be preserved and vindicated. This is a well-recognized power and duty of such an officer both in England and in this country.

We have no hesitation, therefore, in holding that, in all civil cases in which the existence or regulation or control of a public franchise, the grant of which carries with it any exercise of a portion of the sovereign power of the state, is concerned, this court has original jurisdiction at the suit of the state, or of the attorney general in behalf of the state. To hold otherwise would be to divest the state of the most efficient manner of exercise of its regulatory and supervisory powers over the instrumentalities which it has created for its own public purposes, which we cannot believe it ever was the intention of the makers of the organic law to do. In the opinion of Mr. Commissioner RYAN, in *In re Petition of Attorney General,* 40 Neb. 402, it was said: "Such jurisdiction will not be entertained by this court in cases wherein the state is but a nominal party. The case must be such that the state, as a real, substantial party, has a direct interest in having determined." But, as has been pointed out in a number of the opinions, portions of which are quoted herein, a public wrong may consist of almost innumerable instances of private wrong; and that is espe-

cially true if it is a wrong of a nature which affects the rights of the people living in almost every city, town or village in the state as well as those living upon farms and ranches. The express companies now rival the post office in the extent of their operations, and possibly actually transact business for as many or more different persons in the course of a year than the railroad companies do. We think, therefore, that in cases such as this, where the people of the whole state are interested in the charges made for carriage upon public highways by common carriers, the state has a real and substantial interest, and the jurisdiction of this court is undoubted.

2. The objection that the petition does not show whether the defendant is a person, association or corporation probably should have been made by motion to make more specific. At all events, we think it is too late in the progress of this case to raise it now.

3. As to the contention that the suit was prematurely brought, sections 2 and 3 (laws 1907, ch. 91) of the act are as follows: "Section 2. (Schedules of Rates.) Within thirty days after the passage and approval of this act, all express companies doing business in this state shall file with the railway commission a complete schedule of the rates and classifications charged for the transportation of money or merchandise within this state by such company, which was in force on the first day of January, A. D. 1907.

"Section 3. (Rates.) Express companies may charge and receive for the transportation of merchandise within the state of Nebraska any sum not exceeding seventy-five per cent. of the rate as shown in the schedule provided for in section 2 of this act until after the state railway commission shall have provided a greater rate."

The defendant's contention is that the direction that an express company shall file a schedule of rates in force January 1, 1907, "within thirty days after the passage and approval of this act" must be construed as meaning within 30 days after the act becomes a law, and that the

act became a law on July 5; that the legislature intended the companies to have 30 days within which to prepare schedules after the law became effective, and that the rates provided for did not go into effect until 30 days after the filing of the schedules. It is our view that the legislature intended to adopt, and did adopt, the rates and classifications charged for the transportation of money or merchandise on the 1st day of January, 1907, as a basis or standard of comparison for the new rates, and that under the provisions of section 3 of the act it became unlawful, after the act took effect, for an express company to charge or receive for its services in this state any greater sum than 75 per cent. of the rate in force upon January 1, 1907. It cannot be reasonably contended that it was the intention of the legislature that the rates set forth in the written schedule filed should be taken as the basis, or as anything more than evidence of the rate which was actually charged on January 1. If, by mistake, the schedule filed showed a rate other than that actually charged, it would be unreasonable to say that a rate "as shown by the schedule" should be taken as the basis, as a narrow and literal reading of the act would require, and not the rate which was actually charged and in force on the 1st day of January, 1907.

We are of the opinion that the true interpretation of the meaning of the act is that a rate not exceeding 75 per cent. of the rates charged on the 1st of January, 1907, became the lawful rate as soon as the act took effect, but that 30 days thereafter were allowed the express companies to file with the railway commission a complete schedule of the rates and classifications in force on January 1, 1907. To so interpret the act places no harsh or unreasonable burden upon the express companies, by way of requiring new schedules and classifications to be made within such a short period of time as to necessitate undue haste in preparation, or such as to require the employment of extra assistance before the rates could easily be ascertained, since the only process necessary for their agents

to perform in order to ascertain the lawful rate after the act took effect was to deduct 25 per cent. from the rates in force upon January 1, 1907. But, recognizing the difficulty and the necessary time required to prepare new written or printed schedules of rates and classifications of the multifarious articles of merchandise carried by express, the legislature wisely provided the space of 30 days in which to prepare and file such schedules before a penalty for noncompliance with this direction should be imposed. As soon as the act became operative, the rates prescribed took effect, but the time to file the schedules extended for 30 days thereafter. The action, therefore, was not prematurely brought.

We conclude, therefore, that the attorney general had authority to bring the suit in the name of the state, that this court has jurisdiction, and that the action was not premature.

The plea in abatement is therefore

OVERRULED.

STATE OF NEBRASKA V. WELLS, FARGO & COMPANY.

FILED MARCH 5, 1908. No. 15,306.

ACTION by the state. Plea in abatement. *Overruled.*

PER CURIAM.

The facts in this case are the same as in *State v. Pacific Express Co., ante,* p. 823.

For the reasons stated in that opinion, the plea in abatement herein is

OVERRULED.

STATE OF NEBRASKA V. UNITED STATES EXPRESS COMPANY.

FILED MARCH 5, 1908. No. 15,308.

ACTION by the state. Plea in abatement. *Overruled.*

PER CURIAM.

The facts in this case are the same as in *State v. Pacific Express Co., ante,* p. 823.

For the reasons stated in that opinion, the plea in abatement herein is

OVERRULED.

STATE OF NEBRASKA V. AMERICAN EXPRESS COMPANY.

FILED MARCH 5, 1908. No. 15,309.

ACTION by the state. Plea in abatement. *Overruled.*

PER CURIAM.

The facts in this case are the same as in *State v. Pacific Express Co., ante,* p. 823.

For the reasons stated in that opinion, the plea in abatement herein is

OVERRULED.

STATE OF NEBRASKA V. ADAMS EXPRESS COMPANY.

FILED MARCH 5, 1908. No. 15,310.

ACTION by the state. Plea in abatement. *Overruled.*

PER CURIAM.

The facts in this case are the same as in *State v. Pacific Express Co., ante,* p. 823.

For the reasons stated in that opinion, the plea in abatement herein is

OVERRULED.

JAMES BAXTER V. STATE OF NEBRASKA.

FILED MARCH 5, 1908. No. 15,525.

Rape: CONVICTION. Under an information charging rape by force upon a female child under the age of 18 years and not previously unchaste, a conviction may be had, even if the act was committed with the consent of the female child. *Hubert v. State,* 74 Neb. 226.

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

A. H. Byrum and *W. C. Dorsey,* for plaintiff in error.

W. T. Thompson, Attorney General, and *Grant G. Martin, contra.*

LETTON, J.

James Baxter, the plaintiff in error, was convicted in the district court for Franklin county of the crime of rape. From a judgment of conviction, he prosecutes error.

The indictment charges that James Baxter, "a male person over the age of 18 years, on the first day of July, A. D. 1907, then and there being in the said county of Franklin,

state of Nebraska, did then and there in and upon one Mary Koehn, a female child under the age of 18 years, to wit, of the age of 16 years, and not previously unchaste, unlawfully, violently, and feloniously make an assault, and her, the said Mary Koehn, unlawfully and forcibly and against her will feloniously did ravish and carnally know, she, the said Mary Koehn, then and there being a female child other than the daughter or sister of the said James Baxter." At the trial the evidence seemed to be insufficient to sustain the charge of forcible rape. The judge, therefore, charged the jury, in substance, that if they found that the prosecutrix was under the age of 18 years and not previously unchaste, and that the defendant had carnal knowledge of her, whether with or without her consent, it would constitute the crime of rape. The defendant's contention is that the information charged rape upon a female child forcibly and against her will, under the first clause of section 12 of the criminal code, and that the court erred in instructing the jury that it stated an offense under the second clause of that section. The identical question presented has been considered by this court in *Hubert v. State*, 74 Neb. 220, and, on rehearing, 74 Neb. 226. In the latter opinion it is said, speaking of section 12: "The object of the section is to define the crime of rape, and to provide the punishment therefor. At the common law it was necessary to charge that the act of intercourse was accompanied with force on the part of the defendant, and was against the will of the woman assaulted. * * * By the first clause of this section this element of the common law crime of rape is retained. By the second clause it is provided that the crime is established without proof of force under certain conditions. If the female consents to the act it is not rape, but this clause of the statute provides that if she is under the age of fifteen years she cannot consent, or if she is under the age of eighteen years and not previously unchaste she cannot consent, and so the whole section defines the common law crime of rape, with the condition that, when the accused

has reached a certain age, and the female is of such tender years as to be presumed not to understand the nature of the act so as to enable her to consent to it, these elements take the place of the proof required by the common law that the act was with force and against her will." The doctrine of this case is very ingeniously and vigorously assailed in the reply brief on behalf of plaintiff in error, and, among other things, it is said: "The second clause of section 12, in fact, defines and denounces a separate and distinct crime to that denounced in the first section. It was unknown to the common law, and had no existence until that clause was enacted. * * * The second clause of section 12 makes the act of carnal knowledge of a female child a felony when committed with her consent, though at common law the fact of consent would have been a complete defense." This statement is hardly correct. Lord Coke says: "Rape is felony by the common law, declared by parliament for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will, or of a woman child, under the age of ten years, with her will, or against her will, and the offender shall not have the benefit of clergy." 3 Coke, Institutes, 60. Lord Hale defines the crime as follows: "Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman child under the age of ten years with or against her will." 1 Hale, P. C. (Eng.) 628.

The only difference between statutory and common law rape upon a female child under the age of consent is that by the statutes the age of consent has been raised from 10 to 18 years. Upon a reexamination of the question, we are convinced that the opinion of Judge SEDGWICK in *Hubert v. State, supra,* states the law correctly, and we are content to abide by the rule there announced. While the information charged rape with force, yet it contained all the material allegations necessary to charge the crime of rape upon a female child under the statute, and the words charging force may be disregarded as surplusage.

Bishop, Statutory Crimes (3d ed.), sec. 486. It was immaterial, in order to constitute the crime charged, whether the female child consented or did not consent to the assault. The law conclusively presumes that she was incapable of giving consent, and that it was therefore against her will.

Under the law and the evidence, the instruction given by the court was fully warranted, and the judgment of the district court is

AFFIRMED.

GEORGE BRANDT V. STATE OF NEBRASKA.

FILED MARCH 5, 1908. No. 15,565.

Criminal Law: REVIEW. Under the provisions of chapter 162, laws 1907, providing for appeals to the supreme court, only judgments and sentences upon convictions for felonies and misdemeanors under the criminal code may be brought to this court by petition in error. All other cases must come here by appeal, and notice must be given, either as specified in section 3 of the act, or under the provisions of supreme court rules 33 to 37, inclusive.

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

John C. Stevens, for plaintiff in error.

W. F. Button, contra.

LETTON, J.

George Brandt was adjudged guilty of the violation of a city ordinance of the city of Hastings in the police court of that city. He appealed to the district court for that county, where the appeal was dismissed. A petition in error was filed in this court, complaining of errors committed by the district court in dismissing his appeal. After the filing of the petition in error the deputy attorney general, being under the impression that the case was

error from a conviction of a misdemeanor under the criminal code, waived the issuance and service of summons in error. A few days afterwards he ascertained that the case involved the violation of a city ordinance, which was not a crime under the criminal code, and he thereupon withdrew his appearance and acknowledgment of service. Mr. W. F. Button, city attorney of the city of Hastings, appears specially, objecting to the jurisdiction of the court, for the reason that no summons in error or notice of appeal had been served upon any person having authority to act for the city of Hastings.

The question before us is upon the special appearance. The record shows that Brandt was charged with "keeping his saloon open after hours, or on Sunday, September 29, 1907." No particular hours are specified in the criminal code during which it is a crime for a saloon to be kept open, so that the offense with which Brandt was charged was not a violation of any criminal law of this state, but of a local regulation or ordinance of the city of Hastings. Section 1, ch. 162, laws 1907, providing for appeals to the supreme court, provides: "The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court, except judgments and sentences upon convictions for felonies and misdemeanors under the criminal code of this state, shall be by filing in the supreme court," etc. Sections 2 and 3 of the act provide for the manner of docketing the case in the supreme court, and for the giving of notice of appeal. Under this statute only judgments and sentences upon conviction for felonies and misdemeanors under the criminal code of the state may be brought to this court by petition in error. All other cases must come here by appeal, and notice must be given, either as specified in section 3 of the act, or under the provisions of supreme court rules 33 to 37, inclusive. Rule 36 provides that notice of appeal "shall be served upon the appellees named therein or their attorney or attorneys of record in the court below."

In appeals from convictions for violations of city ordinances which are not crimes under the criminal code of the state, service of notice of appeal should be made upon the city or village, or upon the attorney of record in the court below. This has not been done; hence, as the case now stands, the court has no authority to proceed further, and the objections of the city attorney seem to be well taken, and are therefore

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28. The supreme court will not consider on appeal facts not presented by the pleadings. *Whedon v. Lancaster County*.... 682

Appearance.

1. A defendant may appear specially to object to the jurisdiction of the court, but if he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally. *McKillip v. Harvey*.. 264

2. In an action at law against a nonresident, if service is made in a manner not authorized by law, defendant may appear specially and move to quash the service, but, if he prays for a dismissal of the case, it will be held to be a general appearance. *McKillip v. Harvey* 264

Assault and Battery.

1. The term "great bodily injury," as used in sec. 17*b* of the criminal code, implies an injury of a graver character than an ordinary battery; and whether a particular case is within the statute is generally for the jury. *Lambert v. State*.... 562

Assault and Battery—*Concluded.*

2. When the injury proved is a necessary consequence of the deliberate and inexcusable act of the accused, the presumption is that it was the result contemplated by him in its commission. *Lambert v. State* 562
3. It is not essential to a conviction for an assault with intent to inflict great bodily injury that the accused should have intended the precise injury which followed; but it is sufficient if it be shown, beyond a reasonable doubt, by circumstances, together with the nature and extent of the injury, that great bodily injury was contemplated by the defendant. *Lambert v. State* 562
4. Where there is competent evidence that defendant in making an assault was actuated by motives of hatred or revenge, it is proper to charge that, if defendant had no reasonable apprehension of impending injury, and aimed to accomplish some unlawful purpose, or sought revenge, then he cannot avail himself of the law of self-defense. *Lambert v. State*.. 562

Attachment.

1. Where an action is brought without the authority of the party in whose name it is prosecuted, and an attachment is procured, the attachment is wrongfully obtained under sec. 200 of the code. *Bauer v. Mitchell*..... 187
2. Affidavits taken before a notary, who is also an attorney in the case, cannot be used in support of an attachment, over defendant's objections. *Malcom Savings Bank v. Cronin*, 228
3. Where the grounds for an attachment are positively denied by defendant, the burden is on plaintiff to prove them by a preponderance of evidence. *Malcom Savings Bank v. Cronin*, 231

Banks and Banking.

1. The cashier of a bank has authority to execute a bond to secure deposits of public money, in the absence of a rule requiring special authority and notice to the obligee. *Johnson County v. Chamberlain Banking House*..... 96
2. Where a stockholder in a bank in process of liquidation is indebted to the bank and litigates the question, thereby preventing distribution of funds on hand, he should be charged with interest to the time of the entry of judgment. *Gund v. Ballard* 385
3. Where trustees of a bank in process of liquidation withdraw moneys from solvent banks and deposit them in a bank in which one of the trustees is a stockholder, without interest, such trustee is personally liable for the customary interest paid for deposits. *Gund v. Ballard* 385
4. That trustees of a bank in process of liquidation have not

Banks and Banking—*Concluded.*

been active in defending an action by one of their number against the bank on an individual claim will not defeat their right to reasonable compensation for services in settling other affairs of the bank. *Gund v. Ballard*..... 385

5. Where certain stockholders of a bank in process of liquidation employ counsel to litigate for them the distribution of a fund in the hands of the trustees, they cannot recover attorneys' fees out of such fund. *Gund v. Ballard*..... 385

Bills and Notes.

A note pledged before maturity as security for a loan made to the payee is good in the hands of a transferee, who had no notice of equities between the original parties. *Brown v. James* 475

Boundaries.

1. In determining the boundaries of land, fixed monuments and known corners govern both courses and distances; and, where an original government corner is established at a certain point by sufficient evidence, its authenticity cannot be overcome by showing that the location is not at the distance from other monuments indicated by the field notes of the original survey. *Hurn v. Alter* 183
2. Fixed monuments and boundaries marked by government surveyors, when established, control distances stated in the notes of such survey. *Bock v. Porterfield*..... 523
3. The rule that only a preponderance of evidence is required to establish an issue in civil actions applies to boundary disputes. *Bock v. Porterfield* 523

Bridges.

1. Under sec. 84, ch. 78, Comp. St. 1905, contracts for the construction of all bridges cannot be made for a shorter period than one year; nor can the county board evade the statute by terminating a contract before its expiration. *Whedon v. Lancaster County* 682
2. Where the county board has a yearly contract for the construction of all bridges in the county, it may not make another to take effect before the expiration of the first; but it may require the building of a bridge under the yearly contract, though it cannot be completed within the term thereof. *Whedon v. Lancaster County* 682
3. Where a county board has contracted for the construction of bridges for a year, and attempts to supersede the same with a contract much less favorable to the county, damages to the taxpayers will be presumed. *Whedon v. Lancaster County* 682

Burglary.

1. A vat used for storing hides *held* a "storehouse" under sec. 48 of the criminal code. *Steele v. State*..... 9
2. That a witness' testimony is somewhat inconsistent does not warrant the court in rejecting it altogether. *Steele v. State*, 9
3. It is for the jury to determine the credibility of witnesses, and the weight of evidence. *Steele v. State*..... 9

Carriers.

1. Under sec. 10,009, Ann. St. 1903, a contract between a carrier and a shipper to transport merchandise for a less rate than regularly charged to others is void, and an action will not lie for a breach of the contract, if the regular rate is exacted. *Haurigan v. Chicago & N. W. R. Co*..... 139
2. Whether a passenger was guilty of negligence in going from the platform to the step of a moving street car with the intention of alighting therefrom is a question of fact for the jury. *Bendekovich v. Omaha & C. B. Street R. Co*..... 174
3. Where a girl under 14 years of age, unaccustomed to riding on street cars, becomes frightened by the negligence of defendant's servants in carrying her past her known destination, and is about to leave the moving car, it is the conductor's duty to exercise the highest degree of care to prevent the passenger from alighting. *Kruger v. Omaha & C. B. Street R. Co*..... 490
4. In such a case, if the conductor fails to exercise the highest degree of care and the passenger receives injuries while alighting from the moving car, the company is liable. *Kruger v. Omaha & C. B. Street R. Co*..... 490
5. It is error to instruct that plaintiff may recover, even though negligent. *Kruger v. Omaha & C. B. Street R. Co*..... 490
6. Under secs. 2, 3, ch. 92, laws 1907, express companies doing business in Nebraska after the law took effect may charge for transportation of merchandise within the state a sum not exceeding 75 per cent. of the rate in force January 1, 1907, and 30 days were allowed after the act was in force for such companies to file with the state railway commission the schedule of rates and classifications in force on that date. *State v. Pacific Express Co*..... 823
7. Express companies operating over railroads exercising a public franchise in Nebraska are equally subject to state control and regulation with the railroad companies over whose lines they operate. *State v. Pacific Express Co*..... 823
8. The attorney general may, on behalf of the state, enjoin common carriers whose rates are fixed by law from exacting unlawful and excessive rates. *State v. Pacific Express Co*.. 823

Constitutional Law.

1. Sec. 17, laws 1879, p. 61, which provides for descent of a homestead, *held* constitutional. *Holmes v. Mason*..... 448
2. Ch. 34, laws 1897, authorizing the county judge to appoint a clerk of the county court, *held* not in conflict with sec. 11, art. III of the constitution, providing that no law shall be amended unless the new act contain the section so amended, but to be an act complete in itself. *Zimmerman v. Trude*.. 503
3. An act for levying taxes and providing the means of enforcement is within the power of the legislature. *Trainor v. Maverick Loan & Trust Co*..... 626
4. Due process of law does not necessarily require a judicial hearing in matters of taxation. *Trainor v. Maverick Loan & Trust Co*..... 626

Contempt.

1. A prosecution for contempt of court is a criminal proceeding, and defendant is entitled to the benefit of any reasonable doubt. *Connell v. State* 296
2. In a prosecution for contempt in the presence of the court, defendant is not entitled to a change of venue for alleged prejudice of the court. *Connell v. State*..... 296
3. That a prosecution for contempt in the presence of the court is postponed until the end of the trial will not change the character of the prosecution. *Connell v. State*..... 296
4. Where a prosecution for contempt is based on language used by counsel in open court, and the words used are not necessarily contemptuous, and the court orders a prosecution by information, and a formal trial is had, there being no statement in the record as to the conduct of counsel, general findings will be considered as predicated on the evidence in the record, and unless supported by that evidence will not sustain a judgment of guilt. *Connell v. State*..... 296

Continuance.

In the absence of any showing that defendants were surprised by an amendment to the petition at the close of the trial, the decision refusing a continuance will not be reviewed. *Bliss v. Beck* 290

Contracts.

1. Contract of assignment *held* to fall within sec. 341 of the code, which provides that, 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. *Barnes v. Sim* 213

Contracts—*Concluded.*

2. An oral promise to pay interest on interest accrued for an indefinite forbearance is not enforceable. *Sanford v. Lundquist* 408

3. An oral agreement for forbearance, and giving time for the payment of money due, is a sufficient consideration to support an agreement to pay interest thereon. *Sanford v. Lundquist* 414

4. The words "as soon as possible" in a contract for the manufacture of certain specified goods mean with all reasonable diligence or without unreasonable delay. *Childs & Co. v. Omaha Paraphernalia House* 673

Contribution.

One who sues for contribution on the ground that he has satisfied a judgment for a trespass committed against a third party must show that the defendant joined in committing the trespass and was liable equally with the plaintiff. *Schappel v. First Nat. Bank*..... 708

Corporations.

1. Evidence *held* to show that one C. was the last acting manager of a dissolved corporation, and therefore sole trustee and competent to sell the real estate of the corporation. *Heenan & Finlen v. Parmele* 514

2. Under sec. 4112, Ann. St. 1907, a dissolved corporation may be sued in the corporate name and service made upon the trustee or person in charge of the assets. *Heenan & Finlen v. Parmele* 514

Costs. See BANKS AND BANKING, 5.

Counties and County Officers.

1. The allowance by the board of county commissioners of a claim against the county, there being no money in the treasury and no tax levy against which a warrant can be drawn, *held* not in excess of the power given the board. *State v. Farrington* 628

2. The duty of county commissioners to provide for the payment of allowed claims is a continuing duty against which the statute of limitations is no defense. *State v. Farrington,* 628

Courts.

1. An objection to jurisdiction of the person must be supported by evidence when the record does not show facts going to support the objection. *Martin v. Fraternal Life Ass'n*..... 224

2. The jurisdiction conferred on the supreme court by the constitution extends to all cases in which the state, through its

Courts—*Concluded.*

proper officers, seeks the enforcement of public right or the restraint of public wrong. *State v. Pacific Express Co.*. 823

3. A wrong which affects the rights of the people generally, when committed by a public service corporation, is a public wrong, and an action to restrain the wrong by the state is within the jurisdiction of the supreme court. *State v. Pacific Express Co.* 823

Covenants.

1. A covenant in a deed that "I hold said premises by good and perfect title," if untrue, is broken when made. *Webb v. Wheeler* 438

2. Where plaintiff is in possession of premises and can recover the value of his improvements under the occupying claimant's act, he cannot recover the value thereof in an action for damages for breach of covenant. *Webb v. Wheeler*.... 438

Creditors' Suit.

Where a conveyance is set aside as fraudulent and the land is insufficient to pay the judgment, the grantee must apply the rents on the judgment. *First Nat. Bank v. Gibson*.... 577

Criminal Law. See ASSAULT AND BATTERY. BURGLARY. EMBEZZLEMENT. HOMICIDE. INCEST. INDICTMENT AND INFORMATION. LARCENY. RAPE.

1. In a prosecution for embezzlement, an expert accountant may examine voluminous accounts and testify as to the result of his examination. *Bode v. State*..... 74

2. In a prosecution for embezzlement, certain admissions *held* admissible, though tending to show the commission of other offenses. *Bode v. State* 74

3. Instructions must be construed together, and if then they correctly announce the rule applicable to the issues and evidence they will be upheld, though a paragraph standing alone might be faulty. *Bode v. State* 74

4. Where the state elects to proceed on one of several counts in an information, and the court instructs the jury that their verdict must respond to the charge in that count, a verdict of guilty, as charged in the information, *held* sufficient. *Bridges v. State* 91

5. Where a requested instruction contains a statement not warranted by the evidence, *held* not error to strike the unwarranted statement, and give the instruction as modified. *Bridges v. State* 91

6. A wife may sign and file a complaint against a husband for rape. *Harris v. State* 195

Criminal Law—*Continued.*

7. Where the question as to misconduct of the county attorney in the prosecution has been decided by the trial court on conflicting evidence, the decision will not be disturbed unless unsupported by testimony and clearly wrong. *Harris v. State* 195
8. General assignments of error in ruling on evidence will not be discussed unless specifically called to the attention of the court by brief or oral argument, where no manifest error appears. *Harris v. State* 195
9. In a prosecution for rape, it is not error for the court to refuse an instruction as to the necessity for corroboration, where he has properly instructed on that question on his own motion. *Harris v. State* 195
10. Proof of reputation is confined to reputation in the vicinity in which the party lives or in which he had formerly resided. *Younger v. State* 201
11. Where articles pertinent to the issue are offered in evidence, the court will not exclude them on account of the manner in which they were obtained. *Younger v. State*..... 201
12. It is not error to refuse an instruction removing certain evidence from the consideration of the jury where the evidence was received without objection and no motion was made to strike it out. *Younger v. State*..... 201
13. Where defendant in a prosecution for rape calls out from the prosecutrix a description of her assailant, the person to whom complaint was made may testify that the prosecutrix stated that she had been assaulted by a negro, and give her description of him then made. *Younger v. State*.. 201
14. Where the testimony of the prosecutrix in a rape case as to the assault and the identity of her assailant is fully corroborated, *held* not prejudicial error to omit to instruct as to the necessity of corroboration. *Younger v. State*..... 201
15. Purely rebuttal evidence may be given by witnesses whose names are not indorsed on the information. *Clements v. State* 313
16. Where a witness for a defendant on trial for murder exhibits a hat to the jury and conveys the impression that certain holes therein were made by shots fired by the deceased, the state can show that the holes are not shot holes, though the hat has not been formally offered in evidence. *Clements v. State* 313
17. It is not error to refuse an instruction which does not contain a correct statement of the law applicable to the facts shown by the evidence. *Clements v. State*..... 313

Criminal Law—*Continued.*

18. The introduction of evidence to impeach a witness does not require the court to instruct the jury to totally disregard his evidence. *Clements v. State* 313

19. Instruction as to reasonable doubt *held* not ground for reversal. *Clements v. State* 313

20. It is not error to refuse to instruct the jury that they should carefully scrutinize evidence of the prosecuting attorney because of the natural tendency of persons in his position to remember only such matters as are favorable to the state. *Clements v. State* 313

21. Error cannot be predicated on a single expression in an instruction, if the whole instruction correctly states the law. *Clements v. State* 313

22. Newly discovered evidence which is doubtful in character and merely cumulative is not ground for a new trial. *Clements v. State* 313

23. A judgment in a misdemeanor case on conflicting evidence will be upheld unless clearly wrong. *Gebhardt v. State*.... 363

24. Court's directions to jury *held* not to warrant setting aside verdict. *Gebhardt v. State* 363

25. Instructions in a misdemeanor case *held* without error. *Gebhardt v. State* 363

26. Where a defendant is prosecuted before a justice of the peace by complaint and warrant for violation of a village ordinance, and the acts charged are misdemeanors under the laws of the state, he cannot appeal under sec. 1006 of the civil code. *Ruffing v. State* 555

27. The right of appeal given by sec. 324 of the criminal code applies to cases prosecuted for the violation of village ordinances under sec. 52, art. I, ch. 14, Comp. St. 1907. *Ruffing v. State* 555

28. Unless the discretion of the trial court in refusing a continuance has been abused, a reviewing court will not interfere. *Cate v. State* 611

29. Where a number of witnesses have testified to a fact not in dispute, the trial court may in its discretion limit the number of witnesses testifying to such fact. *Cate v. State*..... 611

30. Though part of the instructions standing alone may not be technically correct, yet if as a whole they state the law they will be upheld. *Cate v. State*..... 611

31. Under the evidence, failure to instruct as to insanity, where no instruction was requested, *held* not error. *Cate v. State*.. 611

32. In a prosecution for maliciously killing hogs, admission of

Criminal Law—*Concluded.*

evidence as to their value at a certain price per hundredweight, leaving the jury to decide as to the weight of the hogs, *held* not error. *Carson v. State*..... 619

33. A docket entry that "the court finds that there is probable cause to believe that the defendant is guilty as charged in the complaint," *held* to sufficiently show that the magistrate found that an offense had been committed. *Carson v. State*, 619

34. Where evidence was in sharp conflict, and there was sufficient evidence to sustain a verdict of guilty, the finding cannot be reversed. *Carson v. State*..... 619

35. Where an information charged the malicious killing of 14 hogs of the value of $120 on the 5th day of May, 1906, and the evidence showed 5 hogs killed on the 23d day of April, 1906, of the value of $44.17, the offense being identified as the one charged in the information, *held* that the verdict responded to the charge in the information. *Carson v. State*, 619

36. The question as to whether the acts charged, if committed, were maliciously done, *held* one of fact for the jury. *Carson v. State* 619

37. To obtain a review of instructions, the record must show that exceptions were taken. *Carson v. State*..... 619

38. An instruction which requires a defendant to prove beyond a reasonable doubt his innocence of a graver crime before he can be found guilty of a less heinous offense, *held* erroneous. *Kennison v. State* 688

39. One charged as principal cannot be convicted on evidence tending only to show that he was an accessory. *Skidmore v. State* 698

40. In the prosecution of a bank officer for embezzlement, *held* error to submit the fact of his having overdrawn his account with the bank as proof of guilt. *Chamberlain v. State*, 812

41. An instruction which shifts the burden of proof to the defendant, *held* erroneous. *Chamberlain v. State*..... 812

42. Under an indictment charging a bank officer with embezzling its funds on a certain date, evidence of embezzlement of different amounts at different times before that date, *held* admissible. *Chamberlain v. State*..... 812

43. Under ch. 162, laws 1907, only judgments and sentences on convictions for felonies and misdemeanors under the criminal code may be brought to the supreme court by petition in error. All other cases must come by appeal, and on notice as specified in section 3 of the act or under the supreme court rules 33 to 37, inclusive. *Brandt v. State*..... 843

Damages.

In an action by a married woman for personal injuries, it is proper to show that she has been incapacitated by her injuries from performing labor, for the purpose of showing the nature and extent of her injuries. *Bliss v. Beck*..... 290

Deeds.

Deed construed, and *held* to convey the land in dispute. *Lamson v. Village of Elm Creek*..... 369

Divorce.

Where neither of the parties had resided in the state continuously since the marriage, or continuously for six months immediately preceding the filing of the petition, the district court was without jurisdiction. *Keil v. Keil*..... 496

Drains. See EMINENT DOMAIN.

1. The act of 1905 (laws 1905, ch. 161), relative to the organization of drainage districts, does not contemplate the inclusion of a railroad company's right of way, depot grounds and appurtenances as a part of the district. *Barnes v. Minor* 189
2. In a proceeding to establish a drainage ditch, if the county board possesses jurisdiction, injunction will not lie on account of irregularities in the exercise of the power conferred. *Campbell v. Youngson* 322
3. The drainage act of 1881 (laws 1881, ch. 51) confers power to create districts for draining "marsh or swamp lands" alone, and does not confer power to divert the flow of running streams or natural surface water drains. *Campbell v. Youngson* 322
4. The term "marsh or swamp lands," as used in ch. 51, laws 1881, defined. *Campbell v. Youngson* 322
5. Under the facts, *held* that a county board was without jurisdiction to divert the waters of certain streams from their natural flow to prevent overflows, and that it had no authority to take plaintiff's land against his will for the purpose of draining lands within a proposed drainage district. *Campbell v. Youngson* 322
6. The constitution does not prohibit contemporary legislative acts providing different modes for the formation of drainage districts. *State v. Hanson* 724
7. The establishment of the boundaries of a proposed drainage district is *prima facie* evidence that the county commissioners proceeded regularly in the establishment thereof. *State v. Hanson* 724
8. Ch. 153, laws 1907, *held* to vest in a county board power to

Drains—*Concluded.*

determine the public utility of a proposed drainage district, and a discretion not to fix the boundaries if the reclamation of the district would not promote the public health or welfare. *State v. Hanson* 738

9. The act of 1907, ch. 153, *held* not to be applied unless the county board should prescribe a drainage district, which, if organized and improved, would promote the public health or welfare. *State v. Hanson* 738

Elections.

1. Where an individual has filed the application required by sec. 5 of the primary election law (laws 1907, ch. 52), and has duly qualified as a candidate of a political party, and the requisite number of members of another party file a petition complying with sec. 45 of that act, asking that his name be placed on the ballot of their party, the officer making up the ballot must place his name on the ballots of both parties. *State v. Junkin* 1
2. The same person may be the candidate of more than one political party for nomination at a primary election, but he cannot be the nominee of any party unless he receives the requisite number of votes cast by that party. *State v. Sheldon* 4
3. Sec. 22, art. I of the constitution, providing that there shall be no hindrance to the right to exercise the elective franchise, does not apply to an election upon the formation of a drainage district under sec. 153, laws 1907, nor to one for the election of officers thereof. *State v. Hanson*..... 724
4. Ch. 153, laws 1907, providing for submission of the question of organization and the election of officers of a drainage district, *held* not to call for the exercise of the elective franchise secured to all electors by sec. 22, art. I of the constitution. *State v. Hanson* 738

Embezzlement.

1. An information against a city treasurer for embezzlement under sec. 124 of the criminal code need not allege that the city was organized. *Bode v. State* 74
2. An information against a city treasurer for embezzlement *held* good, though not alleging that accused embezzled the money while holding it as city treasurer. *Bode v. State*.. 74
3. Evidence *held* to sustain conviction of embezzlement. *Bode v. State* 74
4. In charging embezzlement of money of an estate by a county judge in violation of sec. 121 of the criminal code, *held* that an allegation that the money embezzled belonged

Embezzlement—*Concluded.*

to the estate was a sufficient allegation of ownership. *Hendee v. State* 80

5. In charging embezzlement of a certificate of deposit, *held* sufficient to describe the instrument as it appeared when it came into the possession of the accused. *Hendee v. State*, 80

6. Evidence *held* sufficient to sustain a conviction. *Hendee v. State* 80

7. An indictment for embezzlement is sufficient if it sets forth the crime in the language of the statute, without averring the particular acts in which the offense consists. *Chamberlain v. State* 812

Eminent Domain.

1. Ch. 153, laws 1907, authorizing the formation of drainage districts and the condemnation of private property, *held* not to permit the organization of a corporation in furtherance of private interests or the taking of property for private purposes. *State v. Hanson* 724

2. The phrase, "with a view to promoting the interest of said drainage district," used in ch. 153, laws 1907, relative to the duties of county commissioners in establishing drainage districts, means the public interest. *State v. Hanson*..... 724

3. An act of the legislature, ch. 153, laws 1907, providing for the organization of drainage districts, *held* not to amount to the taking of private property for private use, or for public use without just compensation, nor the taking of property without due process of law. *State v. Hanson*..... 738

Estoppel. See MORTGAGES. 6.

1. Where real estate brokers arranged by correspondence with a landowner for a sale of his land and received a commission therefor, *held* that they were estopped to deny they were agents of the vendor. *Northup v. Bathrick*..... 36

2. A mortgagee is estopped to deny the statements in a mortgage, recorded by him, as to the rate of interest and maturity of the notes secured, in a suit against a subsequent purchaser. *Stewart v. Walker* 68

3. The state will not be allowed to oust a corporation of its franchises where it has seen the corporation expend large sums in improvements under rights claimed under its charter. *State v. Lincoln Street R. Co*..... 333

Evidence. See CRIMINAL LAW. INSURANCE, 2.

1. In making an assessment a board of equalization is presumed to have acted on sufficient competent evidence. *Western Union T. Co. v. Dodge County*..... 23

Evidence—*Concluded.*

2. Declarations against interest cannot be explained away by counter declarations. *Harrison v. Harrison*..... 103

3. Evidence of facts additional to the message is admissible to prove damages for delay in sending a telegram. *Smith v. Western Union T. Co.* 395

4. A question calling for the opinion of the witness on the very matter in issue is improper. *Kendrick v. Furman*... 797

5. Where one claims his property has been damaged by certain acts of the defendant, it is not proper to ask the witness in what manner he has been damaged, but he should state the facts. *Kendrick v. Furman* 797

6. Evidence *held* to entitle appellee to an injunction restraining appellant from maintaining a dam so as to interfere with appellee's water-wheel. *Kendrick v. Furman* 797

Executors and Administrators.

1. Where it is sought to charge a legal representative with debts owing by him to the deceased, the burden of proof is on the party applying; but, when the contracting of such indebtedness is admitted, the burden is on the legal representative to show payment. *In re Estate of Mall*..... 233

2. Evidence *held* t ow that an administrator was indebted to the estate. *In re Estate of Mall* 233

Exemptions.

Under sec. 531*f* of the code, in an action by a wage-earner against a creditor, who has by garnishment in a foreign jurisdiction obtained wages earned within 60 days before garnishment, it is necessary to allege that plaintiff is a resident and the wages are exempt. *Corliss v. Plano Mfg. Co.* 366

Fraudulent Conveyances.

Real estate conveyed in fraud of creditors may be levied on and sold under an execution as the property of the grantor, and the purchaser may sue the fraudulent grantee to cancel the conveyance and to quiet title. *Becker v. Linton*..... 655

Guardian and Ward.

1. Sec. 27, ch. 34, Comp. St. 1907, requires a guardian to receive from the county court an order authorizing him to loan the funds of his ward, and if he loans them without such authority, and a loss ensues, he is liable therefor. *In re Estate of O'Brien* 125

2. The personal direction and supervision of the county judge in making loans for a guardian is not equivalent to an order of the court authorizing the loans. *In re Estate of O'Brien,* 125

Guardian and Ward—*Concluded.*

3. The approval by the county court, without notice to those interested, of annual reports of a guardian, wherein he reports loans of his ward's funds without an order of the court, is not equivalent to an order of the court authorizing such loans. *In re Estate of O'Brien* 125

Highways.

1. A public road may be improved to accommodate footmen as well as those using it for teams, wagons or other vehicles. *Hitchcock v. Zink* 29
2. A sidewalk constructed outside the traveled way for teams, but within the boundaries of the road, does not constitute an added burden to the easement. *Hitchcock v. Zink*..... 29
3. The owner of the fee cannot complain that a sidewalk is being constructed along a public road by private parties with permission of the county commissioners. *Hitchcock v. Zink* 29

Homestead.

A homestead of less value than $2,000 cannot be sold at administrator's sale either for the discharge of incumbrances thereon or to pay debts of the estate. *Holmes v. Mason*.... 448

Homicide.

1. Where the circumstances attending a homicide are testified to by eye-witnesses, it is error to instruct that there is a presumption of malice from the fact of the killing or from the use of a deadly weapon. *Kennison v. State* 688
2. An instruction *held* to assume that, if the defendant unlawfully killed the deceased, he was guilty of murder, and to place of burden on him to establish beyond a reasonable doubt the existence of mitigating circumstances, and therefore erroneous. *Kennison v. State* 688
3. An instruction which assumes the crime to be murder, and requires proof of a lower degree to be made by the defendant, *held* inconsistent with instructions that the burden of proof remains with the state throughout the trial, and that the defendant is presumed innocent until proved guilty beyond a reasonable doubt. *Kennison v. State* 688
4. An instruction which assumes the crime to be murder in the second degree *held* erroneous, as the question of intent is for the jury. *Kennison v. State* 688

Husband and Wife. See DAMAGES.

1. An antenuptial contract *held* executory, and not to vest any estate in the children of the parties to the contract. *Becker v. Linton* 655

Husband and Wife—*Concluded.*

2. A purchaser of a note signed by a married woman cannot invoke the rule of innocent purchaser, as against the defense of coverture, by showing that he had no notice of such coverture when he purchased the note. *Northwall Co. v. Osgood* 764

3. The signing of a note by a married woman creates no presumption of consideration or of her intent to bind her separate estate. *Northwall Co. v. Osgood* 764

Incest.

1. In a prosecution for incest, an instruction as to corroborative evidence *held* proper. *Bridges v. State*..... 91

2. A girl under 16 years of age, who under physical and moral coercion maintained incestuous relations with her father, *held* not an accomplice. *Bridges v. State*..... 91

3. Evidence *held* sufficient to sustain a conviction. *Bridges v. State* 91

Indictment and Information. See EMBEZZLEMENT.

1. An information charging embezzlement by a county judge under sec. 121 of the criminal code, which alleged that the property came into the possession of defendant "by virtue or under color of his relation as an officer," *held* not void for duplicity. *Hendee v. State* 80

2. Where designation of the race or color of the accused cannot result in any prejudice to him, it is not a ground for quashing the information. *Harris v. State*..... 195

3. Pending an appeal under sec. 324 of the criminal code from a judgment of a magistrate, the district court may permit the filing of an amended complaint. *Ruffing v. State*..... 555

Injunction.

1. Equity will not enjoin the breach of an oral contract which by its terms is not to be performed within one year. *Platte County I. T. Co. v. Leigh I. T. Co*..... 41

2. Breach of an oral contract will not be restrained, where its terms are so indefinite that a court would not decree specific performance thereof. *Platte County I. T. Co. v. Leigh I. T. Co.* 46

3. Equity will enjoin repeated trespasses. *Hackney v. McInnch* 49

4. The destruction of a fence and threatened repetition thereof as often as it may be replaced entitles the owner to an injunction against the invader, though he may be solvent. *Munger v. Yeiser* 285

Injunction—*Concluded.*

5. In an action to enjoin a trespass, defendant cannot defeat the action by showing an outstanding right in a third party to have a deed in the plaintiff's chain of title declared a mortgage. *Munger v. Yeiser* 285

6. Where, in an action to restrain a trespass on real property, the same is sold during the action, and the vendee substituted as plaintiff, evidence taken before such transfer should be considered. *Munger v. Yeiser* 285

7. A petition for an extraordinary writ will receive a strict construction. *School District v. DeLong*..... 667

Insurance.

1. Where a local agent of an insurance company failed to renew his certificate of authority from the state auditor, but acted as agent of the company, *held*, that the company is bound by his acts. *Hunt v. State Ins. Co*..... 33

2. Parol evidence *held* inadmissible to show that a written application for insurance was conditioned on an agreement that the company was to make a real estate loan to the applicant. *Albright v. State Life Ins. Co*..... 64

3. A solicitor of insurance leaving the service of the company, *held* entitled to her commissions. *Martin v. Fraternal Life Ass'n* 224

4. Under the evidence, that a solicitor of insurance was assisted by a field agent of the company, *held* not a defense to her claim for commissions. *Martin v. Fraternal Life Ass'n*.... 224

5. Evidence *held* to show that no contract of insurance was created. *Lowe v. St. Paul Fire & Marine Ins. Co*..... 499

6. Evidence *held* insufficient to establish a contract for insurance. *Shoemaker v. Commercial Union Assurance Co*..... 637

7. To sustain a defense of suicide, it is necessary to allege and prove that suicide is a violation of the constitution or laws of the order in force at time of death. *Sebesta v. Supreme Court of Honor* 760

8. Evidence *held* insufficient to show self-destruction. *Sebasta v. Supreme Court of Honor* 760

Interest. See BANKS AND BANKING, 2, 3. CONTRACTS, 3.

1. Simple interest may, when due, be added to the principal by including it in a renewal or a separate note, and thus be made to bear interest. *Sanford v. Lundquist*..... 408

2. Where judgment has been entered on a penal bond to secure payment in monthly instalments, part of which was not due, interest should be computed only on instalments not paid at maturity, and then from date of maturity to time of payment. *Dike v. Andrews* 455

Intoxicating Liquors.

1. In a prosecution under sec. 20, ch. 50. Comp. St. 1905, for unlawfully keeping intoxicating liquors with intent to sell the same without a license, *held* prejudicial error to permit the introduction in evidence of the search warrant under which the premises were searched and the liquors seized. *Weinandt v. State* 161
2. In a prosecution under said section, *held* not error to admit evidence of the keeping of other liquors in addition to those charged. *Weinandt v. State* 161
3. In such prosecution, *held* not error for the jury to taste of the liquors taken from defendant's premises under the search warrant. *Weinandt v. State* 161
4. Instructions not limiting the right to a conviction to the keeping of the liquors charged in the information *held* erroneous. *Weinandt v. State* 161
5. The statutory qualification of a freeholder as a petitioner on an application for a saloon license is established by showing that he has by record or documentary evidence, and in good faith believes himself to have, a freehold estate in lands within the prescribed district. *Starkey v. Palm*..... 393
6. The provisions of ch. 50, Comp. St. 1907, apply only to intoxicating liquors, and when one charged with selling without license "malt and intoxicating liquor, to wit, Malt Tonic," introduces evidence tending to show that it was not intoxicating, he is entitled to have the question submitted to the jury. *Luther v. State* 432
7. An administrator cannot recover any part of the amount paid for a liquor license because of the licensee's death before the expiration of the term of the license. *Wood v. School District* 722

Judges.

1. Sureties on the official bond of a county judge are not liable for money which did not come to his possession by virtue of his office. *Stephens v. Hendee* 754
2. Where a county judge receives personal property belonging to an estate prior to the appointment of an administrator, he does not receive it by virtue of his office, and the sureties on his official bond are not liable if he subsequently converts the property. *Stephens v. Hendee* 754

Judgment.

1. A decree affecting the title to land owned by a resident is absolutely void where the only notice was by publication and no appearance was made. *Payne v. Anderson*..... 216
2. Where the determination of a matter has been committed to

Judgment—*Concluded.*

a particular board, and no appeal is provided from its decision, its determination is final, and not subject to collateral attack. *Campbell v. Youngson* 322

3. The city of Lincoln brought suit to oust a street car company from possession of certain streets, and on demurrer judgment went in favor of defendant, which judgment is in full force. *Held*, That if the city represented the state in such action, the force of the judgment as a bar in a subsequent action by the state could extend only to the rights of the company in the streets then occupied by its tracks. *State v. Lincoln Street R. Co*..... 333

4. A judgment on service by publication against a resident on whom personal service might have been had is void. *Wagner v. Lincoln County* 473

5. In a suit to enjoin the collection of a judgment of the county court as void, the petition must affirmatively state facts which show its invalidity. *Zimmerman v. Trude*..... 503

6. The plea of *res judicata* applies to every point which properly belonged to the subject matter of litigation which the parties, exercising reasonable diligence, might have brought forward. *First Nat. Bank v. Gibson* 580

7. Where the validity of a certain deed was the sole issue tried in an action *quia timet*, a decree "that the title be quieted in plaintiff" will not bar defendants from asserting rights to possession or title acquired under other contracts. *Wetherell v. Adams* 589

8. Where a question of fact or of law has been litigated in a court having jurisdiction, its judgment cannot be collaterally attacked in another court. *Becker v. Linton* 655

9. A judgment of a court having jurisdiction is conclusive of the fact that the indebtedness existed at the time of the rendition of the judgment. *Becker v. Linton* 655

10. Sec. 462 of the code authorizes the revival of a dormant judgment against a nonresident on service by publication. *White v. Ress* 749

11. Sec. 462 of the code, authorizing the revival of a dormant judgment on service by publication, is not repugnant to either the state or federal constitution. *White v. Ress*..... 749

Judicial Sales.

The purchaser of realty at a judicial sale buys at his peril. *Hitchcock County v. Cole* 375

Jury.

1. An opinion based on newspaper reports *held* not ground for challenge of a juror. *Bridges v. State* 91

Jury—*Concluded.*

2. In a prosecution for contempt, defendant is not entitled to trial by jury. *Connell v. State* 296

3. In a law action a party is entitled to a jury trial as a matter of right. *Yeiser v. Broadwell* 718

Larceny.

One who advises others to commit larceny, but who is several miles distant at the time of the commission of the offense, but assists in the disposal of the proceeds after the theft, *held* an accessory. *Skidmore v. State* 698

Licenses.

In 1904 a city passed an ordinance imposing an occupation tax on billiard and pool halls, and on May 26, 1906, a second ordinance went into effect requiring the keepers of such halls to apply to the mayor and council for a license. *Held*, That one who had paid the occupation tax prior to the ordinance of 1906 could not restrain the officers of the city from prosecuting him for conducting his business without a license. *McCarter v. City of Lexington* 714

Limitation of Actions. See COUNTIES AND COUNTY OFFICERS, 2. PLEADING, 3. QUIETING TITLE, 2. TAXATION, 11.

1. Where after maturity of a mortgage interest is paid annually, a right of action is not barred until ten years after the last payment. *Gillilan v. Fletcher* 237

2. A warrant issued by a city for a valid debt is a written acknowledgment thereof, and arrests the running of the statute of limitations. *Abrahams v. City of Omaha* 271
Rogers v. City of Omaha 591

3. Sec. 117, ch. 23, Comp. St. 1907, does not apply to void administrator's sales, and an action by an heir to quiet title to the homestead may be maintained within ten years after his right of action accrues or the attainment of his majority. *Holmes v. Mason* 448

Master and Servant.

1. A master must use reasonable care to provide reasonably safe appliances and a reasonably safe place to work. *Kotera v. American S. & R. Co*..... 648

2. Whether a master was negligent in failing to exercise reasonable care to provide a reasonably safe place to work is a question for the jury. *Kotera v. American S. & R. Co*.... 648

3. Whether a master was negligent in not exercising reasonable care to provide reasonably safe appliances is a question for the jury. *Kotera v. American S. & R. Co*..... 648

4. A servant may assume that his master has used due dili-

Master and Servant—*Concluded.*

gence in providing reasonably safe appliances and a reasonably safe place to work, and he does not assume the risk arising from the master's negligence, unless he knows of the danger. *Kotera v. American S. & R. Co*..... 648

Mechanics' Liens.

1. A verified account filed to secure a mechanic's lien for material furnished is no evidence of its delivery. *Searle & Chapin Lumber Co. v. Jones* 567
2. Evidence *held* insufficient to show delivery to defendants of certain material. *Searle & Chapin Lumber Co. v. Jones*.... 567

Money Received.

Evidence in an action for money received *held* to sustain judgment for defendant. *Northwest Thresher Co. v. Eddyville State Bank* 377

Mortgages.

1. Where a mortgage specifies the date of maturity and rate of interest of notes, the mortgagee cannot in a suit against a subsequent purchaser show that the notes matured at an earlier date or bore a higher rate of interest than specified in the mortgage. *Stewart v. Walker* 68
2. Where a mortgagee records a mortgage which describes notes as maturing at a later date or bearing a lower rate of interest than named in the notes, he must suffer the consequences of such error, rather than an innocent purchaser. *Stewart v. Walker* 68
3. An order confirming a foreclosure sale, in the absence of fraud, cures all defects and irregularities in the appraisement, and is conclusive on all parties to the suit. *Paule v. Scofield* 100
4. Where defendant, in violation of his agreement not to purchase a mortgage on plaintiff's homestead, purchased it, and on foreclosure bought the land, *held* that plaintiff, who was not served with notice of the foreclosure, was entitled to redeem by paying the amount paid for the mortgage, with interest at 7 per cent. *Unangst v. Southwick* 112
5. Evidence *held* to sustain the findings. *Sanford v. Lundquist* 414
6. Where in a suit to set aside a conveyance of land for fraud plaintiff obtains a decree by a settlement in which he agrees to discharge a mortgage on the premises, in a subsequent suit to foreclose he is estopped to deny the amount of the mortgage or to claim that the mortgagee might have obtained a partial satisfaction from a source other than the land. *Hannan v. Rihner* 521

Mortgages—*Concluded.*

7. Where a request for stay of order of sale is filed within 20 days of the rendition of a decree, the court is without power to sell the mortgaged premises within nine months of the entry of the decree. *Jenkins Land & Live Stock Co. v. Attwood* 806

8. A request for a stay filed before the entry of a decree is as effective as though filed within 20 days thereafter. *Jenkins Land & Live Stock Co. v. Attwood* 806

9. An owner of the equity of redemption, who has sold his interest after his appearance as defendant in a foreclosure suit, may file a request for a stay of sale. *Jenkins Land & Live Stock Co. v. Attwood* 806

10. Confirmation will not validate a void sale. *Jenkins Land & Live Stock Co. v. Attwood* 806

Municipal Corporations. See STREET RAILWAYS, 4-6.

1. Where an ordinance recited that it was passed under an act afterwards declared unconstitutional, the city having power under a prior statute to enact the ordinance, *held* that the mistake in reciting the power to act did not deprive the city of the power which it actually had. *State v. Several Parcels of Land* 11

2. Where the existence of a municipal corporation is not questioned by the state, it cannot be brought in issue by a private individual in a collateral proceeding, nor can the validity of annexation proceedings be tested in such a suit, where the evidence shows acquiescence in the proceedings and the payment of taxes levied by the corporation for several years. *State v. Several Parcels of Land* 11

3. Physical incapacity is not available to extend the time for serving notice to fix a statutory liability upon a city. *Ellis v. City of Kearney* 51

4. A statutory notice to a city of injuries is not void for surplusage, which has not prejudiced the city. *Jacobsen v. City of Omaha* 56

5. In an action for injuries, evidence *held* not to show abandonment of a pathway for pedestrians along which the city had previously constructed a sidewalk. *Jacobsen v. City of Omaha* 56

6. The provision of the Omaha charter (Comp. St. 1903, ch. 12a, sec. 901), providing that the mayor and council shall not allow claims under certain circumstances, *held* a limitation of power. *Redell v. City of Omaha* 178

7. The power of the legislature over procedure, within limits not impairing the inherent powers of the courts, is not

Municipal Corporations—*Continued.*

restricted; and it may require by statute a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation. *Barnes v. Minor* 189

8. A city warrant issued for a valid obligation payable out of the general fund is not invalidated by a recital, not contemplated by the statute, that it shall be payable out of a special fund which the city is not authorized to create, or out of a special fund which the city may lawfully create, but has failed to create. *Abrahams v. City of Omaha* 271

9. A city of the class of the city of Lincoln has authority under subd. IV, sec. 9, art. I, ch. 13, Comp. St. 1905, to sell property acquired at a tax sale without obtaining the approval of the electors of the city. *State v. Citizens Street R. Co.* 357

10. A city ordinance extending to a telephone company the right to use the streets and public grounds of the city, and which does not exclude other companies from a like privilege, is not the grant of an exclusive privilege. *City of Plattsmouth v. Nebraska T. Co.* 460

11. Municipal authorities may grant to a telephone company the use of the streets and public grounds for a telephone system, the use being for a public purpose. *City of Plattsmouth v. Nebraska T. Co.* 460

12. Where a city ordinance has invited investments by a telephone company, which are made in good faith and in reliance upon it, the city cannot arbitrarily impose additional burdens on the company which are beyond the reasonable exercise of the police power. *City of Plattsmouth v. Nebraska T. Co.* 460

13. Where no express power is granted a city to license or regulate the business of constructing artificial walks, it cannot be implied from the grant of authority to construct and repair walks as the mayor and council may deem necessary. *Gray v. City of Omaha* 526

14. The provisions of an ordinance to license and regulate the business of constructing artificial walks *held* unreasonable and void. *Gray v. City of Omaha* 526

15. Where a city made a contract which it was authorized to make, but the statutory procedure was not followed, the contract is merely irregular, and the contractor may recover thereon. *Rogers v. City of Omaha* 591

16. The motive governing a legislative body in passing a statute or ordinance is not a proper subject for investigation by the courts. *McCarter v. City of Lexington* 714

Municipal Corporations—*Concluded.*

17. The making and repairing of streets by a city relate to its corporate interests only, and it is liable for its failure to perform its duty. *Goodrich v. University Place*..... 774
18. By accepting the special privileges and powers of taxation and local government, cities of the second class and villages assume the liabilities flowing therefrom, and such special privileges and powers are a sufficient consideration for the liabilities thus assumed. *Goodrich v. University Place* 774
19. A city of the second class or village *held* liable for failure to maintain its streets in a safe condition. *Goodrich v. University Place* 774

New Trial.

Where a question as to the operation of physical laws is involved and a juror seeks the opinion of one specially skilled in such matters, and communicates such opinion to his fellow jurors, it is misconduct, for which the verdict may properly be set asde. *Hoskovec v. Omaha Street R. Co*.... 784

Officers.

A public office cannot be created, and its powers, duties and emoluments prescribed, by concurrent resolution. *First Nat. Bank v. State* 597

Parties.

1. After dissolution a partner to whom is assigned a right of action of the partnership may be substituted as party plaintiff. *Heenan & Finlen v. Parmele* 514
2. Plaintiff brought replevin in justice court under the name, "Omaha Furniture and Carpet Company," and on appeal was allowed in the district court to substitute his own name. *Held*, Proper practice under sec. 144 of the code. *Omaha F. & C. Co. v. Meyer* 769

Partition.

1. In partition, where defendant answers claiming title, and participates in a trial to the court, he waives his right to have the title first determined. *Fisher v. Fisher*..... 145
2. In a partition suit, the district court has jurisdiction to construe a will determining the rights of the parties. *Fisher v. Fisher* 145

Partnership.

1. Two assignments of a partnership agreement *held* not to include a personal promise of one partner to pay a sum of money to the other. Modified on rehearing. *Barnes v. Sim*, 211
2. To authorize suit in a partnership name, a firm must plead that it was formed to carry on trade or business or to hold property in this state. *McJunkin v. Placek & Fitl*.... 373

Pleading.

1. The verification of a pleading is not jurisdictional, and is waived unless objection is made before trial. *Northup v. Bathrick* 36
2. A petition to recover for several breaches of one contract states but one cause of action. *Haurigan v. Chicago & N. W. R. Co.* 132
3. Plaintiff may file an amended petition after the sustaining of a demurrer to his original petition, notwithstanding limitations have run prior to the filing of the amended petition, if the amended petition does not state a new cause of action. *Johnson v. American Smelting & Refining Co.*... 250
4. Amended petition *held* not to state a new cause of action nor one barred by limitations. *Johnson v. American Smelting & Refining Co.* 250
5. A cause of action alleged in an amended petition *held* a different cause of action, if dependent on different reasons for holding the defendant liable. *Johnson v. American Smelting & Refining Co.* 256
6. Where the original petition alleged a personal injury because of the negligence of a third party, and that defendant succeeded to the liabilities of such third person, and the amended petition alleged that said injury was caused by defendant's negligence, *held* that the amended petition stated a new cause of action. *Johnson v. American Smelting & Refining Co.* 256
7. In testing the sufficiency of a pleading, mere conclusions of law will be disregarded. *Johnson v. American Smelting & Refining Co.* 256
8. Cause of action stated. *Johnson v. American Smelting & Refining Co.* 256
9. Where in a suit to quiet title the petition sets forth the adverse title in general terms, the pleading is not for that reason demurrable, but the remedy is a motion to make more definite and certain. *State v. Alter* 405
10. Where suit is brought against a corporation and its officers for specific performance, an amendment to the petition that when the contract was made the corporation was dissolved and some of the defendants were the trustees thereof does not change the cause of action. *Heenan & Finlen v. Parmele*, 514
11. The court should allow an amendment to a pleading after the close of the testimony, if it is in furtherance of justice and conforms to the proof, and the adverse party is not prejudiced. *Blondel v. Bolander* 531
12. On appeal from an inferior court to the district court the

Pleading—*Concluded.*

original pleadings may be amended to correct a clerical error. *Kofoid v. Lincoln I. & T. Co.* 634

13. Petition *held* not to state facts sufficient to constitute a cause of action for equitable relief. *School District v. De-Long* 667

14. In case of misjoinder, plaintiff may dismiss one cause of action and proceed with the other. *McCague Savings Bank v. Croft* 702

Pledges.

1. Negotiable instruments may be pledged to secure liabilities arising in the future. *Brown v. James*..... 475

2. A contract of pledge *held* not to secure the payment of moneys afterwards collected for the pledgee by the pledgor as agent and unlawfully converted by the latter. *Brown v. James* 475

Principal and Agent.

1. An agent, having authority to sell both real and personal property for a certain sum, cannot, without the consent of his principal, take the personal property on receiving the authorized sum for the real estate. *Northup v. Bathrick*.. 36

2. The apparent authority of an agent which will bind his principal is such as the agent appears to have by reason of his actual authority. *Northwest Thresher Co. v. Eddyville State Bank* 377

3. Ostensible authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on such apparent agency. *Northwest Thresher Co. v. Eddyville State Bank* 377

4. A general collection agent has power to bind his principal by a contract with a bank, authorizing it to make advancements for freight on machinery sold and to retain the amount advanced from the first moneys collected on notes of his principal placed with the bank for collection. *Northwest Thresher Co. v. Eddyville State Bank*..... 377

Principal and Surety.

1. A surety signing a bond to secure deposits of public money affirms the genuineness of previous signatures. *Johnson County v. Chamberlain Banking House* 96

2. A surety who signs a bond on condition that it will be signed by other sureties is not released from liability because the others did not sign, unless the obligee has notice thereof. *Johnson County v. Chamberlain Banking House*.. 96

Process.

1. The return of an officer to a writ may be impeached in a collateral proceeding by clear and convincing evidence. *Unangst v. Southwick* 112
2. The return of an officer cannot be impeached except by clear and convincing evidence. *Unangst v. Southwick*.... 119
3. An affidavit for service by publication is not invalid because it has a caption, or because persons named in the affidavit are referred to as defendants. *Becker v. Linton*..... 655
4. The allegation in an affidavit for service by publication that defendants are nonresidents and that service cannot be made on them within the state, *held* not objectionable as alleging a mere conclusion. *Becker v. Linton* 655

Quieting Title.

1. In a suit to quiet title, evidence *held* to sustain decree for defendant. *Miller v. Bradford* 167
2. Where lands of a resident are sold under a decree entered on service by publication, no appearance being made, an action to quiet his title may be brought within ten years from the recording of the deed made on a sale under the decree. *Payne v. Anderson* 216
3. In an action to quiet title as against a sale for taxes under a void decree, an offer to pay such sum as the court may find due on any lien for taxes paid is a sufficient tender. *Payne v. Anderson* 216
4. Evidence in a suit to cancel a deed and quiet title *held* to support decree for plaintiff. *Wetherell v. Adams*..... 584

Quo Warranto.

An information against a corporation by its corporate name admits the existence of the corporation, and if the charge be that the corporation is exercising powers not given by its charter, the action proceeds against the corporation, but, where it is claimed that corporate powers are being usurped by a body which has no corporate existence, the action must be against the individuals. *State v. Lincoln Street R. Co.* 333

Railroads.

1. The mere killing of an animal by a moving train on the tracks of a railway company is not evidence of negligence, nor can negligence be established by inference in contradiction to the testimony of an eyewitness. *Kennedy v. Chicago, B. & Q. R. Co.* 267
2. Evidence *held* insufficient to support verdict for plaintiff. *Kennedy v. Chicago, B. & Q. R. Co*..... 267
3. A traveler approaching a railroad track laid in a public

Railroads—*Concluded.*

street has a right to anticipate that trains will be operated according to law and without negligence. *Schwanenfeldt v. Chicago, B. & Q. R. Co*..... 790

4. A railroad company operating a train on a city street used by it and pedestrians and vehicles may be required to take precautions which are not necessary when operating trains on its own right of way. *Schwanenfeldt v. Chicago, B. & Q. R. Co.* 790
5. The rule that a traveler must stop, listen and look when approaching a railroad crossing should not be applied to the crossing of a railroad switch laid in a public street. *Schwanenfeldt v. Chicago, B. & Q. R. Co*..... 790
6. A railroad company using the public streets of a city should give adequate notice of the approach of its trains. *Schwanenfeldt v. Chicago, B. & Q. R. Co*..... 790

Rape.

1. Record *held* to contain sufficient evidence corroborating the testimony of the prosecutrix to warrant submission of defendant's guilt to the jury. *Harris v. State*..... 195
2. Where the evidence shows that the prosecutrix was less than 15 years old, *held* not reversible error to refuse to submit the question of her previous chastity to the jury. *Harris v. State* 195
3. Evidence *held* to sustain the verdict. *Younger v. State*..... 201
4. Under an information charging rape on a child under 18 years of age and not previously unchaste, a conviction may be had though the act was committed with her consent. *Baxter v. State* 840

Replevin.

Replevin for possession of grain due from a tenant as rent may be defeated by showing that title and right to possession is in a third person. *Northup v. Bathrick* 36

Sales.

1. Evidence in an action for goods sold *held* to sustain judgment for plaintiff. *Canadian Fish Co. v. McShane*..... 551
2. Where a purchaser has used a harvesting machine a part of two harvests, he cannot rescind a contract of purchase, though the machine failed to comply with a warranty. *Acme Harvester Co. v. Carroll* 594
3. Evidence in an action on a note given for a harvester *held* to sustain judgment for plaintiff. *Acme Harvesting Co. v. Carroll* 594
4. Evidence in an action for goods sold *held* to sustain judgment for plaintiff. *Childs & Co. v. Omaha Paraphernalia House* 673

Schools and School Districts.

1. In designating a school site, the failure to state the township and range in which the section is located *held* not to render the location uncertain. *McMahon v. School District*, 156
2. Under secs. 11036, 11038, Ann. St., a school district may authorize the removal of the schoolhouse to a new site previous to the acquisition of title thereto. *McMahon v. School District* 156
3. Where the electors of a school district authorize the acquisition of a new school site, and in the description the site is located in section 22, but in a township without the district, and there is but one section 22 within the district, it will be conclusively presumed that the location was on the section 22 within the district. *McMahon v. School District*..... 156

Specific Performance.

1. An oral agreement to convey realty will be specifically enforced where the evidence is clear, and the plaintiff has fully performed. *Harrison v. Harrison* 103
2. Where acts performed tend to show, not only an agreement, but also throw some light on the nature of that agreement, the evidence does not rest wholly in parol. *Harrison v. Harrison* 103
3. A contract for the sale of realty, executed by and between T. E. P. and C. C. P., as vendors, and H., as vendee, will not sustain an action for specific performance by H. & F., a copartnership, against the vendors as trustees of an expired corporation, where the contract discloses that the vendors acted as individuals. *Heenan & Finlen v. Parmele*, 509
4. Where one has obtained a contract by unconscionable means, he will be denied affirmative relief in a suit for specific performance. *Blondel v. Bolander* 531
5. Where one, after making a valid contract, has by fraudulent practices secured a change thereof, and sues for specific performance of the contract as changed, he cannot, after the court has determined the contract as so changed invalid, prosecute his suit for specific performance of the original contract. *Blondel v. Bolander* 531
6. Where, in a suit to enforce a contract obtained by unconscionable practices, defendants ask an accounting for rents, there may be deducted from the rents due the amount expended by plaintiff and the value of his services performed for their benefit. *Blondel v. Bolander*..... 531

Statute of Frauds.

1. Where an oral contract has been fully performed by one of the parties, it is not void under the statute of frauds, though

Statute of Frauds—*Concluded.*

a division of profits may be required by its terms for a series of years. *Platte County I. T. Co. v. Leigh I. T. Co*..... 46

2. Where a vendor of chattels by a contract voidable by the statute of frauds makes a subsequent valid sale and delivery of the chattels to a third person, he thereby repudiates the former contract, and the subsequent purchaser may invoke the statute for his own protection. *First Nat. Bank v. Blair State Bank* 400

3. Correspondence and an abstract of title *held* a sufficient memorandum to satisfy the statute of frauds. *Heenan & Finlen v. Parmele* 514

4. Where, in an action of forcible detainer, the defendant claims under a parol lease for more than one year, it is proper to direct a verdict for plaintiff. *Kofoid v. Lincoln I. & T. Co.* 634

Statutes.

1. While the doctrine of strict construction of statutes in derogation of common right will not be so extended as to hamper public enterprises, property rights of individuals will not be interfered with unless the power is plainly conferred by law. *Campbell v. Youngson* 322

2. In considering an amendatory or substituted statute, it is proper to consider the old law with the new one to ascertain the legislative intent, and all provisions of the original statute not carried into the new law are annulled by the repealing statute. *Campbell v. Youngson* 322

3. To ascertain the meaning of a statute all existing acts should be considered. *Campbell v. Youngson* 322

4. When the legislative journals show that a bill passed by one house has been amended in the other, and that the amendments have not been concurred in by the house in which the measure originated, and have not been receded from with the assent of a majority of all the members of the house by which they were made, the bill is void. *Moore v. Neece* 600

5. In construing legislative acts courts will give them the meaning which it is apparent from the language used the legislature had in mind. *State v. Hanson* 738

6. An act which provides that it shall take effect on and after its passage and approval does not express an emergency under sec. 24, art. III of the constitution, and it does not take effect until three months after adjournment of the legislative session. *State v. Pacific Express Co*..... 823

Street Railways.

1. The charter of a street railway company organized to construct lines in a city under the act of February 15, 1877 (laws 1877, p. 135), must fix the termini of the road, and state the streets through which it is proposed to construct the same. *State v. Lincoln Street R. Co.* 333
2. The consent of a majority of the electors to the use of the streets by a street railway company must be obtained at an election called for that purpose before construction is commenced. *State v. Lincoln Street R. Co* 333
3. The consent of the electors to the occupation of all the streets of a city by a street railway company, where no termini are mentioned in the notice of the election, carries no right to the use of any street not used for the road within a reasonable time. *State v. Lincoln Street R. Co.*.. 333
4. Where the electors of a city have power to extend to a street car company the right to use the streets of the city, an irregular exercise of such power will not be held void. *State v. Citizens Street R. Co.* 357
5. Where a street railway company, under the belief that it is authorized so to do under a vote of the electors, expends money in the construction of its line, public policy may require courts to protect it in the use of its road so far as constructed, when its right to the use of the streets of the city is brought in question. *State v. Citizens Street R. Co.*, 357
6. The right of a street car company to occupy the streets of a city, granted by a vote of the electors, is a license coupled with an interest, and transferable. *State v. Citizens Street R. Co.* 357

Taxation.

1. In a suit under the scavenger act, the presumption is that the tax was legally levied and assessed, and the burden is on defendant to plead and prove lack of authority of the city authorities to levy the tax. *State v. Several Parcels of Land* 11
2. In assessing the property of a telegraph company having property in more than one state, the value of the whole property, and also its relation to the value of the property in the taxing district should be considered. *Western Union T. Co. v. Dodge County* 18
3. In valuing the property of a telegraph company in a taxing district, the total gross and net receipts of the system as a whole, as well as in the particular district, and also the value of the company's stock and bonds, may be considered. *Western Union T. Co. v. Dodge County* 18

Taxation—*Continued.*

4. Equalization boards may obtain information of the value of taxable property from the most reliable source at their command, and strict rules of evidence are not applicable. *Western Union T. Co. v. Dodge County* 18

5. The district court on appeal may receive proof of any pertinent fact tending to show the value of taxable property. *Western Union T. Co. v. Dodge County* 18

6. Evidence *held* sufficient to sustain finding of district court in an assessment of property of a telegraph company. *Western Union T. Co. v. Dodge County* 18

7. The net earnings of a telegraph company for a single year, *held* not a proper criterion by which to determine the value of its system for taxation. *Western Union T. Co. v. Dodge County* 23

8. The income from messages in a district comprising only a part of a telegraph system, *held* not the proper measure of the gross earnings of that part of the system within the district. *Western Union T. Co. v. Dodge County*..... 23

9. That the net earnings of a telegraph company are 13 per cent. of its gross earnings does not justify the conclusion that the net earnings of a district comprising only a part of the system are but 13 per cent. of the gross earnings of such part of the system. *Western Union T. Co. v. Dodge County.* 23

10. On appeal by a taxpayer from the board of equalization, the burden of proof is on appellant. *Western Union T. Co. v. Dodge County* 23

11. The limitation of two years within which a party may redeem from a sale for taxes has no application to a sale made under a void decree foreclosing a tax lien. *Payne v. Anderson* 216

12. Where, in a suit to foreclose a tax sale certificate, a clerical mistake appears to have been made in the description, the error will not defeat the action if sufficient remains to identify the land. *Hart v. Murdock* 274

13. Where land owned by one person is assessed with land of another, so that neither can determine the amount of his tax, the entire tax is void. *Hart v. Murdock* 274

14. In a description of land by metes and bounds, a point of the compass named in a survey may be construed to mean an opposite direction, when it appears to have been written by clerical error. *Hart v. Murdock* 274

15. Purchaser at tax sale *held* entitled to recover purchase

Taxation—*Concluded.*

money from the redemptioner, and not from the county. *Hitchcock County v. Cole* 375

16. Where a taxpayer makes a tender of his general taxes, and the treasurer refuses to receive the same because he will not also pay an invalid special tax, interest should not be charged the taxpayer. *State v. Several Parcels of Land*...424

17. Sec. 242 of the revenue act of 1903 (Comp. St., ch. 77, art. I) saves to the parties purchasing land at tax sales held prior to the passage of that act all rights under the statute in force when the purchase was made. *Whiffin v. Higginbotham* 468

18. After confirmation of a sale for delinquent taxes under the scavenger act, the deed to the purchaser will not be set aside for irregularity in the levy, or because a void special tax was included in the sale. *Ambler v. Patterson* 570

19. A separate notice to redeem from a tax sale should, when published, be given to each owner of lands sold. *Ambler v. Patterson* 570

20. A notice running to several different persons, and describing different tracts in which each had a separate interest, *held* not sufficient. *Ambler v. Patterson* 570

21. A tax deed issued to a former tenant cannot be avoided on the ground that the former tenant was indebted to the fee owner for rent which accrued during the tenancy. *Manning v. Oakes* 471

22. Where a decree foreclosing a tax lien was entered against a resident on service by publication, in an action to redeem from a sale under said decree, *held* error to require plaintiff to pay the costs of the foreclosure suit and sale. *Wagner v. Lincoln County* 473

Telegraphs.

For breach of contract to transmit a message a telegraph company is liable for such damages as may reasonably be supposed to have been within the contemplation of the parties. *Smith v. Western Union T. Co.* 395

Tender. See QUIETING TITLE, 3.

Trial. See APPEAL AND ERROR. CRIMINAL LAW.

1. Fraud or imposition on the court and against defendant, practiced by plaintiff during the trial, does not justify dismissal of his action without a determination of its merits. *Fitch v. Martin* 60

2. The courts are not bound by the rules of evidence adopted in another jurisdiction. *Malcom Savings Bank v. Cronin*.. 228

Trial—*Concluded.*

3. Under sec. 284 of the code, the trial court may in his discretion require the jury to view property within this state which is the subject of litigation. *Beck v. Staats*..... 482

4. An objection that a question is leading, incompetent, immaterial and irrelevant is not equivalent to an objection that the party is seeking thereby to impeach his own witness. *Cady Lumber Co. v. Wilson Steam Boiler Co*..... 607

5. Where the facts are undisputed, but different minds might honestly draw different conclusions as to whether such facts established negligence, the question is for the jury. *Schwanenfeldt v. Chicago, B. & Q. R. Co*..... 790

6. Instructions as to preponderance of evidence and number of witnesses, *held* erroneous. *Hoskovec v. Omaha Street R. Co*..... 784

Usury.

1. A contract to pay compound interest is not usurious, and will be enforced in the amount of simple interest computed at the maximum rate. *Sanford v. Lundquist* 408

2. Where the original obligation bears interest at the maximum rate, there is no consideration for an agreement to pay interest on interest for a time past; but including such interest in a renewal note does not make it usurious. *Sanford v. Lundquist* 408

3. The demanding of interest in advance, though the highest rate is charged, is not usury under Comp. St. 1907, ch. 44, sec. 1. *Sanford v. Lundquist* 414

4. Where the maximum rate of interest is charged, interest on interest cannot be stipulated for at the time of the loan. *Sanford v. Lundquist* 414

5. An agreement that past-due interest shall carry interest is valid, though the principal bears the maximum rate, and such subsequent agreement also stipulates for the maximum rate. *Sanford v. Lundquist* 414

Vendor and Purchaser.

1. It is not necessary for a purchaser of real estate to personally inspect the public records, but he may do this by his agent. *Stewart v. Walker* 68

2. Evidence *held* insufficient to show that plaintiff's contract to convey land in settlement of her husband's indebtedness was secured by duress. *Unangst v. Southwick* 112

3. The measure of damages for breach by vendor of an executory contract to convey real estate is the difference between the value of the land at the time of the breach and the

Vendor and Purchaser—*Concluded.*

contract price, and the vendee may also recover the amount advanced on the purchase price. *Beck v. Staats* 482

4. On an issue between a vendor and vendee, where the contract fails to specify improvements made by a tenant in possession, but recognizes the right of the tenant to remove them, the presumption is that such improvements were removed at the expiration of the lease. *Beck v. Staats*..... 482

5. A contract for the sale of realty that does not describe the land so as to render it possible to ascertain the exact description is void for uncertainty. *Heenan & Finlen v. Parmele* 509

Waters.

1. The proviso in sec. 1, art. III, ch. 93*a*, Comp. St. 1905, that, where ditches have been previously constructed of sufficient capacity to water the land thereunder, such ditches and land shall be exempt from the operation of the law, is for the benefit of the owners of the land, as well as for the owners of the ditches. *State v. Several Parcels of Land*..... 424

2. In the organization of an irrigation district, the judgment of the county board as to matters committed to it cannot be collaterally attacked; but whether land is under a ditch already constructed of sufficient capacity to water the same is not left by the statute to the county board, but is exempted under sec. 1, art. III, ch. 93*a*, Comp. St. 1907? *State v. Several Parcels of Land* 424

3. Secs. 46-53, art. III, ch. 93*a*, Comp St. 1907, are not applicable where land is under a ditch already constructed of sufficient capacity, such land being expressly exempted by sec. 1 of said art. III. *State v. Several Parcels of Land*..... 424

Wills.

1. A devise on condition that the devisee support testator during his lifetime, *held* a devise on a condition precedent, requiring substantial performance to vest title in the devisee. *Fisher v. Fisher* 145

2. A will should be construed, if possible, so as to give effect to every part thereof. *Fisher v. Fisher* 145

3. Unless a different intention is apparent, words of limitation in a devise will be given their usual meaning. *Fisher v. Fisher* 145

4. Waiver of a condition precedent to the vesting of a devise can generally be shown only from the will or a codicil. *Fisher v. Fisher* 145

5. Nonperformance of a condition precedent to the vesting of

Wills—*Concluded.*

a devise is not excused by devisee's ignorance of the condition. *Fisher v. Fisher* 145

6. Evidence *held* insufficient to show substantial performance of the conditions of a devise. *Fisher v. Fisher* 145

Witnesses.

1. Under sec. 329 of the code, an interested party may testify only to such conversations and transactions had with decedent as were testified to by a witness for the representative. *In re Estate of Neckel* 123

2. That a witness was intoxicated at the time of the happening of events about which he testifies is relevant, and may be shown without first asking whether he was intoxicated. *Bliss v. Beck* 290

3. It is within the discretion of the trial court to allow counsel to ask a witness called by him, who takes him by surprise by his testimony, whether he had not at a prior time made a statement inconsistent therewith. *Cady Lumber Co. v. Wilson Steam Boiler Co*..... 607